Strata Managing Agents Legislation Amendment Act 2024 No 65 (not commenced)

Part 1 Preliminary1 Name of Regulation

This Regulation is the *Strata Schemes Management Regulation 2016*.

2 Commencement(1)

Except as provided by subclause (2), this Regulation commences on 30 November 2016 and is required to be published on the NSW legislation website.

(2)

Part 8 commences on 1 January 2018.

cl 2: Am 2017 No 25, Sch 6 [2].

3 Definitions(1)

In this Regulation—

approved form means a form approved by the Secretary.

close of the ballot—see clause 15(8).

Department means the Department of Customer Service.

pre-meeting electronic voting, for Part 2—see clause 3A.

the Act means the *Strata Schemes Management Act 2015*.

Note—

The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

(2)

Notes included in this Regulation do not form part of this Regulation.

cl 3: Am 2018 No 65, Sch 8.11[1]; 2020 (323), Sch 1[1]; 2022 (564), Sch 1[1].

Part 2 Owners corporations and strata committees3A Definition

In this Part—

pre-meeting electronic voting means voting on a matter by electronic means before the meeting at which the matter will be determined.

cl 3A: Ins 2022 (564), Sch 1[2].

4 Functions that may only be delegated to strata committee member or strata managing agent

For the purposes of section 13(1)(h) of the Act, the following functions of an owners corporation are prescribed as functions that may be delegated to or conferred only on a member of the strata committee or a strata managing agent—

- (a)

  arranging for inspections for the purposes of fire safety in accordance with section 123 of the Act,

- (b)

  ensuring that the owners corporation complies with any relevant requirements under the *Work Health and Safety Act 2011*,

- (c)

  entering into contracts relating to the maintenance of common property or the provision of services to the common property (other than contracts relating to a parcel),

- (d)

  arranging for inspections of records and other documents under section 183 of the Act,

- (e)

  giving certificates under section 184 of the Act.

5 Agenda for first AGM(1)

For the purposes of section 15(p) of the Act, the agenda for the first annual general meeting of an owners corporation is to include the following item, if a tenant representative has been nominated for the strata committee in accordance with section 33 of the Act—

- •

  to receive the nomination of a tenant representative for the strata committee

(2)

The agenda for the first annual general meeting of an owners corporation is also to include the following item, if the initial period of the strata scheme ends not later than 12 months after completion of building work for which a building inspector is required to be appointed under Part 11 of the Act—

- •

  to approve the appointment of a building inspector for the purposes of Part 11 of the Act

cl 5: Am 2020 (323), Sch 1[2].

6 Documents and records to be provided to owners corporation before first AGM

For the purposes of section 16(1)(f) of the Act, the following documents obtained or received by the original owner or lessor and relating to the parcel concerned, or any building, plant or equipment on the parcel, are prescribed—

- (a)

  if a building is required to be insured under Division 1 of Part 9 of the Act, any valuation of the building,

- (b)

  maintenance and service manuals,

- (c)

  all service agreements relating to the supply of gas, electricity or other utilities to the parcel,

- (d)

  copies of building contracts for the parcel, including any variations to those contracts,

- (e)

  the most recent BASIX certificate (issued under the *Environmental Planning and Assessment Act 1979*) for each building on the parcel.

7 Tenant representatives: section 33 of Act(1)

A person who is entitled to convene an annual general meeting of an owners corporation that has tenants for at least half of the number of lots in the scheme must convene a meeting of eligible tenants for the purpose of the nomination of a person for the position of tenant representative on the strata committee.

(2)

The person must give notice of the meeting to each eligible tenant at least 14 days before the annual general meeting and the tenants meeting may be held at any time before the annual general meeting, but not earlier than 7 days after notice of the meeting is given.

(3)

Notice may be given in one of the following ways—

- (a)

  by causing a copy of the notice to be prominently displayed on any notice board required to be maintained by or under the by-laws on some part of the common property,

- (b)

  by written notice given to each eligible tenant.

(4)

The convenor of the meeting, or a tenant nominated by the eligible tenants present at the meeting, is to chair the tenants meeting.

(5)

An eligible tenant may nominate for, or nominate another eligible tenant for, nomination as the tenant representative at the meeting.

(6)

The tenant representative to be nominated by the eligible tenants for a strata scheme is to be determined by majority vote of tenants present at the meeting.

(7)

The quorum for the meeting is one person.

(8)

The term of a tenant representative commences at the end of the annual general meeting at which the nomination is received.

(9)

A person is an eligible tenant for the purposes of this Part if the tenant is a tenant notified in a tenancy notice given in accordance with the Act.

8 Vacation of office by tenant representative(1)

A tenant representative ceases to be a tenant representative—

- (a)

  if the person ceases to be an eligible tenant, or

- (b)

  on receipt by the secretary of the owners corporation from the person of written notice of the person's resignation as the tenant representative, or

- (c)

  at the end of the next meeting at which a new strata committee is elected by the owners corporation, or

- (d)

  if the person dies.

(2)

If a tenant representative ceases to be a tenant representative before the next meeting at which a new strata committee is elected, the secretary of the owners corporation is to convene a meeting of eligible tenants for the purpose of the nomination of a person for the position of tenant representative on the strata committee.

(3)

The secretary must give at least 7 days notice of the meeting to each eligible tenant.

(4)

The secretary, a member of the strata committee or a tenant nominated by the eligible tenants at the meeting is to chair the tenants meeting.

(5)

Clause 7(3), (5) and (6) apply to the nomination of a replacement tenant representative.

(6)

The term of a replacement tenant representative is for the remainder of the term of the representative that the person replaces.

9 Election of strata committee(1)

At a meeting of an owners corporation at which the strata committee is to be elected, the chairperson must—

- (a)

  announce the names of the candidates already nominated in writing for election to the strata committee, and

- (b)

  call for any oral nominations of candidates eligible for election to the strata committee.

(2)

A written or oral nomination made for the purposes of the election is ineffective if it is made by a person other than the nominee unless it is supported by the consent of the nominee given—

- (a)

  in writing, if the nominee is not present at the meeting, or

- (b)

  orally, if the nominee is present at the meeting.

(3)

After the chairperson declares that nominations have closed, the owners corporation is to decide, in accordance with the Act, the number of members of the strata committee.

(4)

If the number of candidates—

- (a)

  is the same as, or fewer than, the number of members of the strata committee decided on—those candidates are to be declared by the chairperson to be, and are taken to have been, elected as the strata committee, or

- (b)

  is greater than the number so decided on—a ballot is to be held.

10 Ballot for strata committee(1)

This clause applies to the election of a strata committee for a strata scheme comprising more than 2 lots.

(2)

If a ballot for membership of the strata committee of an owners corporation is required, the person presiding at the meeting of the owners corporation must—

- (a)

  announce to the meeting the name of each candidate, and

- (b)

  provide each person present and entitled to vote at the meeting with a blank ballot paper for each vote the person is entitled to cast.

(3)

For a vote to be valid, a ballot paper must be signed by the voter and completed by the voter's writing on it—

- (a)

  the names of the candidates (without repeating a name) for whom the voter desires to vote, the number of names written being no more than the number determined by the owners corporation as the number of members of the strata committee, and

- (b)

  the capacity in which the voter is exercising a right to vote, whether—

- (i)

  as owner, first mortgagee or covenant chargee of a lot (identifying the lot), or

- (ii)

  as a company nominee, or

- (iii)

  by proxy, and

- (c)

if the vote is being cast by proxy—the name and capacity of the person who gave the proxy.

Note—

See the *Electronic Transactions Act 2000*, section 9, in relation to requirements for the electronic signature of a person.

(4)

The completed ballot paper must be returned to the chairperson.

(4A)

For the Act, section 271(2)(n), the ballot paper—

- (a)

  may be provided or delivered by electronic means specified in the notice given under clause 14(a) in relation to the meeting, and

- (b)

  if the ballot paper is provided or delivered by electronic means—must be returned to the chairperson in a way specified in the notice given under clause 14(a) in relation to the meeting.

Note—

See the Act, Schedules 1 and 2, and this Regulation, clause 14, in relation to notices for meetings.

(5)

Until all places for membership of the strata committee have been filled, the chairperson is to declare elected successively each candidate who has a greater number of votes than all other candidates who have not been elected.

(6)

If only one place remains to be filled but there are 2 or more eligible candidates with an equal number of votes, the candidate to fill the place is to be decided by a show of hands of the persons present and entitled to vote.

(7)

For subclause (6), a person is taken to vote by a show of hands on a matter at a meeting if—

- (a)

  the notice for the meeting specified voting by electronic means while participating in the meeting as a way of voting at the meeting, and

  Note—

  See the Act, Schedule 1, clause 28(3) and this Regulation, clause 14(a).

- (b)

  the person uses the electronic means to indicate the voter's choice on the matter while participating in the meeting.

cl 10: Am 2022 (564), Sch 1[3]–[6].

11 Nominations for officers of strata committee(1)

The written notice of the first meeting of a strata committee after the appointment of the committee is to include a call for nominations for chairperson, secretary and treasurer of the committee.

(2)

Any person who is a member of the strata committee may nominate another member for election as any or all of chairperson, secretary or treasurer of the committee.

(2A)

A nomination must be made by written notice or orally at the meeting in accordance with this clause, or the nomination is ineffective.

(3)

A nomination made by written notice must be given to the person convening the meeting, stating the name of—

- (a)

  the person nominated, and

- (b)

  the person making the nomination and that the person nominated consents to the nomination.

(4)

The person convening the meeting must include any prior nominations in the notice of the meeting at which the election is to take place. Notice of any subsequent nomination is to be given by the

convenor at the meeting.

(5)

A nomination may be made at any time before the election is held and may be made at the meeting.

(5A)

For an oral nomination—

- (a)

  the nomination must be made at the meeting, and

- (b)

  the person nominated must—

  - (i)

    be present at the meeting, and

  - (ii)

    consent to the nomination.

(6)

If a ballot for the election of a person as chairperson, secretary or treasurer of the committee is required, the election is to be conducted by a show of hands of the persons present at the meeting and entitled to vote.

(7)

For subclause (6), a person is taken to vote by a show of hands on a matter at a meeting if—

- (a)

  the notice for the meeting specified voting by electronic means while participating in the meeting as a way of voting at the meeting, and

  Note—

  See the Act, Schedule 2, clause 10(3) and this Regulation, clause 14(a).

- (b)

  the person uses the electronic means to indicate the voter's choice on the matter while participating in the meeting

cl 11: Am 2022 (564), Sch 1[7]–[11].

12 Priority votes—owners corporation

For the purposes of clause 24(2)(b) of Schedule 1 to the Act, a priority vote may be cast on a motion if the motion would require expenditure that exceeds an amount calculated by multiplying $1,000 by the number of lots in the strata scheme.

13

(Repealed)

cl 13: Rep 2018 No 65, Sch 8.11[2].

14 Ways of voting

For the Act, Schedule 1, clause 28(3) and Schedule 2, clause 10(3), a notice for a meeting of an owners corporation or a strata committee may specify one or more of the following ways of voting—

- (a)

  voting by electronic means while participating in the meeting,

- (b)

  if the strata committee has, by resolution, adopted pre-meeting electronic voting as a way of voting—pre-meeting electronic voting for a meeting of the strata committee,

- (c)

  if the owners corporation has, by resolution, adopted pre-meeting electronic voting as a way of voting—pre-meeting electronic voting for a meeting of the owners corporation.

cl 14: Subst 2022 (564), Sch 1[12].

14A Pre-meeting electronic voting

For the Act, Schedule 1, clause 28(3) and Schedule 2, clause 10(3), the following applies in relation to voting by pre-meeting electronic voting—

- (a)

  an election must not be determined by pre-meeting electronic voting,

- (b)

  for a matter that may be determined partly by pre-meeting electronic voting—the notice of the meeting must include a statement that—

  - (i)

    the relevant motion may be amended by a further motion given at the meeting after the pre-meeting electronic voting takes place, and

  - (ii)

    consequently, the pre-meeting vote may have no effect,

- (c)

  a motion that is to be determined wholly by pre-meeting electronic voting must not be amended at the meeting for which the pre-meeting electronic voting was conducted,

- (d)

  a motion that is to be determined partly by pre-meeting electronic voting may be amended at the meeting for which the pre-meeting electronic voting was conducted but only if the amendment does not change the subject matter of the motion,

- (e)

  if a motion that is to be determined partly by pre-meeting electronic voting is amended at the meeting for which the pre-meeting electronic voting has been conducted—the minutes of the meeting distributed to owners must be accompanied by—

  - (i)

    notice of the change, and

  - (ii)

    a statement setting out the power to make a qualified request for a further meeting under the Act, section 19.

cl 14A: Ins 2022 (564), Sch 1[12].

14B Reasonable steps

For the Act, Schedule 1, clause 28(3)(e) and Schedule 2, clause 10(3)(e), the following may constitute reasonable steps—

- (a)

  providing clear and accessible instructions about how to participate in and vote at a meeting,

- (b)

  providing multiple ways for a person entitled to vote at a meeting to participate in and vote at the meeting, including ways that do not require the person to access the internet or incur unreasonable expenses,

- (c)

  using technology that is reasonably accessible to a person entitled to vote at a meeting, including technology that does not require unreasonable costs to be paid by the person.

cl 14B: Ins 2022 (564), Sch 1[12].

15 Electronic ballot paper for pre-meeting electronic voting(1)

This clause applies to a ballot for determination of a matter by an owners corporation or strata committee that is to be conducted by pre-meeting electronic voting.

(2)

The secretary of the owners corporation must ensure that the form for the electronic ballot paper contains—

- (a)

  instructions for completing the ballot paper, and

- (b)

  the question to be determined, and

- (c)

  the means of indicating the voter's choice on the question to be determined.

(3)

The secretary of the owners corporation must, at least 7 days before the meeting at which the matter is to be determined, give each person entitled to vote—

- (a)

  access to an electronic ballot paper, or to a voting website or electronic application containing an electronic ballot paper, that complies with this clause, and

- (b)

  access to information about—

  - (i)

    how the ballot paper must be completed, and

  - (ii)

    the closing date of the ballot, and

  - (iii)

    if voting is by email, the address where the ballot paper is to be returned, and

  - (iv)

    if voting is by other electronic means, the means of accessing the electronic voting system and how the completed electronic ballot paper is to be sent to the secretary, and

- (c)

access to an electronic form of declaration requiring the voter to state—

- (i)

  his or her name, and

- (ii)

  the capacity in which the person is entitled to vote, and

- (iii)

  in the case of a matter that requires a special resolution, the voter's unit entitlement, and

- (iv)

  if the vote is a proxy vote, the name and capacity of the person who gave the proxy.

(4)

Each person entitled to vote must vote in accordance with the instructions contained in the information.

(5)

If the ballot is a secret ballot, the secretary must ensure that—

- (a)

  the identity of the voter cannot be ascertained from the form of the electronic ballot paper, and

- (b)

  the declaration by the voter is dealt with so that it is not capable of being used to identify the voter.

(6)

An electronic ballot paper and the form of declaration must be sent to the secretary of the owners corporation no later than the close of the ballot.

(7)

The secretary of the owners corporation must ensure that all electronic ballot papers are stored securely until the counting of the votes begins.

(8)

In this clause, the close of the ballot means—

- (a)

  for a matter to be determined by the owners corporation, the time that is 24 hours before the commencement of the meeting at which the matter is to be determined, or

- (b)

  for a matter to be determined by a strata committee, immediately before the commencement of the meeting at which the matter is to be determined.

cl 15: Am 2022 (564), Sch 1[13].

16 Informal votes in pre-meeting electronic voting(1)

A ballot paper of a voter who votes by means of pre-meeting electronic voting is informal if the voter has failed to record a vote in accordance with the information provided by the secretary.

(2)

If voting is carried out by pre-meeting electronic voting using a voting website or other electronic application, the website or application is to provide a warning message to a person casting an informal vote that the proposed vote is informal.

cl 16: Am 2022 (564), Sch 1[14].

17 Ascertaining result of pre-meeting electronic voting(1)

As soon as practicable after the close of a ballot conducted by pre-meeting electronic voting, the secretary of the owners corporation must—

- (a)

  review all information and reports about the electronic ballot, and

- (b)

  reject as informal any votes that do not comply with the requirements of this Regulation, and

- (c)

  ascertain the result of the electronic ballot.

(2)

The secretary must, at the meeting to consider the matter for which the pre-meeting electronic voting was held, inform the persons present of the result of the ballot.

17A Electronic affixing of seal of owners corporation(1)

For the Act, section 273(7), if an owners corporation has only 1 owner, the seal of the owners corporation must not be affixed electronically to an instrument except in the presence of—

- (a)

  the owner, or

- (b)

if there is a strata managing agent of the owners corporation—the strata managing agent.

(2)

If an owners corporation has only 2 owners, the seal of the owners corporation must not be affixed electronically to an instrument except in the presence of—

- (a)

  both owners, or

- (b)

  if there is a strata managing agent of the owners corporation—the strata managing agent.

(3)

If an owners corporation has more than 2 owners, the seal of the owners corporation must not be affixed electronically to an instrument except in the presence of—

- (a)

  if, for the purposes of this subclause, the owners corporation has determined 2 persons who are owners of lots or members of the strata committee—the persons, or

- (b)

  if the owners corporation has not made a determination referred to in paragraph (a)—

  - (i)

    the secretary of the owners corporation, and

  - (ii)

    another member of the strata committee, or

- (c)

  if there is a strata managing agent of the owners corporation—the strata managing agent.

(4)

In this clause—

instrument includes a document.

cl 17A: Ins 2022 (564), Sch 1[15].

17B Requirements for strata managing agent for seal affixed electronically(1)

For the Act, section 273(7), if the seal of the owners corporation is affixed electronically in the presence of a strata managing agent under clause 17A, the strata managing agent must attest to the fact and date of the affixing of the seal—

- (a)

  by the strata managing agent's signature, or

- (b)

  if the strata managing agent is a corporation—by the signature of—

  - (i)

    the president, chairperson or other principal officer of the corporation, or

  - (ii)

    a staff member of the corporation who is authorised by the president, chairperson or other principal officer to attest to the fact and date of the affixing of the seal.

(2)

The requirement for a signature under subclause (1) is taken to have been met in relation to an electronic communication if—

- (a)

  a method is used to identify the person and to indicate the person's intention in respect of the information communicated, and

- (b)

  the method used was either—

  - (i)

    as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement, or

  - (ii)

    proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence, and

- (c)

  the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

(3)

In this clause—

consent includes consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with.

electronic communication means—

- (a)

  a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both, or

- (b)

  a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.

information means information in the form of data, text, images or sound.

cl 17B: Ins 2022 (564), Sch 1[15].

Part 3 Financial management18 Payment plans for unpaid contributions: section 85(6) of Act(1)

A payment plan for the payment of overdue contributions is to be in writing and is to contain the following—

- (a)

  the name of the lot owner and the title details of the lot,

- (b)

  the address for service of the lot owner,

- (c)

  the amount of the overdue contributions,

- (d)

  the amount of any interest payable for the overdue contributions and the way in which it is calculated,

- (e)

  the schedule of payments for the amounts owing and the period for which the plan applies,

- (f)

  the manner in which the payments are to be made,

- (g)

  contact details for a member of the strata committee or a strata managing agent who is to be responsible for any matters arising in relation to the payment plan,

- (h)

a statement that a further plan may be agreed to by the owners corporation by resolution,

- (i)

  a statement that the existence of the payment plan does not limit any right of the owners corporation to take action to recover the amount of the unpaid contributions.

(2)

The strata committee must, at the request of a lot owner who has entered into a payment plan, give the lot owner a written statement for each calendar month (or any longer interval specified by the lot owner) of the plan that sets out the payments made during that month and the amount of unpaid contributions and interest owing.

19 Notice of recovery action for unpaid contributions, interest or expenses

For the purposes of section 86(5)(c) of the Act, a notice of proposed action to recover an amount of contributions, interest or expenses must include the following—

- (a)

  the date the amount was due to be paid,

- (b)

  the manner in which the amount may be paid,

- (c)

  whether a payment plan may be entered into,

- (d)

  any other action that may be taken to arrange for payment of the amount.

20

(Repealed)

cl 20: Rep 2018 No 65, Sch 8.11[2].

21 Calculation of annual budget

For the purposes of section 95(4) of the Act, the amount of the annual budget is to be the sum of the following—

- (a)

  the amount of contributions levied for the year concerned (whether or not they have been paid),

- (b)

  any income of the owners corporation from any other source,

- (c)

  any other amounts held by the owners corporation for the purposes of the owners corporation.

22 Accounting records

The accounting records required to be kept for the purposes of section 96(4) of the Act are as follows —

- (a)

  receipts consecutively numbered,

- (b)

  a statement of deposits and withdrawals for the account of the owners corporation,

- (c)

  a cash record,

- (d)

  a levy register.

23 Levy register(1)

The levy register must include a separate section for each lot in the strata scheme that is not a utility lot.

(2)

Each of those sections must specify, by appropriate entries, the following matters in relation to each contribution levied by the owners corporation and must indicate whether those entries are debits or credits and the balances for those entries—

- (a)

  the date on which the contribution is due and payable,

- (b)

  the type of contribution and the period in respect of which it is to be made,

- (c)

  the amount of the contribution levied shown as a debit,

- (d)

  the amount of each payment shown as a credit,

- (e)

the date on which each payment relating to the contribution was made,

- (f)

  whether a payment made was made in cash or by cheque or in some other specified manner,

- (g)

  whether an amount paid comprised full payment or part payment,

- (h)

  details of any discount given for early payment,

- (i)

  the balance of the account.

24 Receipts

For the purposes of section 97(2) of the Act, each receipt issued by the treasurer of the owners corporation must include the following—

- (a)

  the date of issue of the receipt,

- (b)

  the amount of money received,

- (c)

  the form (cash, cheque, postal order or other) in which the money was received,

- (d)

  the name of the person on whose behalf the payment was made,

- (e)

  if the payment is for a contribution to the administrative or capital works fund—

  - (i)

    a statement that the payment was made in respect of that contribution, and

  - (ii)

    the lot number in respect of which the contribution was made, and

  - (iii)

    the period in respect of which the payment is made (if relevant), and

  - (iv)

details of any discount given for early payment,

- (f)

  if the payment is not a payment referred to in paragraph (e)—particulars of the transaction in respect of which the payment is received,

- (g)

  if the payment is received in respect of more than one transaction—the manner in which the payment is apportioned between transactions.

25 Limits on spending by owners corporations

For the Act, section 102(1), the prescribed amount is $30,000.

cl 25: Subst 2023 No 45, Sch 5.1[1].

26 Approval for legal services costs(1)

The amount of $15,000 is prescribed for the purposes of section 103(2)(b) of the Act.

(2)

For the purposes of section 103 of the Act, approval is not required under that section to the obtaining of legal services in relation to a matter that is not urgent if the cost of the legal services does not exceed $3,000.

Part 4 Property management27 Common property memorandum

The Common Property Memorandum, published in the Gazette and on the website of the Department of Finance, Services and Innovation on 30 November 2016 is prescribed for the purposes of section 107(1) of the Act as the common property memorandum that may be adopted by the by-laws for a strata scheme.

Note—

The Common Property Memorandum cannot be modified by the adopting by-laws, except to exclude specified items that are not common property for the purposes of the particular strata scheme. Any common property by-law or a by-law made under section 108 of the Act prevails over the by-law adopting the Memorandum if it is inconsistent with the Memorandum (see section 107(3) and (4) of the Act).

28 Minor renovations by owners

Work for the following purposes is prescribed as minor renovations for the purposes of section 110(3) of the Act—

- (a)

  removing carpet or other soft floor coverings to expose underlying wooden or other hard floors,

- (b)

  installing a rainwater tank,

- (c)

  installing a clothesline,

- (d)

  installing a reverse cycle split system air conditioner,

- (e)

  installing double or triple glazed windows,

- (f)

  installing a heat pump,

- (g)

  installing ceiling insulation.

Note—

The work prescribed by this clause is subject to the requirements set out in section 110(7) of the Act, including requirements that it does not involve structural changes, changes to the external appearance of a lot or waterproofing.

29 Initial maintenance schedule: section 115 of Act(1)

The initial maintenance schedule for the maintenance of the common property of a strata scheme must contain maintenance and inspection schedules for a thing that is on common property if the maintenance and inspection is reasonably required to avoid damage to the thing or a failure to function properly for its intended purpose.

(2)

Without limiting the matters to be included in the initial maintenance schedule, maintenance and inspection schedules must be included for the following—

- (a)

  exterior walls, guttering, downpipes and roof,

- (b)

  pools and surrounds, including fencing and gates,

- (c)

  air conditioning, heating and ventilation systems,

- (d)

  fire protection equipment, including sprinkler systems, alarms and smoke detectors,

- (e)

  security access systems,

- (f)

  embedded networks and micro-grids.

(3)

The following are to be included with or attached to the initial maintenance schedule—

- (a)

  all warranties for systems, equipment or any other things referred to in the schedule,

- (b)

  any manuals or maintenance requirements provided by manufacturers for any of those things,

- (c)

  the name and contact details of the manufacturer and installer of any of those things.

(4)

The schedule may be in hard copy or in an electronic form that is accessible by the owners corporation.

Following paragraph cited by:

Endre v The Owners - Strata Plan No. 17771 (17 April 2019) (M Harrowell, Principal Member, J McAteer, Senior Member)

> The work to be carried out by the respondent (owners corporation) is to include the installation of window safety devices for each skylight as required by s 118 of the *Strata Schemes Management Act 2015* and in accordance with Reg 30 of the *Strata Schemes Management Regulation 2016* (NSW).

Endre v The Owners - Strata Plan No. 17771 (17 April 2019) (M Harrowell, Principal Member, J McAteer, Senior Member)

> (c) The work to be carried out by the respondent (owners corporation) is to include the installation of window safety devices for each skylight as required by s 118 of the Strata Schemes Management Act, 2015 and in accordance with Reg 30 of the Strata Schemes Management Regulation, 2016.

Endre v The Owners - Strata Plan No. 17771 (17 April 2019) (M Harrowell, Principal Member, J McAteer, Senior Member)

30 Window safety devices(1)

A building in a strata scheme is a building to which section 118 of the Act applies if the building contains lots used for residential purposes.

(2)

A window within any such building is a window to which section 118 of the Act applies if—

- (a)

  it is a window within the meaning of the *Building Code of Australia*, and

- (b)

  it can be opened, and

- (c)

  the lowest level of the window opening is less than 1.7 metres above the surface of any internal floor that abuts the wall of which it forms part, and

- (d)

  that internal floor is 2 metres or more above the ground surface, or any external surface, below the window that abuts the wall, and

- (e)

  it is a window on common property to which access can be gained from a residence in a strata scheme or a window on any part of the building that is part of a residence.

(3)

A screen, lock or any other device is a complying window safety device for the purposes of section 118 of the Act if it—

- (a)

  is capable of restricting the opening of a window so that a sphere having a diameter of 125 millimetres or more cannot pass through the window opening, and

- (b)

  is capable of resisting an outward horizontal action of 250 newtons, and

- (c)

  has a child resistant release mechanism, in the case of a device that can be removed, overridden or unlocked.

(4)

In this clause—

Building Code of Australia has the same meaning as it has in the *Environmental Planning and Assessment Act 1979*.

31 Notification by owners of window safety devices

An owner of a lot in a strata scheme who installs a window safety device under section 118 of the Act must give written notice of the installation to the owners corporation within 7 days after completion of the installation.

Note—

Section 262 of the Act sets out the manner in which a document is to be served on an owners corporation.

32–34

(Repealed)

cll 32–34: Rep 2018 No 79, Sch 3.11.

Part 5 By-laws35 By-laws for schemes before Strata Schemes Management Act 1996

For the purposes of section 134(3) of the Act, the by-laws for a strata scheme that was in existence before the commencement of the *Strata Schemes Management Act 1996* are the by-laws set out in Schedule 2.

Note—

By virtue of section 134(3) of the Act, the by-laws also include any amendments to the by-laws set out in Schedule 2, and any additional by-laws made for the scheme, as in force before the commencement of section 134 of the Act. The by-laws may also be amended in accordance with the Act.

36 Occupancy limits—exception(1)

For the purposes of section 137(3)(b) of the Act, a by-law that limits the number of adults who may reside in a lot has no effect if all of the adults who reside in the lot are related to each other.

(2)

For the purposes of this clause, a person is related to another person who resides in a lot if—

- (a)

  the person is the parent, guardian, grandparent, son, daughter, grandchild, brother, sister, uncle, aunt, niece, nephew or cousin of the other person, or

- (b)

the person is such a relative of the other person's spouse or de facto partner or former spouse or de facto partner, or

- (c)

  the person is the spouse or de facto partner of the other person, or

- (d)

  the person is the carer of, or is cared for by, the other person.

(3)

For the purposes of this clause, a person who is an Aboriginal person or a Torres Strait Islander is also related to another person if the person is, or has been, part of the extended family or kin of the person according to the indigenous kinship system of the person's culture.

36A Keeping of animals—circumstances of unreasonable interference

For the purposes of the Act, section 137B(3), the circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property are—

- (a)

  the animal makes a noise that persistently occurs to the degree that the noise unreasonably interferes with the peace, comfort or convenience of another occupant, or

- (b)

  the animal repeatedly runs at or chases another occupant, a visitor of another occupant or an animal kept by another occupant, or

- (c)

  the animal attacks or otherwise menaces another occupant, a visitor of another occupant or an animal kept by another occupant, or

- (d)

  the animal repeatedly causes damage to the common property or another lot, or

- (e)

  the animal endangers the health of another occupant through infection or infestation, or

- (f)

  the animal causes a persistent offensive odour that penetrates another lot or the common property, or

- (g)

  for a cat kept on a lot—the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998*, section 31, or

- (h)

  for a dog kept on a lot—

  - (i)

    the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998*, section 32A, or

  - (ii)

    the animal is declared to be a menacing dog or a dangerous dog under the *Companion Animals Act 1998*, section 34, or

  - (iii)

    the animal is a restricted dog within the meaning of the *Companion Animals Act 1998*, section 55(1).

cl 36A: Ins 2021 (464), Sch 1.

37 Model by-laws

For the purposes of section 138 of the Act, the by-laws set out in Schedule 3 are model by-laws that may be adopted, either in whole or in part, as the by-laws for a strata scheme.

Part 6 Insurance38 Approved insurers(1)

A Lloyd's underwriter authorised to carry on insurance business, or exempted from authorisation, under the *Insurance Act 1973* of the Commonwealth is an approved insurer for the purposes of paragraph (b) of the definition of approved insurer in section 4(1) of the Act.

(2)

In this clause—

Lloyd's underwriter has the same meaning as in the *Insurance Act 1973* of the Commonwealth.

39 Manner of calculation of insurance limit under damage policy(1)

For the purposes of section 161(1)(a) of the Act, the minimum amount for which a building is to be insured is to be not less than the amount calculated in accordance with subclause (2).

(2)

For the purposes of section 161(2) of the Act, the amount to which the liability of an insurer may be limited under a damage policy is to be calculated by adding together the following amounts—

- (a)

  the estimated cost, as at the date of commencement of the damage policy, of—

  - (i)

carrying out the work that a damage policy is required to provide for under section 161 of the Act, and

- (ii)

making the payments that a damage policy is required to provide for under section 161 of the Act,

- (b)

the estimated amount by which expenditure referred to in the preceding paragraphs may increase during the period of 24 months following the date of commencement of the damage policy.

(3)

The amounts referred to in subclause (2)(a) and (b) are to be calculated so as to include any applicable taxes, fees and charges (including taxes, fees and charges of the Commonwealth).

40 Insurance amount

For the purposes of section 164(2) of the Act, the minimum insurance cover for the purposes of damage to property, death or bodily injury for which the owners corporation could become liable in damages is $20,000,000.

Part 7 Records and information about strata schemesDivision 1 Records

pt 7, div 1, hdg: Ins 2021 (773), Sch 1[1].

41 Electronic voting records(1)

For the purposes of section 180(1)(j) of the Act, records relating to electronic voting for motions for resolutions by an owners corporation must be retained by an owners corporation.

(2)

For the purposes of section 180(2) of the Act, the period for which an owners corporation is required to retain voting papers under section 180(1)(g) of the Act or records referred to in subclause (1) is 13 months, if the voting papers or records relate to secret ballots, unless the papers relate to the appointment of a strata renewal committee or other decisions in connection with Part 10 of the *Strata Schemes Development Act 2015*.

42 Inspection of records

For the purposes of section 182(3)(k) of the Act, the owners corporation must make available for inspection the accounting records and other records relating to the strata scheme that are kept by the strata managing agent.

Division 2 Information—the Act, s 271(2)(o) and (2A)

pt 7, div 2: Ins 2021 (773), Sch 1[2].

43 Owners corporations to give information annually(1)

The owners corporation for a strata scheme must give the information specified in clause 43A about the strata scheme to the Secretary in the approved form—

- (a)

  for the first time—

  - (i)

    if the first annual general meeting of the owners corporation is held on or before 30 June 2022—by 31 December 2022, or

  - (ii)

    otherwise—within 3 months after the first annual general meeting of the owners corporation, and

- (b)

  for each subsequent calendar year—within 3 months after the annual general meeting of the owners corporation.

Maximum penalty—50 penalty units.

(2)

When giving the information, the owners corporation must pay the Secretary the fee, set out in Schedule 4, for administration relating to the information.

cl 43: Rep 2018 No 65, Sch 8.11[2]. Ins 2021 (773), Sch 1[2]. Am 2022 (583), sec 3(1).

43A Information required for purposes of clause 43(1)

For the purposes of clause 43, the following information is specified—

- (a)

  the strata plan number of the strata scheme,

- (b)

  the date of registration of the strata plan for the strata scheme,

- (c)

  if the strata scheme is part of a community scheme—the date of registration and the number of the community plan, within the meaning of the *Community Land Management Act 2021*,

- (d)

if the strata scheme is part of a precinct scheme—the date of registration and the number of the precinct plan, within the meaning of the *Community Land Management Act 2021*,

- (e)

  the address of the parcel of the strata scheme,

- (f)

  the total number of lots in the strata scheme,

- (g)

  the number of lots in the strata scheme used for the following purposes—

  - (i)

    residential purposes,

  - (ii)

    the purposes of a retirement village,

  - (iii)

    commercial purposes,

  - (iv)

    the purposes of a utility lot,

  - (v)

    other purposes,

- (h)

  if a building of the strata scheme has a NABERS rating—the rating,

- (i)

  if an occupation certificate has been issued for a building of the strata scheme—the date the certificate was issued,

- (j)

  if an annual fire safety statement has been issued under the *Environmental Planning and Assessment Act 1979* for a building of the strata scheme—the date the most recent statement was issued,

- (k)

  for a class 2 building, within the meaning of the *Building Code of Australia*, of the strata scheme—the number of storeys above ground level in the building,

- (l)

  if the owners corporation is required to insure a building, or part of a building, of the strata scheme under the Act, section 160—the replacement value of the building, or the part of the building, as—

  - (i)

    specified in the damage policy for the building, or

  - (ii)

    determined by the Tribunal under the Act, section 162(3),

- (m)

  the following details of the secretary of the owners corporation—

  - (i)

    full name,

  - (ii)

    telephone number,

  - (iii)

    email address,

- (n)

  the following details of the chairperson of the owners corporation—

  - (i)

    full name,

  - (ii)

    telephone number,

  - (iii)

    email address,

- (o)

  if there is a strata managing agent appointed for the strata scheme—the following details of the agent—

  - (i)

    full name,

- (ii)

  telephone number,

- (iii)

  email address,

- (iv)

  the number of the agent's licence under the *Property and Stock Agents Act 2002*,

- (p)

  if there is a building manager appointed for the strata scheme—the following details of the manager—

  - (i)

    full name,

  - (ii)

    telephone number,

  - (iii)

    email address,

- (q)

  the following details of the emergency contact person for the strata scheme—

  - (i)

    full name,

  - (ii)

    telephone number,

  - (iii)

    email address,

  - (iv)

    the person's connection to the strata scheme,

    Examples of connections to strata scheme—

    The person may be the secretary, chairperson or another officer of the owners corporation for the scheme, the strata managing agent for the scheme, the building manager for the scheme or the owner or occupier of a lot in the scheme.

- (r)

  the date of the most recent annual general meeting of the owners corporation,

- (s)

  if the owners corporation is required to establish a capital works fund under the Act, section 75 —the balance of the fund, as specified in the most recent financial statements,

- (t)

  whether a strata renewal committee is currently established under the *Strata Schemes Development Act 2015* in relation to the strata scheme and, if so, the date the committee was established.

(2)

In this clause—

emergency contact person means a person who is nominated by the owners corporation, with the person's consent, as a contact for the strata scheme if there is an emergency.

NABERS rating of a building means a star rating for the environmental performance of the building, issued by the National Australian Built Environment Rating System under the *Building Energy Efficiency Disclosure Act 2010* of the Commonwealth.

occupation certificate means—

- (a)

  an interim occupation certificate or final occupation certificate issued under the *Environmental Planning and Assessment Act 1979* before 1 December 2019, or

- (b)

  an occupation certificate issued under the *Environmental Planning and Assessment Act 1979*.

replacement value of a building or part of a building means the cost of rebuilding or replacing the building or part of the building in accordance with the Act, section 161(1)(b).

cl 43A: Ins 2021 (773), Sch 1[2]. Am 2022 (583), sec 3(2) (3).

43B Owners corporations to correct information given(1)

The owners corporation for a strata scheme must notify the Secretary if information given under clause 43—

- (a)

  was incorrect in a material particular when the information was given, or

- (b)

for information specified in clause 43A(1)(m)–(q) or (t)—changes before the next annual general meeting of the owners corporation.

(2)

The notification must be—

- (a)

  in the approved form, and

- (b)

  made within 28 days after either of the following persons becomes aware of a circumstance mentioned in subclause (1)—

  - (i)

    the secretary of the owners corporation,

  - (ii)

    if there is a strata managing agent for the strata scheme—the agent.

Maximum penalty (subclause (2))—20 penalty units.

cl 43B: Ins 2021 (773), Sch 1[2].

43C Disclosure of information by Secretary(1)

The Secretary may publicly disclose any of the information specified in clause 43A(1)(a)–(g), (k) or (r) about a strata scheme.

(2)

The Secretary may disclose to the following persons any of the information specified in clause 43A(1)(j), (m)–(p) or (t) about a strata scheme—

- (a)

  a person required to be named on the strata roll for the strata scheme under the Act, section 178,

- (b)

  the secretary of the owners corporation,

- (c)

  the members of the strata committee of the owners corporation,

- (d)

  if there is a building manager for the strata scheme—the manager.

(3)

The Secretary may disclose to the following bodies any of the information specified in clause 43A(1)(j), (m), (o) or (q) about a strata scheme—

- (a)

  Fire and Rescue NSW,

- (b)

  the local council for the land on which the strata scheme is situated.

(4)

The Secretary may disclose to the following bodies any of the information specified in clause 43A(1)(q) about a strata scheme—

- (a)

  NSW State Emergency Service,

- (b)

  Ambulance Service of New South Wales,

- (c)

  NSW Police Force.

cl 43C: Ins 2021 (773), Sch 1[2]. Am 2022 (583), sec 3(4).

Part 8 Building defectsDivision 1 Interpretation

pt 8, div 1, hdg: Ins 2020 (323), Sch 1[3].

44 Interpretation(1)

Words and expressions used in this Part have the same meaning as they have in Part 11 of the Act.

(2)

In this Part—

authorised professional association means any of the following bodies—

- (a)

  the Housing Industry Association Limited (ACN 004 631 752),

- (b)

  the Master Builders Association of New South Wales Pty Ltd as registered under the *Industrial Relations Act 1996*,

- (c)

  the Australian Institute of Building (ACN 000 165 248),

- (d)

  the Australian Institute of Building Surveyors (ACN 004 540 836),

- (e)

  the Australian Institute of Building Consultants Pty Ltd (ACN 605 683 690),

- (f)

  the Australian Society of Building Consultants Incorporated (NSW Y1805133),

- (g)

  the Institute of Building Consultants Inc (NSW Y0848702),

- (h)

  Engineers Australia Pty Limited (ACN 001 311 511),

- (i)

  the Association of Accredited Certifiers Incorporated (NSW INC9880607),

- (j)

  the Australian Institute of Quantity Surveyors Ltd (ACN 000 093 005),

- (k)

  RICS Australasia Pty Ltd (ACN 089 873 067).

Building Code of Australia has the same meaning as in the *Environmental Planning and Assessment Act 1979*.

building inspector functions mean the functions of a building inspector under Part 11 of the Act.

strata inspector panel—see clause 45.

cl 44: Am 2020 (323), Sch 1[4]; 2021 (346), Sch 1[1].

44A Building work excluded from the Act, Part 11—the Act, s 191

The Act, Part 11 does not apply to building work for a build-to-rent property that is—

- (a)

  carried out under development consent granted under *State Environmental Planning Policy (Housing) 2021*, Chapter 3, Part 4, and

- (b)

  entitled to a reduction in the assessable value of the land under the *Land Tax Management Act 1956*, section 9E.

cl 44A: Ins 2024 (9), Sch 1[1].

Division 2 Building inspectors, inspection reports and rectification

pt 8, div 2, hdg: Ins 2020 (323), Sch 1[5].

45 Persons qualified to be appointed as building inspectors(1)

An authorised professional association may establish and maintain a strata inspector panel for building work of a particular kind (a strata inspector panel).

(2)

The association may appoint an individual to be a member of the panel if satisfied that the individual is appropriately qualified to carry out building inspector functions in relation to that kind of building work.

(3)

A member of the panel is qualified to be appointed under section 193(2) of the Act as a building inspector for that kind of building work.

cl 45: Subst 2020 (323), Sch 1[5].

45A Register of members of strata inspector panel(1)

An authorised professional association must keep a register of members of a strata inspector panel established by the association that contains the following particulars in relation to each member—

- (a)

  the member's name,

- (b)

  any registered business name under which the member carries on business as a building inspector, together with the related Australian Business Number,

- (c)

  the address of the member's principal place of business,

- (d)

  the member's telephone number and other particulars (such as an email address) for contacting the member for business purposes,

- (e)

any formal qualifications held by the member that are relevant to the individual's business as a building inspector,

- (f)

  any conditions in force under clause 45C in relation to the member that the association has been made aware of as a result of notification to the association under that clause.

(2)

The register may contain any other particulars that the association considers appropriate, including particulars of project experience that have been provided by the member to the association and that the association considers relevant.

(3)

An authorised professional association that is required to keep a register under this clause must retain the register and its contents for at least 7 years after the date on which the last entry was made in it.

(4)

An authorised professional association that is required to keep a register under this clause must ensure that the register is made available free of charge for inspection by the public—

- (a)

  at the professional association's offices during ordinary office hours (in paper or electronic form), and

- (b)

  on the internet.

Maximum penalty—40 penalty units.

cll 45A–45E: Ins 2020 (323), Sch 1[5].

45B Secretary's guidelines(1)

In exercising its functions under clauses 45 and 45A, an authorised professional association must have regard to the guidelines (if any) approved by the Secretary for the purposes of this clause that have been provided to the professional association by the Secretary and are in force.

(2)

The Secretary is to cause such guidelines to be published on the website of the Department.

cll 45A–45E: Ins 2020 (323), Sch 1[5].

45C Conditions imposed on building inspectors by Secretary(1)

For the purposes of section 214(1)(a3) of the Act, the Secretary may impose a condition on the exercise of building inspector functions by a building inspector.

(2)

Conditions may be imposed on a specified building inspector or a class of building inspectors by written notice—

- (a)

  in the case of a specified building inspector—given to the building inspector and to the authorised professional association that established the strata inspector panel of which the building inspector is a member, or

- (b)

  in the case of a class of building inspectors—given to each authorised professional association and published in the Gazette.

(3)

The imposition of a condition under this clause takes effect on the date specified in the notice concerned.

(4)

A building inspector exercising building inspector functions must comply with any applicable conditions imposed under this clause.

Maximum penalty—200 penalty units in the case of a corporation and 100 penalty units in any other case.

(5)

This clause applies to the variation or removal of a condition imposed under this clause in the same way as it applies to the imposition of the condition.

cll 45A–45E: Ins 2020 (323), Sch 1[5].

45D Liability of professional associations in respect of accreditation and other functions

For the purposes of the definition of professional association in section 213B(2) of the Act, each authorised professional association is prescribed.

cll 45A–45E: Ins 2020 (323), Sch 1[5].

45E Nomination of building inspector for approval of owners corporation(1)

A developer nominating a building inspector for approval under section 195(1) of the Act at a general meeting of an owners corporation must do so by written notice given to the owners corporation at least 14 days before the general meeting.

(2)

The notice must be in the approved form (if any) and contain the matters specified in the form (if any).

(3)

The notice must include or be accompanied by the following particulars—

- (a)

  the name of the authorised professional association that established the strata inspector panel of which the building inspector is a member,

- (b)

  the particulars required to be kept in relation to the building inspector under clause 45A(1),

- (c)

  particulars of project experience that have been provided by the member to the developer or that appear on the register.

Maximum penalty—40 penalty units in the case of a corporation and 20 penalty units in any other case.

cll 45A–45E: Ins 2020 (323), Sch 1[5].

46 Disclosure of previous employment by developer

For the purposes of section 195(2) of the Act, a building inspector must disclose previous employment by the developer or a contractor of the developer that occurred at any time within the period of 2 years before appointment as a building inspector.

46A Documents to be provided to building inspector by developer(1)

For the purposes of section 198A(1)(b) of the Act, the following are prescribed—

- (a)

  a copy of the initial maintenance schedule relating to the strata scheme,

- (b)

  copies of the following documents relating to the building work—

  - (i)

    the contract or contracts between the developer and the builder,

  - (ii)

    any specifications and any variations (including any "issued for construction" and "as-built" drawings and specifications and particulars of approved performance solutions to meet the performance requirements of the *Building Code of Australia*),

  - (iii)

any written warranties,

- (iv)

  any schedule of samples (being samples of fixtures, fittings, materials and finishes) approved by the developer for use in the building work,

- (v)

  any development consents, approvals or certificates granted or issued under the *Environmental Planning and Assessment Act 1979*,

- (vi)

  in the case of building work involving a performance solution in respect of a fire safety requirement under the *Building Code of Australia*—any report prepared by or on behalf of an accredited practitioner (fire safety) in relation to the performance solution that was required in connection with an application for a certificate under the *Environmental Planning and Assessment Act 1979*,

- (vii)

  any certificates relating to the design of the building work that were required in connection with an application for a development consent, approval or certificate under the *Environmental Planning and Assessment Act 1979*,

- (viii)

  any report obtained by the developer or builder relating to the inspection of the building work.

(2)

A reference to specifications and variations under subclause (1)(b)(ii) includes the following documents in relation to the building work—

- (a)

  the construction issued regulated designs for the building work provided under the Design Regulation, clause 16(1)(a),

- (b)

  the varied regulated design provided under the Design Regulation, clause 17(1)(b),

- (c)

  the regulated design for the new building element or performance solution provided under the Design Regulation, clause 17(1)(d),

- (d)

  a regulated design that contains additional details provided under the Design Regulation, clause 18(2)(b),

- (e)

  a design relied on by the building practitioner to carry out the regulated building work and provided under the Design Act, Schedule 1, clause 3(3),

- (f)

  a design relied on by the building practitioner to carry out Crown building work and provided under the Design Act, Schedule 1, clause 4B(3).

(3)

For the purposes of the Act, section 198A, documents required to be provided by the developer of a strata scheme are taken to be provided in accordance with that section if the documents are lodged by another person in accordance with the Design Act.

(4)

Words used in this clause have the same meanings as in the Design Act.

(5)

In this clause—

accredited practitioner (fire safety) includes a fire safety practitioner for things done before 1 July 2020.

Design Act means the *Design and Building Practitioners Act 2020*.

Design Regulation means the *Design and Building Practitioners Regulation 2021*.

cl 46A: Ins 2020 (323), Sch 1[6]. Am 2021 (346), Sch 1[2]; 2023 (71), Sch 1.10[1]–[3].

47 Interim reports: section 199(2) of Act

An interim report by a building inspector must be in the approved form and contain the matters specified in the form.

cll 47: Am 2020 (323), Sch 1[7].

48 Final report: section 201(2) of Act

A final report by a building inspector must be in the approved form and contain the matters specified in the form.

cll 48: Am 2020 (323), Sch 1[7].

49 Notice to owners of reports: section 202(3) of Act

A notice to owners of the receipt of an interim or final report by a building inspector must contain the following particulars—

- (a)

whether the report is an interim or final report,

- (b)

  how to obtain an electronic copy of the report.

49A Reasons enabling appointment of new builder to rectify defects

For the purposes of section 206(7) of the Act, the following reasons are prescribed—

- (a)

  the builder responsible for the defective building work is unwilling to rectify the defective building work,

- (b)

  it would be unlawful for the builder to rectify the defective building work (for example, because the builder does not hold a licence where required to do so by law),

- (c)

  the builder is unable to rectify the defective building work because the builder has become a mentally incapacitated person or physically incapacitated or is serving a term of imprisonment,

- (d)

  after due search and inquiry, the builder cannot be found in Australia.

cl 49A: Ins 2020 (323), Sch 1[8].

Division 3 Building bonds

pt 8, div 3, hdg: Ins 2020 (323), Sch 1[9].

50 Contract price for determining building bond(1)

For the purposes of the definition of contract price in section 189 of the Act, the contract price for building work is the total price paid or payable under all the applicable contracts for the building work regardless of when the amounts become payable.

(2)

However, the contract price for building work is to be the price set out in a cost report if—

- (a)

  there is no written contract for the building work, or

- (b)

  the parties to the building contract are connected persons (other than as a result of being parties to the contract).

(2A)

The cost report is to be prepared by a qualified quantity surveyor—

- (a)

  engaged by the developer (except as provided by paragraph (b)), or

- (b)

  determined by the Tribunal or the Supreme Court to be appropriate in proceedings dealing with an application by an owners corporation or the Secretary under section 211 of the Act.

(2B)

The quantity surveyor who prepares the cost report must not be connected to—

- (a)

  the builder or the developer (other than as a result of being engaged by the developer to prepare the report), or

- (b)

  a bank, or other person, providing finance for the building work.

(2C)

For the purposes of this clause, a qualified quantity surveyor is a quantity surveyor who is a member of the Australian Institute of Quantity Surveyors or the Royal Institution of Chartered Surveyors.

(3)

A cost report prepared by a quantity surveyor for the purposes of this clause must include the costs of the following and be accompanied by a certificate by the quantity surveyor that he or she has inspected the as-built drawings and specifications for the strata plan to which the report relates—

- (a)

  construction and fit out costs, not including appliance and PC items,

- (b)

  demolition and site preparation,

- (c)

  excavation,

- (d)

  car parking,

- (e)

costs for the common property that is included in the property plan, including landscaping, pools, fencing and gates,

- (f)

  professional fees,

- (g)

  taxes applied in the calculation of the as-built construction.

cl 50: Am 2020 (323), Sch 1[10]–[12].

51 Maturity dates for building bond

The amount secured by a building bond must be able to be claimed or realised for a period of not less than 30 months and not more than 3 years after the date of the occupation certificate for the building work to which the bond relates.

cl 51: Subst 2020 (323), Sch 1[13].

52 Additional documents to be lodged with building bond(1)

A developer must, when giving a building bond to the Secretary, also give the Secretary the following documents and information, in the manner approved by the Secretary—

- (a)

  a lodgment form in the approved form,

- (b)

  the strata plan number of the strata scheme concerned,

- (c)

  the street address of any building to which the bond relates,

- (d)

  the name and address of the principal certifying authority for any building work to which the bond relates,

- (e)

  an address for service for the developer,

- (f)

  an address for service for the owners corporation for the strata scheme,

- (g)

a copy of any documents relevant to the determination of the contract price used to calculate the amount required to be secured by the building bond (including, if applicable, the quantity surveyor's cost report referred to in clause 50(2A)),

- (h)

  the documents set out in clause 46A(1)(b) relating to the building work.

- (i)–(r)

  (Repealed)

(2)

Without limiting subclause (1)(g) and (h), the Secretary may, by notice in writing given to the developer, require the developer to provide any additional information or documents that the Secretary considers necessary to substantiate the contract price used to calculate the amount required to be secured by the building bond.

(3)

The developer must not, without reasonable excuse, fail to comply with the notice.

Maximum penalty (subclauses (1) and (3))—200 penalty units in the case of a corporation and 100 penalty units in any other case.

cl 52: Am 2020 (323), Sch 1[7] [14]–[16].

53 Application to pay amount secured by building bond to owners corporation(1)

For the purposes of section 209(2) of the Act, an application to pay the whole or part of the amount secured by a building bond to the owners corporation must be made not later than 14 days before the last day on which the amount must be claimed or realised under that section.

(2)

The application is to be made in accordance with the procedures (if any) approved by the Secretary and published on the website of the Department that are in force.

cl 53: Subst 2020 (323), Sch 1[17].

54 Amount of building bond

For the Act, section 207(2) and (4), the prescribed percentage is as follows—

- (a)

  for a building bond given before 1 July 2025—2%,

- (b)

  for a building bond given on or after 1 July 2025—3%.

cl 54: Rep 2020 (323), Sch 1[17]. Ins 2023 No 44, Sch 3.2[1]. Am 2024 (9), Sch 1[2]; 2024 (215), Sch 2; 2024 (536), Sch 1.

54A Time within which building bond is payable

For the Act, section 209(3), an amount secured by a building bond must be claimed or realised under section 209 before the later of the following—

- (a)

  2 years after the date of completion of the building work for which the bond is given,

- (b)

  90 days after the final report on the building work is given to the Secretary by the building inspector.

cl 54A: Ins 2023 No 44, Sch 3.2[1].

55 Payment of building bond(1)

The Secretary must not pay the whole or part of an amount secured by a building bond unless the Secretary has given at least 14 days written notice to the owners corporation, the developer of the strata scheme and the builder of the proposed payment.

(2)

If an application to review a decision to pay the whole or part of an amount secured by a building bond is made in accordance with clause 56, the amount is not to be paid until the application for the review is determined or withdrawn.

(3)

The Secretary may approve procedures relating to the payment by the Secretary of amounts secured by a building bond and publish the procedures on the website of the Department.

cl 55: Am 2020 (323), Sch 1[18].

55AA Cancellation of building bond

For the Act, section 210A(c), the Secretary may provide to a developer any release necessary to enable a building bond for building work provided by the developer to be cancelled if—

- (a)

  a final report on the building work—

  - (i)

    does not identify any defective building work, or

  - (ii)

    only identifies defective building work for which a building bond cannot be claimed or realised by the Secretary for payment under the Act, section 209, and

- (b)

  the Secretary thinks it appropriate in the circumstances of the case to enable the building bond to be cancelled.

cl 55AA: Ins 2024 (9), Sch 1[3].

Division 3A Decennial insurance

pt 8, div 3A: Ins 2023 No 44, Sch 3.2[2].

55A Decennial insurance criteria(1)

For the Act, section 211AA(2)(a), decennial insurance for a building must—

- (a)

  not permit cancellation, whether by the developer or another party to the policy,

- (b)

  be issued before an application is made for an occupation certificate under the *Environmental Planning and Assessment Act 1979* for any part of the building.

(2)

To avoid doubt, insurance complies with subclause (1)(b) if the insurance is issued before the application for the occupation certificate subject to a condition that the insurance does not take effect until the occupation certificate is issued.

s 55A: Ins 2023 No 44, Sch 3.2[2].

55B Notice of intention to take out decennial insurance to be given to Secretary(1)

For the Act, section 211AI(a), the developer of a strata scheme must, before an application is made for a construction certificate under the *Environmental Planning and Assessment Act 1979* for building work to which the Act, Part 11 applies, give written notice to the Secretary, in the way specified by the Secretary, as to whether or not the developer intends to obtain decennial insurance for the building work.

(2)

If the developer intends to obtain decennial insurance for the building work, the written notice to the Secretary must include a copy of a certificate of currency for the decennial insurance showing the following—

- (a)

  the name of the issuer,

- (b)

  the name of the insured,

- (c)

  the amount covered by the policy,

- (d)

  the terms and conditions of the insurance policy, including the building work covered by the policy and the commencement date of the policy,

- (e)

  the amount of the premium deposit,

- (f)

  confirmation that the premium deposit has been paid.

(3)

A developer must not fail to comply with this clause.

Maximum penalty—

- (a)

  200 penalty units, and

- (b)

  for a continuing offence—50 penalty units for each day the offence continues.

s 55B: Ins 2023 No 44, Sch 3.2[2].

55C Certificate of currency for decennial insurance to be given to Secretary before application for occupation certificate is made(1)

For the Act, section 21IAI(b), the developer of a strata scheme must, before an application is made for an occupation certificate under the *Environmental Planning and Assessment Act 1979* for building work to which the Act, Part 11 applies, give the Secretary, in the way specified by the Secretary, a copy of a certificate of currency for the decennial insurance for the building work.

(2)

Subclause (1) does not apply if the developer has given the Secretary a building bond under the Act, section 207.

(3)

The copy of a certificate of currency for the decennial insurance must show the following—

- (a)

  the name of the issuer,

- (b)

  the name of the insured,

- (c)

  the amount covered by the policy,

- (d)

  the terms and conditions of the insurance policy, including the building work covered by the policy and the commencement date of the policy,

- (e)

  the amount of the premium deposit,

- (f)

  confirmation that the premium deposit has been paid.

(4)

A developer must not fail to comply with this clause.

Maximum penalty—

- (a)

  200 penalty units, and

- (b)

  for a continuing offence—50 penalty units for each day the offence continues.

s 55C: Ins 2023 No 44, Sch 3.2[2].

Division 4 Miscellaneous

pt 8, div 4, hdg: Ins 2020 (323), Sch 1[19].

56 Review of decisions(1)

For the purposes of section 213 of the Act, the following decisions of the Secretary are reviewable decisions—

- (a)

  a decision under section 200(2)(a) of the Act to arrange for a final inspection and report,

- (b)

  a determination under section 200(4) of the Act that a developer is not required to arrange for a final report,

- (c)

  a decision under section 212 of the Act to vary the period within which an interim report or final report is to be provided, or other action is to be done, under Part 11 of the Act,

- (d)

  a decision that the whole or part of a building bond may be claimed or realised for payment to an owners corporation, developer or other person.

(2)

Despite subclause (1), a decision by the Secretary to claim or realise a building bond for payment is not reviewable if the amount has been paid in accordance with the decision.

(3)

An application for a review of a reviewable decision must be made not later than 14 days after notice of the decision is given by the Secretary to the interested person or, if the interested person is the owner of a lot, to the owners corporation and must—

- (a)

  be in writing and signed by the applicant, and

- (b)

  specify the decision for which a review is sought and the grounds on which the review is sought, and

- (c)

  specify any additional information that is provided by the applicant for the purposes of the review and indicate why the information was not previously provided, and

- (d)

  provide an address for giving notice to the applicant of the decision by the Secretary on the review.

(4)

For the purposes of section 213(2)(d) of the Act, a builder who carried out building work to which a reviewable decision relates, or a builder who is responsible for defective building work to which a reviewable decision relates, is an interested person in relation to the reviewable decision.

cl 56: Am 2020 (323), Sch 1[20].

Following paragraph cited by:

ENS v Commissioner for Fair Trading (09 November 2022) (P French, Senior Member)

Further, an agency is exempt from compliance with s 18 if non-compliance is reasonably contemplated under an Act or any other law. Part 12, Division 2 of the *Strata Schemes Management Act 2015* and Part 9 of the *Strata Schemes Regulation 2016* provide for alternate dispute resolution.

ENS v Commissioner for Fair Trading (09 November 2022) (P French, Senior Member)

Part 9 Alternative dispute resolution57 Application of Part

This Part applies to a mediation conducted under section 218 of the Act.

Following paragraph cited by:

ENS v Commissioner for Fair Trading (09 November 2022) (P French, Senior Member)

84. I note r 58 of the SSM Regulation. If the Secretary has issued directions in accordance with that Regulation they are not in evidence, and thus do not take the matter any further.

58 Directions of Secretary

Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.

Following paragraph cited by:

ENS v Commissioner for Fair Trading (09 November 2022) (P French, Senior Member)

83. Additionally, and in any event, I am satisfied that Mr King's email to Ms N of 16 July 2020 is an exempt disclosure under s 25 of the PPIP Act. In this respect, at the material time, Mr King was carrying out under delegation the statutory functions of the Secretary under s 218 of the SSM Act. Specifically, he was arranging mediation in accordance with the SSM Regulation. In accordance with r 59 it was necessary for Mr King to determine the parties to the mediation to provide for their attendance. He was also required to determine if he would exercise the discretion conferred by r 59(2) to grant leave for non-parties to attend the mediation session. It must be accepted that this reasonably required him to consult the applicant for the mediation about a request from a non-party to the mediation application to participate in the mediation. I am satisfied that a purposive reading of s 218(2) and r 59 leads to the conclusion that Mr King was lawfully authorised by those provisions to notify Ms N of the applicant's request to participate and to ascertain her views as to whether that was appropriate: s 25(1)(a). Additionally, or alternatively, non-compliance with IPP 11 in these circumstances is necessarily implied by s 218(2) and r 59.

ENS v Commissioner for Fair Trading (09 November 2022) (P French, Senior Member)

> 83. Additionally, and in any event, I am satisfied that Mr King's email to Ms N of 16 July 2020 is an exempt disclosure under s 25 of the PPIP Act. In this respect, at the material time, Mr King was carrying out under delegation the statutory functions of the Secretary under s 218 of the SSM Act. Specifically, he was arranging mediation in accordance with the SSM Regulation. In accordance with r 59 it was necessary for Mr King to determine the parties to the mediation to provide for their attendance. He was also required to determine if he would exercise the discretion conferred by r 59(2) to grant leave for non-parties to attend the mediation session. It must be accepted that this reasonably required him to consult the applicant for the mediation about a request from a non-party to the mediation application to participate in the mediation. I am satisfied that a purposive reading of s 218(2) and r 59 leads to the conclusion that Mr King was lawfully authorised by those provisions to notify Ms N of the applicant's request to participate and to ascertain her views as to whether that was appropriate: s 25(1)(a). Additionally, or alternatively, non-compliance with IPP 11 in these circumstances is necessarily implied by s 218(2) and r 59.
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> 83. Additionally, and in any event, I am satisfied that Mr King's email to Ms N of 16 July 2020 is an exempt disclosure under s 25 of the PPIP Act. In this respect, at the material time, Mr King was carrying out under delegation the statutory functions of the Secretary under s 218 of the SSM Act. Specifically, he was arranging mediation in accordance with the SSM Regulation. In accordance with r 59 it was necessary for Mr King to determine the parties to the mediation to provide for their attendance. He was also required to determine if he would exercise the discretion conferred by r 59(2) to grant leave for non-parties to attend the mediation session. It must be accepted that this reasonably required him to consult the applicant for the mediation about a request from a non-party to the mediation application to participate in the mediation. I am satisfied that a purposive reading of s 218(2) and r 59 leads to the conclusion that Mr King was lawfully authorised by those provisions to notify Ms N of the applicant's request to participate and to ascertain her views as to whether that was appropriate: s 25(1)(a). Additionally, or alternatively, non-compliance with IPP 11 in these circumstances is necessarily implied by s 218(2) and r 59.

59 Attendance and representation(1)

A mediation session must be attended by each party or a representative of the party if all other parties consent to the representation.

(2)

Other persons may attend a mediation session with the leave of the mediator.

Following paragraph cited by:

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

42. Before we can uphold the appeal and set aside or vary the Tribunal's decision, the appellant must establish that the failure to deal with the submission was material to the outcome of the proceedings. In other words, to succeed on its appeal, the appellant must establish that its submissions concerning the operation of reg 60 were correct. Neither the failure to deal with the submission nor the provision of inadequate reasons for rejecting the submission would be sufficient reason to set aside the decision if, in fact, the submissions regarding the operation of reg 60 were without any substance and would fail in any event.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

110. Even if reg 60 should be construed as prohibiting the parties from agreeing as part of the resolution of the dispute that one party will pay the costs of the successful mediation, there is no reason why it should be limited to that purpose. In our view reg 60 clearly denies to the Tribunal and any court the power to make an order with respect to the costs of a mediation.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

49. The respondent submitted:

> "**Reasons other than those given by the Tribunal**
>
> 15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.
>
> ...
>
> 17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:
>
> > **57 Application of Part**
> >
> > This Part applies to a mediation conducted under section 218 of the Act.
> >
> > **58 Directions of Secretary**
> >
> > Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.

18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
>
> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not

purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

38. Mr Ton referred the Appeal Panel to the transcript of the hearing before the Senior Member in which, he submitted, the application of reg 60 was clearly raised. We did not understand Mr Forgacs to suggest that the application of reg 60 had not been clearly articulated before the Tribunal.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

45. The appellant submitted that only the first of the five invoices, dated 17 May 2022 in the amount of $650 plus GST, which was for drafting and issuing the letter of demand, was clearly not costs associated with the mediation. The appellant maintained that the balance of the invoices was costs associated with the mediation and, by reason of reg 60, could not be subject of an award of damages pursuant to s 106(5) and 232 of the SSMA.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

49. The respondent submitted:

"**Reasons other than those given by the Tribunal**

15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.

...

17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:

> **57 Application of Part**
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18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on

the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.

[18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

96. If the particular expenses are not "costs of, and incidental to the proceedings" then they may be recoverable as damages by reason of breach of the duty under s 106 of the SSMA, subject to the other limitations on the award of damages for breach of duty under s 106 of the SSMA, including whether the type of loss is a "reasonably foreseeable loss suffered by the owner as a result of contravention of this section by the owners corporation" (s 106(5) of the SSMA); and whether the proceedings have been brought within the limitation period in s 106(6) of the SSMA. A further limitation occurs by reason of reg 60.

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102. In relation to costs associated with a mediation under the SSMA, reg 60 is a further limitation on the Tribunal's powers. We agree with the appellant's submission that, if reg 60 is valid, it has the effect that costs associated with a

mediation under s 218 of the SSMA cannot be the subject of an award of damages under s 106(5); nor are such costs recoverable as costs of, or incidental to, the proceedings. That is the effect of the High Court decision in *Anderson v Bowles*.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

115. The costs associated with the mediation were properly characterised as costs of the proceedings. As such s 106(5) is not applicable and reg 60 cannot be said to be inconsistent with section 106(5). It is not necessary to determine whether, in a case where the costs of mediation would not form part of the costs of the proceedings, reg 60 would be inconsistent with section 106(5) to the extent that it prevented the recovery of those costs as compensation for reasonably foreseeable loss arising from a failure to comply with s 106. Even if that were the case, reg 60 could be read down to exclude such cases pursuant to s 32 of the *Interpretation Act 1987* (NSW).

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

112. Section 271 of the SSMA empowers the making of regulations "not inconsistent with this Act". If reg 60 were inconsistent with s 106 of the SSMA, it would be invalid to the extent of the inconsistency. However, we do not consider that those provisions are inconsistent. Mr Forgacs' submission was that, because the costs associated with the mediation were a foreseeable loss suffered as a result of a contravention of s 106, a regulation which had the effect of denying the respondent the capacity to recover that loss must be inconsistent with s 106(5) which provides that a lot owner may recover "any reasonably foreseeable loss" suffered by the owner as a result of a breach of the obligations in s 106(1) and (2).

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

123. The parties' representatives agreed in the course of the hearing that, if we accepted the appellant's submissions concerning the effect of reg 60 and the characterisation of the legal fees included in the judgment sum, the correct amount of the judgment in favour of the respondent would be $7,019.64. Accordingly, the outcome of the appeal should be that the amount of the judgment in favour of the respondent is reduced to $7,019.64.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

49. The respondent submitted:

> "**Reasons other than those given by the Tribunal**
>
> 15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016* (NSW) does not preclude the recovery of pre-litigation legal costs,

including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.

...

17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:

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18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
>
> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

> 38. Mr Ton referred the Appeal Panel to the transcript of the hearing before the Senior Member in which, he submitted, the application of reg 60 was clearly raised. We did not understand Mr Forgacs to suggest that the application of reg 60 had not been clearly articulated before the Tribunal.

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> 49. The respondent submitted:
>
> "**Reasons other than those given by the Tribunal**

15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.

...

17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:

> **57 Application of Part**
>
> This Part applies to a mediation conducted under section 218 of the Act.
>
> **58 Directions of Secretary**
>
> Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.

18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of

contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
>
> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

> 102. In relation to costs associated with a mediation under the SSMA, reg 60 is a further limitation on the Tribunal's powers. We agree with the appellant's submission that, if reg 60 is valid, it has the effect that costs associated with a mediation under s 218 of the SSMA cannot be the subject of an award of damages under s 106(5); nor are such costs recoverable as costs of, or incidental to, the proceedings. That is the effect of the High Court decision in *Anderson v Bowles*.

The Owners Strata Plan No 21563 v Rutherford (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

115. The costs associated with the mediation were properly characterised as costs of the proceedings. As such s 106(5) is not applicable and reg 60 cannot be said to be inconsistent with section 106(5). It is not necessary to determine whether, in a case where the costs of mediation would not form part of the costs of the proceedings, reg 60 would be inconsistent with section 106(5) to the extent that it prevented the recovery of those costs as compensation for reasonably foreseeable loss arising from a failure to comply with s 106. Even if that were the case, reg 60 could be read down to exclude such cases pursuant to s 32 of the *Interpretation Act 1987* (NSW).

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36. As clarified at the hearing by Mr Ton, we understand the appellant's grounds of appeal to be:

    1. The Tribunal erred with respect to a question of law by failing to engage with and determine a clearly articulated argument, that is, that the effect of reg 60 was that legal costs associated with the mediation could not be the subject of compensation pursuant to s 106(5).

    2. That to the extent that the Tribunal did deal with that submission, it made an error with respect to a question of law by failing to provide adequate reasons for not accepting the submission.

    3. That the award of damages pursuant to s 106(5) in respect of the legal costs associated with the mediation involved an error with respect to a question of law because reg 60 precluded the award of damages in respect of costs associated with the mediation.

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60 Costs

The parties to a mediation are to pay their own costs associated with the mediation.

61 Termination(1)

A mediator may terminate a mediation at any time.

(2)

A party may terminate a mediation at any time by giving notice of the termination to the mediator and each other party.

Part 10 Miscellaneous62 Connected persons(1)

For the purposes of section 7(1)(f) of the Act, a person that is a corporation (the principal person) is connected with another person if the other person—

- (a)

  is a related body corporate or an associated entity (within the meaning of the *Corporations Act 2001* of the Commonwealth) of the principal person, or

- (b)

  holds an executive position (within the meaning of section 7 of the Act) in a related body corporate or an associated entity of the principal person, or

- (c)

  holds or will hold any relevant financial interest in the principal person, or is or will be entitled to exercise any relevant power (whether in the person's own right or on behalf of any other person) in the business of the principal person, and by virtue of that interest or power is or will be able to exercise a significant influence over or with respect to the management or operation of the principal person.

(2)

In this clause—

relevant financial interest, in relation to a principal person, means—

- (a)

any shares in the capital of the principal person, or

- (b)

any entitlement to receive any income derived from a business carried on by the principal person, or to receive any other financial benefit or financial advantage from the carrying on of the business, whether the entitlement arises at law or in equity or otherwise.

relevant power means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others—

- (a)

to participate in any directorial, managerial or executive position in the principal person, or

- (b)

to elect or appoint any person to any such position.

63 Limit for gifts to strata managing agents

For the purposes of section 57(3)(d) of the Act, the amount prescribed is $60.

64 Fees

The fees payable under the Act and this Regulation are set out in Schedule 4.

cl 64: Am 2021 (773), Sch 1[3].

65 Penalty notice offences and penalties(1)

For the purposes of section 250 of the Act—

- (a)

each offence created by a provision specified in Column 1 of Schedule 5 is an offence for which a penalty notice may be served, and

- (b)

the penalty prescribed for each such offence is the amount specified opposite the provision in Column 2 of the Schedule.

(2)

If the reference to a provision in Column 1 of Schedule 5 is qualified by words that restrict its operation to specified kinds of offences, an offence created by the provision is a prescribed offence only if it is an offence of a kind so specified or committed in the circumstances so specified.

66 Seals of owners corporations—savings provision

The seal of an owners corporation in existence before the commencement of this clause may continue to be used as its seal for the purposes of the Act or for any other purpose, unless replaced by the owners corporation.

67 Amendment of Act: clause 1(5) of Schedule 3 to Act

Omit clause 8(1) and (2). Insert instead—

(1)

A person who held office as an Adjudicator under the former Act immediately before the commencement of this clause ceases to hold the office on a day appointed by the Secretary, being a day not earlier than the determination or finalisation of all proceedings referred to in clause 7.

68 Amendment of Act: clause 1(5) of Schedule 3 to Act

Omit clause 14(1). Insert instead—

(1)

The term of appointment of a strata managing agent appointed or reappointed before the commencement of section 50(1) of this Act, that is in force on that commencement, ends on the following day—

- (a)

  if the agent was appointed or reappointed for a term (including any roll over or extension period) of 3 years or more, on the day that is 3 years after the term commenced or that is 6 months after the commencement of section 50(1) of this Act, whichever is the later,

- (b)

  if the agent was appointed or reappointed for a term (including any roll over or extension period) of less than 3 years, on the day that the term ends or that is 6 months after the commencement of section 50(1) of this Act, whichever is the later.

68A

(Repealed)

cl 68A: Ins 2021 (346), Sch 1[3]. Rep 2023 No 45, Sch 5.1[2].

68B Pre-meeting electronic voting—transitional arrangement(1)

This clause applies if—

- (a)

  before 30 September 2022, the secretary of an owners corporation complied with the requirements under clause 15(3) in relation to a ballot for the determination of a matter by the owners corporation or strata committee that will be conducted by pre-meeting electronic voting, and

- (b)

  the meeting at which the matter is to be determined has not been held before that date.

(2)

Despite clause 14(b) and (c), the requirement that the owners corporation or strata committee must adopt, by resolution, pre-meeting electronic voting as a way of voting does not apply to the meeting at which the matter is to be determined.

cl 68B: Ins 2022 (564), Sch 1[16].

Following paragraph cited by:

Linney v The Owners - Strata Plan No. 11669 (08 December 2021) (G Sarginson, Senior Member)

36. Sections 24 and 25 of the SSMA state:

24 Order invalidating resolution of owners corporation

(1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.

(2) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of Part 10 (other than Division 6 or 7) of the *Strata Schemes Development Act 2015* have not been complied with in relation to the meeting.

(3) The Tribunal may refuse to make an order under this section only if it considers—

(a) that the failure to comply with the provisions of this Act or the regulations, or of the *Strata Schemes Development Act 2015*, did not adversely affect any person, and

(b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

(4) The Tribunal may not make an order invalidating a resolution under subsection (2) if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.

(5) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

25 Order where voting rights denied or due notice of item of business not given

(1) The Tribunal may, on application by a person entitled to vote on a motion for a resolution of an owners corporation at a general meeting, order that a resolution passed at the general meeting be treated as a nullity on and from the date of the order.

(2) The Tribunal must not make the order unless the Tribunal is satisfied that the resolution would not have been passed but for the fact that the applicant for the order—

(a) was improperly denied a vote on the motion for the resolution, or

(b) was not given due notice of the item of business in relation to which the resolution was passed.

(3) An application for an order may not be made unless—

(a) an application for mediation of the dispute was made not later than 28 days after the date of the meeting at which the resolution was passed, or

(b) if an application for mediation was not made, the application for the order was made not later than 28 days after the date of the meeting at which the resolution was passed.

(4) If a resolution that is to be treated as a nullity by an order changes the by-laws and the order has been recorded in the Register under this Act, the by-laws have force and effect on and from the date the order is so recorded to the same extent as they would have had if the change had not been made.

(5) Subsection (4) is subject to the by-laws having been or being changed in accordance with this Act and to any relevant order made by a superior court.

(6) The Tribunal may not make an order under this section if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.

(7) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

Linney v The Owners - Strata Plan No. 11669 (08 December 2021) (G Sarginson, Senior Member)

44. The 2020 AGM on 24 August 2020 was conducted by way of videoconference. Although the submissions of the applicant are critical of the manner in which the meeting was conducted, there is nothing in the evidence or submissions of the applicant to satisfy the Tribunal that the decision to hold the meeting electronically contravenes Clause 10 of Schedule 2 of the SSMA; Reg. 14 of the SSM Regulations; or Part 11 of the SSM Regulations.

Linney v The Owners - Strata Plan No. 11669 (08 December 2021) (G Sarginson, Senior Member)

36. Sections 24 and 25 of the SSMA state:

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(1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.

(2) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of Part 10 (other than Division 6 or 7) of the *Strata Schemes Development Act 2015* have not been complied with in relation to the meeting.

(3) The Tribunal may refuse to make an order under this section only if it considers—

(a) that the failure to comply with the provisions of this Act or the regulations, or of the *Strata Schemes Development Act 2015*, did not adversely affect any person, and

(b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

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(2) The Tribunal must not make the order unless the Tribunal is satisfied that the resolution would not have been passed but for the fact that the applicant for the order—

(a) was improperly denied a vote on the motion for the resolution, or

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(4) If a resolution that is to be treated as a nullity by an order changes the by-laws and the order has been recorded in the Register under this Act, the by-laws have force and effect on and from the date the order is so recorded to the same extent as they would have had if the change had not been made.

(5) Subsection (4) is subject to the by-laws having been or being changed in accordance with this Act and to any relevant order made by a superior court.

(6) The Tribunal may not make an order under this section if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.

(7) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

Part 11 69–72

(Repealed)

pt 11: Ins 2020 (243), Sch 1. Subst 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.

cl 69: Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]; 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.

cl 70: Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]; 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.

cl 71: Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]; 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.

cl 72: Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]. Rep 2021 (218), Sch 1. Ins 2021 (402), Sch 1. Subst 2021 (721), Sch 1. Rep 2016 (501), cl 72.

cl 73: Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]. Rep 2021 (218), Sch 1.

cl 74: Ins 2020 (660), Sch 1[2]. Rep 2021 No 5, Sch 1.29.

Schedule 1

(Repealed)

sch 1: Am 2017 No 69, Sch 2.9. Rep 2018 No 65, Sch 8.11[2].

Following paragraph cited by:

Pollack v The Owners - Strata Plan No. 2834; The Owners - Strata Plan No. 2834 v Pollack (16 September 2019) (S Westgarth, Deputy President, M Anderson, Senior Member)

60. The submissions in support of the above Grounds of Appeal put forward by the Owners Corporation may be summarised as follows:

    1. The Tribunal erred in not deciding that the lot 44 owners continued occupation of the roof area to the exclusion to the Owners Corporation and other owners and occupiers after 30 June 2018 did not infringe the proprietary rights of the Owners Corporation in connection with that area, or result in a breach of their statutory duty under s 153 of the SSM Act or a contravention of their covenants in by-laws 3 and 28. The only reason given by the Tribunal on this issue was that the lot 44 owners had continued to have exclusive use of the roof area since 30 June 2018 arising from the interim orders;

    2. The Tribunal proceeded on the basis that the lot 44 owners continued occupation of the roof area "arising from" the interim orders was something that was mutually exclusive to, and could not overlap with, any infringement of the proprietary rights of the Owners Corporation or any breach of the statutory duty of the lot 44 owners in s 153 of the SSM Act or their covenants in by-laws 3 and 28. There was no cogent reason for the Tribunal to adopt that approach. Once the Tribunal rejected the Owners Corporation's contention that an infringement of its proprietary rights and breach of the legislation and by-laws, the Tribunal concluded that considerations as to compensation payable by the lot 44 owners for breach of duty or mesne profits did not arise. The Tribunal should not have rejected that contention and neither should the Tribunal have dismissed the claim for payment of an occupation fee;

    3. Section 153 of the SSM Act imposes a statutory duty on an owner not to use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the owner or occupier of any lot. By-law 3 in Sch 2 to the 2016 Regulation contains terms which have the effect that an owner or occupier must not obstruct lawful use of common property by any person. It follows that by continuing to use the rooftop to the exclusion of the Owners Corporation and the owners and occupiers of other lots, the lot 44

owners infringed the rights of the other parties under the general law, contravened s 153 and breached by-laws 3 and 28;

4. The Tribunal has a broad power to make orders to resolve disputes – see ss 232, 241 and 249 of the SSM Act. In *Crawley v Cochrane* the Court, dealing with the 1996 Act and considering the sections which were the predecessor to s 232, stated that wide powers were given to the Adjudicator (in that context the decision maker) so as to permit a resolution of disputes without the need to apply to a Court;

5. In the circumstances, the entitlement of the Owners Corporation was to an occupation fee in the form of mesne profits. They are calculated on the open market value of the premise and the measure of mesne profits is a reasonable sum in the nature of rent (see *Biviano v Natoli* (1998) 43 NSWLR 695). The Owners Corporation was entitled to an occupation fee in the form of mesne profits payable by the penthouse owners at the rate of $3,970.00 per month having regard to the evidence of Mr Keen; and

6. The Owners Corporation submits that there was no reason why the Tribunal could not make an order requiring the lot 44 owners to pay the Owners Corporation an amount of money. In *The Owners Strata Plan No 30621 v Shum* the Appeal Panel held that the Tribunal has jurisdiction under s 232 of the SSM Act to make an order for payment of compensation and that there is no monetary limit to the jurisdiction of the Tribunal in that respect. *Shum* involved a claim by a lot owner against an Owners Corporation for payment of compensation for breach of the statutory duty to repair common property. However, the key finding in *Shum* is that the power given to the Tribunal in s 232(1) to "settle a dispute or complaint" should be construed in a way that enables the determination of a claim for damages by the Tribunal, particularly because s 3(b) indicates that the object of the SSM Act is to "provide for resolution of disputes arising from strata schemes": see *The Owners Strata Plan No 30621 v Shum* at [64]. The Appeal Panel's conclusion in that case makes it clear that the Tribunal has power to make a money order for the award of damages not confined to only a claim for damages made by a lot owner against an Owners Corporation for breach of statutory duty.

Pollack v The Owners - Strata Plan No. 2834; The Owners - Strata Plan No. 2834 v Pollack (16 September 2019) (S Westgarth, Deputy President, M Anderson, Senior Member)

Schedule 2 By-laws for pre-1996 strata schemes

(Clause 35)

1 Noise

An owner or occupier of a lot must not create any noise on the parcel likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or of any person lawfully using common property.

Note—

This by-law was previously by-law 12 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 13 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

2 Vehicles

An owner or occupier of a lot must not park or stand any motor or other vehicle on common property except with the written approval of the owners corporation.

Note—

This by-law was previously by-law 13 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 14 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

3 Obstruction of common property

An owner or occupier of a lot must not obstruct lawful use of common property by any person.

Note—

This by-law was previously by-law 14 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 15 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

4 Damage to lawns and plants on common property

An owner or occupier of a lot must not—

- (a)

  damage any lawn, garden, tree, shrub, plant or flower being part of or situated on common property, or

- (b)

  use for his or her own purposes as a garden any portion of the common property.

Note—

This by-law was previously by-law 15 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 16 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

5 Damage to common property(1)

An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property without the approval in writing of the owners corporation.

Note—

This by-law is subject to sections 109 and 110 of the *Strata Schemes Management Act 2015*.

(2)

An approval given by the owners corporation under clause (1) cannot authorise any additions to the common property.

(3)

This by-law does not prevent an owner or person authorised by an owner from installing—

- (a)

  any locking or other safety device for protection of the owner's lot against intruders, or

- (b)

  any screen or other device to prevent entry of animals or insects on the lot, or

- (c)

  any structure or device to prevent harm to children.

(4)

Any such locking or safety device, screen, other device or structure must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with the appearance of the rest of the building.

(5)

Despite section 106 of the *Strata Schemes Management Act 2015*, the owner of a lot must maintain and keep in a state of good and serviceable repair any installation or structure referred to in clause (3) that forms part of the common property and that services the lot.

Note—

This by-law was previously by-law 16 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 17 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

6 Behaviour of owners and occupiers

An owner or occupier of a lot when on common property must be adequately clothed and must not use language or behave in a manner likely to cause offence or embarrassment to the owner or occupier of another lot or to any person lawfully using common property.

Note—

This by-law was previously by-law 17 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 18 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

7 Children playing on common property in building

An owner or occupier of a lot must not permit any child of whom the owner or occupier has control to play on common property within the building or, unless accompanied by an adult exercising

effective control, to be or to remain on common property comprising a laundry, car parking area or other area of possible danger or hazard to children.

Note—

This by-law was previously by-law 18 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 19 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

8 Behaviour of invitees

An owner or occupier of a lot must take all reasonable steps to ensure that invitees of the owner or occupier do not behave in a manner likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or any person lawfully using common property.

Note—

This by-law was previously by-law 19 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 20 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

9 Depositing rubbish and other material on common property

An owner or occupier of a lot must not deposit or throw on the common property any rubbish, dirt, dust or other material likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or of any person lawfully using the common property.

Note—

This by-law was previously by-law 20 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 21 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

10 Drying of laundry items

An owner or occupier of a lot must not, except with the consent in writing of the owners corporation, hang any washing, towel, bedding, clothing or other article on any part of the parcel in such a way as to be visible from outside the building other than on any lines provided by the owners corporation for the purpose and there only for a reasonable period.

Note—

This by-law was previously by-law 21 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 22 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

11 Cleaning windows and doors

An owner or occupier of a lot must keep clean all glass in windows and all doors on the boundary of the lot, including so much as is common property.

Note—

This by-law was previously by-law 22 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 23 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

12 Storage of inflammable liquids and other substances and materials(1)

An owner or occupier of a lot must not, except with the approval in writing of the owners corporation, use or store on the lot or on the common property any inflammable chemical, liquid or gas or other inflammable material.

(2)

This by-law does not apply to chemicals, liquids, gases or other material used or intended to be used for domestic purposes, or any chemical, liquid, gas or other material in a fuel tank of a motor vehicle or internal combustion engine.

Note—

This by-law was previously by-law 23 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 24 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

13 Moving furniture and other objects on or through common property

An owner or occupier of a lot must not transport any furniture or large object through or on common property within the building unless sufficient notice has first been given to the strata committee so as to enable the strata committee to arrange for its nominee to be present at the time when the owner or occupier does so.

Note—

This by-law was previously by-law 24 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 25 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

14 Floor coverings(1)

An owner of a lot must ensure that all floor space within the lot is covered or otherwise treated to an extent sufficient to prevent the transmission from the floor space of noise likely to disturb the peaceful enjoyment of the owner or occupier of another lot.

(2)

This by-law does not apply to floor space comprising a kitchen, laundry, lavatory or bathroom.

Note—

This by-law was previously by-law 25 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 26 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

15 Garbage disposal

An owner or occupier of a lot—

- (a)

  must maintain within the lot, or on such part of the common property as may be authorised by the owners corporation, in clean and dry condition and adequately covered a receptacle for

garbage, and

- (b)

  must ensure that before refuse is placed in the receptacle it is securely wrapped or, in the case of tins or other containers, completely drained, and

- (c)

  for the purpose of having the garbage collected, must place the receptacle within an area designated for that purpose by the owners corporation and at a time not more than 12 hours before the time at which garbage is normally collected, and

- (d)

  when the garbage has been collected, must promptly return the receptacle to the lot or other area referred to in paragraph (a), and

- (e)

  must not place any thing in the receptacle of the owner or occupier of any other lot except with the permission of that owner or occupier, and

- (f)

  must promptly remove any thing which the owner, occupier or garbage collector may have spilled from the receptacle and must take such action as may be necessary to clean the area within which that thing was spilled.

Note—

This by-law was previously by-law 26 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 27 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

16 Keeping of animals(1)

Subject to section 157 of the *Strata Schemes Management Act 2015*, an owner or occupier of a lot must not, without the approval in writing of the owners corporation, keep any animal on the lot or the common property.

(2)

The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property.

Note—

This by-law was previously by-law 27 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 28 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

17 Appearance of lot(1)

The owner or occupier of a lot must not, without the written consent of the owners corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building.

(2)

This by-law does not apply to the hanging of any washing, towel, bedding, clothing or other article as referred to in by-law 10.

Note—

This by-law was previously by-law 29 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 30 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

18 Notice board

An owners corporation must cause a notice board to be affixed to some part of the common property.

Note—

This by-law was previously by-law 3 in Schedule 1 to the *Strata Schemes (Freehold Development) Act 1973* and by-law 3 in Schedule 3 to the *Strata Schemes (Leasehold Development) Act 1986*.

19 Change in use of lot to be notified

An occupier of a lot must notify the owners corporation if the occupier changes the existing use of the lot in a way that may affect the insurance premiums for the strata scheme (for example, if the change of use results in a hazardous activity being carried out on the lot, or results in the lot being used for commercial or industrial purposes rather than residential purposes).

Following paragraph cited by:

Sorrenson v Versluis (12 September 2023) (D Robertson, Senior Member)

60. I note that, in *Cooper*, at [37], Basten JA referred to the provisions of the Model By-Laws contained in Schedule 3 to the *Strata Schemes Management Regulation 2016* (NSW), including clause 12, which provides:

(1) The owner or occupier of a lot must not, without the prior written approval of the owners corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building.

(2) This by-law does not apply to the hanging of any clothing, towel, bedding or other article of a similar type in accordance with by-law 14.

Sorrenson v Versluis (12 September 2023) (D Robertson, Senior Member)
The Owners - SP No 91684 v Liu; The Owners - SP No 90189 v Liu (05 January 2022) (R C Titterton Oam, Senior Member, J Kearney, Senior Member)

46. In *Cooper,* Basten JA said at [12]

> It follows that by-laws may (i) confer specific functions on the owners corporation with respect to the use and enjoyment of the lots and the common property, (ii) make provision directly in relation to the use and enjoyment of the lots and the common property, but for the purpose of managing, administering or controlling the strata scheme. That reading is consistent with the terms of the model by-laws, which may be found in Sch 3 to the Strata Schemes Management Regulation 2016 (NSW).

McGregor v The Owners - Strata Plan No 74896 (01 March 2021) (R C Titterton Oam, Senior Member)

8. On 3 February 2020, Mr McGregor gave the Owners (through the Strata Manager) a letter stating:

> My partner and I have recently purchased Apartment 710 at [address omitted] Camperdown.
>
> In accordance with Schedule 3, Item 5 of the Strata Schemes Management Regulation 2016, we are bringing our little dog with us.
>
> Jimmy is an 11 year-old miniature Fox Terrier who is very quiet, well-trained and experienced at apartment living. He is fully vaccinated, very social, non-aggressive and charms everyone he meets. Please see attached a reference for Jimmy from John Miller, Secretary of the Carnegie strata committee in Alexandria, where Jimmy has been residing on and off for the last 8 years.
>
> We are responsible owners and will most certainly ensure that he doesn't cause anyone any convenience.
>
> We're very much looking forward to being part of the Altro and wider City Quarter community.

McGregor v The Owners - Strata Plan No 74896 (01 March 2021) (R C Titterton Oam, Senior Member)

45. In that document, the Applicants also state that prior to purchasing their apartment:

> We were aware of the By-Law 22, which allows for cats, birds and fish to be kept as pets, and while it does not include dogs, it not does not expressly exclude them. However, we had noticed numerous 'No Dogs' signs around the complex. Our enquiries of real estate agents and dog owners alike (including some who sit on their own building strata committees) met with the same response "Well, the By Law doesn't expressly exclude dogs but it doesn't include them. Its just that they need something to fall back on if a dog becomes a problem. Just bring your dog and as long as he doesn't cause any problems you'll be fine".

We noted the By-Law was inconsistent with the model By-Laws set out in Schedule 3 of the Strata Schemes Management Regulation 2016 and sought legal advice on this. We were advised that essentially a Strata Committee could make any By-Laws it wanted and enforce them. However, it was noted that a By-Law that allows the keeping of some pets but excluding a small dog was perplexing, as it was both inconsistent with the usual By-Law model that either includes a small dog or rules out pets altogether and was inconsistent with community standard. To be honest, we have found the whole thing rather confusing! What we have come to understand though, is that Altro seems to be the only building in the City Quarter complex that takes an inflexible approach to dogs.

We are asking that they make exceptions where it is reasonable to do so and come into line with how the other buildings in the City Quarter are approaching the dog issue.

In our conversations with past and present owners at Altro, it has become apparent that until 2010, dogs were present at Altro. We understand that at that time, a new owner aggressively and vigorously sought to have them all removed.

We're seeking a ruling on this matter because we believe

- the By-Law is out of step with community standards
- it is harsh and unreasonable that we be forced to either rehome or euthanise Jimmy at this stage of his life
- it is harsh and unreasonable that we be forced to be separated from a treasured pet who brings us so much joy and good mental health
- the 'no dogs' ruling at Altro is being aggressively driven by a single person

Cooper v Owners - Strata Plan No 58068 (12 October 2020) (Basten and Macfarlan JJA, Fagan J)

12. It follows that by-laws may (i) confer specific functions on the owners corporation with respect to the use and enjoyment of the lots and the common property, (ii) make provision directly in relation to the use and enjoyment of the lots and the common property, but for the purpose of managing, administering or controlling the strata scheme. That reading is consistent with the terms of the model by-laws, which may be found in Sch 3 to the Strata Schemes Management Regulation 2016 (NSW). These are in a common form, of which by-law 9, “Smoke penetration”, is an example:

(1) An owner or occupier, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property.

(2) An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or

any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.

...

Cooper v Owners - Strata Plan No 58068 (12 October 2020) (Basten and Macfarlan JJA, Fagan J)
Ho v Lau (27 November 2019) (Lindsay J)
Owners – Strata Plan No 58068 v/ats Cooper (21 November 2019) (G K Burton SC, Senior Member)

45. The model by-laws in Sch 3 to the *Strata Schemes Management Regulation 2016 (NSW)* (the 2016 Regulation) were empowered to be adopted as by-laws for a strata scheme under cl 37 of the 2016 Regulation and SSMA s 138.

Owners – Strata Plan No 58068 v/ats Cooper (21 November 2019) (G K Burton SC, Senior Member)

Strata management – by-law excluding pets - refusal to amend or replace with new by-law - SSMA ss 134, 135, 136, 138, 139, 146, 147, 148, 149, 150, 153, 156, 157, 158, 159, 232; 1996 Regulation cll 35, 37, Sch 2, Sch 3.

Roden v The Owners-Strata Plan No 55773 (18 September 2019) (N Vrabac, Senior Member)

37. Option C, in Schedule 2 of the former SSM Regulation, which permitted a blanket prohibition of animals as pets, was removed in Schedule 3 of the 2016 SSM Regulation.

Roden v The Owners-Strata Plan No 55773 (18 September 2019) (N Vrabac, Senior Member)

45. The respondent stated that the strata scheme was registered prior to 30 November 2016 and it was therefore not compelled to adopt either Option A or Option B in Schedule 3 of the SSM Regulation (the model by-laws), having undertaken the mandatory review of by-laws for strata schemes registered before 30 November 2016.

Longhurst v Randwick City Council (18 January 2019) (Bish C)
Longhurst v Randwick City Council (18 January 2019) (Bish C)

Schedule 3 Model by-laws for residential strata schemes

(Clause 37)

Note—

These by-laws do not apply to a strata scheme unless they are adopted by the owners corporation for the strata scheme or lodged with the strata plan.

1 Vehicles

An owner or occupier of a lot must not park or stand any motor or other vehicle on common property, or permit a motor vehicle to be parked or stood on common property, except with the prior written approval of the owners corporation or as permitted by a sign authorised by the owners corporation.

2 Changes to common property(1)

An owner or person authorised by an owner may install, without the consent of the owners corporation—

- (a)

  any locking or other safety device for protection of the owner's lot against intruders or to improve safety within the owner's lot, or

- (b)

  any screen or other device to prevent entry of animals or insects on the lot, or

- (c)

  any structure or device to prevent harm to children.

(2)

Any such locking or safety device, screen, other device or structure must be installed in a competent and proper manner and must have an appearance, after it has been installed, in keeping with the appearance of the rest of the building.

(3)

Clause (1) does not apply to the installation of any thing that is likely to affect the operation of fire safety devices in the lot or to reduce the level of safety in the lots or common property.

(4)

The owner of a lot must—

- (a)

  maintain and keep in a state of good and serviceable repair any installation or structure referred to in clause (1) that forms part of the common property and that services the lot, and

- (b)

  repair any damage caused to any part of the common property by the installation or removal of any locking or safety device, screen, other device or structure referred to in clause (1) that forms part of the common property and that services the lot.

3 Damage to lawns and plants on common property

An owner or occupier of a lot must not, except with the prior written approval of the owners corporation—

- (a)

  damage any lawn, garden, tree, shrub, plant or flower being part of or situated on common property, or

- (b)

  use for his or her own purposes as a garden any portion of the common property.

4 Obstruction of common property

An owner or occupier of a lot must not obstruct lawful use of common property by any person except on a temporary and non-recurring basis.

5 Keeping of animalsNote—

Select option A or B. If no option is selected, option A will apply.

(1)

An owner or occupier of a lot may keep an animal on the lot, if the owner or occupier gives the owners corporation written notice that it is being kept on the lot.

(2)

The notice must be given not later than 14 days after the animal commences to be kept on the lot.

(3)

If an owner or occupier of a lot keeps an animal on the lot, the owner or occupier must—

- (a)

  keep the animal within the lot, and

- (b)

  supervise the animal when it is on the common property, and

- (c)

  take any action that is necessary to clean all areas of the lot or the common property that are soiled by the animal.

(1)

An owner or occupier of a lot may keep an animal on the lot or the common property with the written approval of the owners corporation.

(2)

The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property and must give an owner or occupier written reasons for any refusal to

grant approval.

(3)

If an owner or occupier of a lot keeps an animal on the lot, the owner or occupier must—

- (a)

  keep the animal within the lot, and

- (b)

  supervise the animal when it is on the common property, and

- (c)

  take any action that is necessary to clean all areas of the lot or the common property that are soiled by the animal.

(4)

An owner or occupier of a lot who keeps an assistance animal on the lot must, if required to do so by the owners corporation, provide evidence to the owners corporation demonstrating that the animal is an assistance animal as referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth.

6 Noise

An owner or occupier of a lot, or any invitee of an owner or occupier of a lot, must not create any noise on a lot or the common property likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or of any person lawfully using common property.

7 Behaviour of owners, occupiers and invitees(1)

An owner or occupier of a lot, or any invitee of an owner or occupier of a lot, when on common property must be adequately clothed and must not use language or behave in a manner likely to cause offence or embarrassment to the owner or occupier of another lot or to any person lawfully using common property.

(2)

An owner or occupier of a lot must take all reasonable steps to ensure that invitees of the owner or occupier—

- (a)

  do not behave in a manner likely to interfere with the peaceful enjoyment of the owner or occupier of another lot or any person lawfully using common property, and

- (b)

  without limiting paragraph (a), that invitees comply with clause (1).

8 Children playing on common property(1)

Any child for whom an owner or occupier of a lot is responsible may play on any area of the common property that is designated by the owners corporation for that purpose but may only use an area designated for swimming while under adult supervision.

(2)

An owner or occupier of a lot must not permit any child for whom the owner or occupier is responsible, unless accompanied by an adult exercising effective control, to be or remain on common property that is a laundry, car parking area or other area of possible danger or hazard to children.

9 Smoke penetrationNote—

Select option A or B. If no option is selected, option A will apply.

(1)

An owner or occupier, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property.

(2)

An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.

(1)

An owner or occupier of a lot, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property, except—

- (a)

  in an area designated as a smoking area by the owners corporation, or

- (b)

  with the written approval of the owners corporation.

(2)

A person who is permitted under this by-law to smoke tobacco or any other substance on common property must ensure that the smoke does not penetrate to any other lot.

(3)

An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.

10 Preservation of fire safety

The owner or occupier of a lot must not do any thing or permit any invitees of the owner or occupier to do any thing on the lot or common property that is likely to affect the operation of fire safety devices in the parcel or to reduce the level of fire safety in the lots or common property.

11 Storage of inflammable liquids and other substances and materials(1)

An owner or occupier of a lot must not, except with the prior written approval of the owners corporation, use or store on the lot or on the common property any inflammable chemical, liquid or gas or other inflammable material.

(2)

This by-law does not apply to chemicals, liquids, gases or other material used or intended to be used for domestic purposes, or any chemical, liquid, gas or other material in a fuel tank of a motor vehicle or internal combustion engine.

12 Appearance of lot(1)

The owner or occupier of a lot must not, without the prior written approval of the owners corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building.

(2)

This by-law does not apply to the hanging of any clothing, towel, bedding or other article of a similar type in accordance with by-law 14.

13 Cleaning windows and doors(1)

Except in the circumstances referred to in clause (2), an owner or occupier of a lot is responsible for cleaning all interior and exterior surfaces of glass in windows and doors on the boundary of the lot, including so much as is common property.

(2)

The owners corporation is responsible for cleaning regularly all exterior surfaces of glass in windows and doors that cannot be accessed by the owner or occupier of the lot safely or at all.

14 Hanging out of washing(1)

An owner or occupier of a lot may hang any washing on any lines provided by the owners corporation for that purpose. The washing may only be hung for a reasonable period.

(2)

An owner or occupier of a lot may hang washing on any part of the lot other than over the balcony railings. The washing may only be hung for a reasonable period.

(3)

In this by-law—

washing includes any clothing, towel, bedding or other article of a similar type.

15 Disposal of waste—bins for individual lots [applicable where individual lots have bins](1)

An owner or occupier of a lot must not deposit or throw on the common property any rubbish, dirt, dust or other material or discarded item except with the prior written approval of the owners corporation.

(2)

An owner or occupier of a lot must not deposit in a toilet, or otherwise introduce or attempt to introduce into the plumbing system, any item that is not appropriate for any such disposal (for example, a disposable nappy).

(3)

An owner or occupier must—

- (a)

  comply with all reasonable directions given by the owners corporation as to the disposal and storage of waste (including the cleaning up of spilled waste) on common property, and

- (b)

  comply with the local council's guidelines for the storage, handling, collection and disposal of waste.

(4)

An owner or occupier of a lot must maintain bins for waste within the lot, or on any part of the common property that is authorised by the owners corporation, in clean and dry condition and appropriately covered.

(5)

An owner or occupier of a lot must not place any thing in the bins of the owner or occupier of any other lot except with the permission of that owner or occupier.

(6)

An owner or occupier of a lot must place the bins within an area designated for collection by the owners corporation not more than 12 hours before the time at which waste is normally collected and, when the waste has been collected, must promptly return the bins to the lot or other area authorised for the bins.

(7)

An owner or occupier of a lot must notify the local council of any loss of, or damage to, bins provided by the local council for waste.

(8)

The owners corporation may give directions for the purposes of this by-law by posting signs on the common property with instructions on the handling of waste that are consistent with the local council's requirements or giving notices in writing to owners or occupiers of lots.

(9)

In this by-law—

bin includes any receptacle for waste.

waste includes garbage and recyclable material.

16 Disposal of waste—shared bins [applicable where bins are shared by lots](1)

An owner or occupier of a lot must not deposit or throw on the common property any rubbish, dirt, dust or other material or discarded item except with the prior written approval of the owners corporation.

(2)

An owner or occupier of a lot must not deposit in a toilet, or otherwise introduce or attempt to introduce into the plumbing system, any item that is not appropriate for any such disposal (for example, a disposable nappy).

(3)

An owner or occupier must—

- (a)

  comply with all reasonable directions given by the owners corporation as to the disposal and storage of waste (including the cleaning up of spilled waste) on common property, and

- (b)

  comply with the local council's guidelines for the storage, handling, collection and disposal of waste.

(4)

The owners corporation may give directions for the purposes of this by-law by posting signs on the common property with instructions on the handling of waste that are consistent with the local council's requirements or giving notices in writing to owners or occupiers of lots.

(5)

In this by-law—

bin includes any receptacle for waste.

waste includes garbage and recyclable material.

17 Change in use or occupation of lot to be notified(1)

An occupier of a lot must notify the owners corporation if the occupier changes the existing use of the lot.

(2)

Without limiting clause (1), the following changes of use must be notified—

- (a)

  a change that may affect the insurance premiums for the strata scheme (for example, if the change of use results in a hazardous activity being carried out on the lot, or results in the lot being used for commercial or industrial purposes rather than residential purposes),

- (b)

  a change to the use of a lot for short-term or holiday letting.

(3)

The notice must be given in writing at least 21 days before the change occurs or a lease or sublease commences.

18 Compliance with planning and other requirements(1)

The owner or occupier of a lot must ensure that the lot is not used for any purpose that is prohibited by law.

(2)

The owner or occupier of a lot must ensure that the lot is not occupied by more persons than are allowed by law to occupy the lot.

Schedule 4 Fees

(Clause 64)

Item	Type of fee	Fee
	Fee payable to Secretary	
1	Lodgment of building bond	$1,500
1A	Arranging appointment of building inspector under section 196 or 200 of the Act	$1,500
1B	For administration relating to information given under this Regulation, clause 43	$3 per lot in the strata scheme
	Fees payable to owners corporation	
2	For making records available for inspection under section 182 of the Act	$31 and an additional $16 for each half-hour or part of half-hour after the first

Item	Type of fee	Fee
		hour of inspection
3	For giving a certificate under section 184 of the Act—	
	• (a) if the request is an initial request or request made more than 3 months after a previous request by the same person in respect of the same lot	$109 and an additional $54 for a further certificate for a lot comprising a garage, parking space or storeroom that services the lot the subject of the first certificate
	• (b) if the request is made not more than 3 months after a previous request by the same person in respect of the same lot	$94 and an additional $47 for a further certificate for a lot comprising a garage, parking space or storeroom that services the lot the subject of the first certificate

sch 4: Am 2020 (323), Sch 1[21]; 2021 (773), Sch 1[4].

Schedule 5 Penalty notice offences

(Clause 65)

Column 1	Column 2
Provision	Penalty
Offences under the Act	
Section 57(2)	$550 (in the case of an individual) or $1,100 (in the case of a corporation)
Section 60(1)	$550 (in the case of an individual) or $1,100 (in the case of a corporation)
Section 60(2)	$550 (in the case of an individual) or $1,100 (in the case of a corporation)
Section 62(1)	$550 (in the case of an individual) or $1,100 (in the case of a corporation)
Section 123(2)	$1,100
Section 160(1)	$220
Section 160(2)	$220
Section 186(1) and (3)	$110 for an individual or $220 for a corporation
Section 195(4)	$220
Section 202(1)	$220

Column 1	Column 2
Provision	Penalty
Section 202(2)	$220
Section 203(2)	$220
Section 249(4)	$220
Section 258(1) and (3)	$110 (in the case of an individual) or $220 (in the case of a corporation)
Offences under this Regulation	
Clause 43(1)	$220
Clause 43B(2)	$220
Clause 45E	$55 (in the case of an individual) or $110 (in the case of a corporation)

sch 5: Am 2020 (323), Sch 1[22] [23]; 2021 (773), Sch 1[5]; 2023 No 45, Sch 5.1[3] [4]; 2024 No 53, Sch 1.15[1] [2].

Historical notesTable of amending instruments

Strata Schemes Management Regulation 2016 (501). LW 12.8.2016. Date of commencement, Part 8 excepted, 30.11.2016, cl 2 (1); date of commencement of Part 8, 1.1.2018, cl 2 (2). This Regulation has been amended by this Regulation, cll 71 and 72 and as follows—

2017	No 25	*Electronic Transactions Legislation Amendment (Government Transactions) Act 2017*. Assented to 27.6.2017. Date of commencement, assent, sec 2.
2018	No 69	*Building Products (Safety) Act 2017*. Assented to 30.11.2017. Date of commencement of Sch 2.9, 18.12.2017, sec 2 (1) and 2017 (715) LW 15.12.2017.
	No 65	*Fair Trading Legislation Amendment (Reform) Act 2018*. Assented to 31.10.2018. Date of commencement of Sch 8.11, 1.2.2020, sec 2(2) and 2019 (634) LW 20.12.2019.
	No 79	*Fair Trading Legislation Amendment (Miscellaneous) Act 2018*. Assented to 28.11.2018. Date of commencement of Sch 3, 1.7.2020, sec 2.
2020	(243)	*Strata Schemes Management Amendment (COVID-19) Regulation 2020*. LW 5.6.2020. Date of commencement, on publication on LW, cl 2.
	(323)	*Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020*. LW 26.6.2020. Date of commencement, 1.7.2020, cl 2 and 2020 (299) LW 26.6.2020.

		Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020. LW 12.11.2020.
	(660)	Date of commencement of Sch 1[1], 13.11.2020, cl 2(2); date of commencement of Sch 1[2], on publication on LW, cl 2(1).
2021	No 5	*COVID-19 Recovery Act 2021*. Assented to 25.3.2021.
		Date of commencement of Sch 1.29, assent, sec 2(1).
	(218)	*Strata Schemes Management Amendment (COVID-19) Regulation 2021*. LW 12.5.2021.
		Date of commencement, 12.5.2021, cl 2.
	(346)	*Strata Schemes Management Amendment (Professional Associations) Regulation 2021*. LW 30.6.2021.
		Date of commencement of Sch 1[1] [2], 1.7.2021, cl 2(1); date of commencement of Sch 1[3], 1.8.2021, cl 2(2).
	(402)	*Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021*. LW 21.7.2021.
		Date of commencement, 21.7.2021, cl 2.
	(464)	*Strata Schemes Management Amendment (Pets) Regulation 2021*. LW 20.8.2021.
		Date of commencement, 25.8.2021, cl 2.
	(721)	*Strata Schemes Management Amendment (COVID-19) Regulation (No 3) 2021*. LW 1.12.2021.
		Date of commencement, 1.12.2021, sec 2.
	(773)	*Strata Schemes Management Amendment (Information) Regulation 2021*. LW 17.12.2021.
		Date of commencement, 30.6.2022, sec 2.
2022	(265)	*Strata Schemes Management Amendment (COVID-19) Regulation 2022*. LW 1.6.2022.
		Date of commencement, 1.6.2022, sec 2.
	(564)	*Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2022*. LW 23.9.2022.
		Date of commencement, 30.9.2022, sec 2.
	(583)	*Strata Schemes Management Amendment (Miscellaneous) Regulation 2022*. LW 30.9.2022.
		Date of commencement, on publication on LW, sec 2.
2023	(71)	*Planning Legislation Amendment (National Construction Code) Regulation 2023*. LW 24.2.2023.
		Date of commencement, 1.5.2023, sec 2.

	No 44	*Building Legislation Amendment Act 2023*. Assented to 11.12.2023.
		Date of commencement of Sch 3.2, assent, sec 2(b).
	No 45	*Strata Legislation Amendment Act 2023*. Assented to 11.12.2023.
		Date of commencement of Sch 5.1, assent, sec 2(b).
2024	(9)	*Strata Schemes Management Amendment Regulation 2024*. LW 19.1.2024.
		Date of commencement, on publication on LW, sec 2.
	(215)	*Building, Development and Strata Legislation Amendment Regulation 2024*. LW 21.6.2024.
		Date of commencement, on publication on LW, sec 2.
	No 53	*Better Regulation Legislation Amendment (Miscellaneous) Act 2024*. Assented to 20.8.2024.
		Date of commencement of Sch 1.15, assent, sec 2(b).
	(536)	*Strata Schemes Management Amendment (Strata Bond) Regulation 2024*. LW 25.10.2024.
		Date of commencement, on publication on LW, sec 2.

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Cl 2	Am 2017 No 25, Sch 6 [2].
Cl 3	Am 2018 No 65, Sch 8.11[1]; 2020 (323), Sch 1[1]; 2022 (564), Sch 1[1].
Cl 3A	Ins 2022 (564), Sch 1[2].
Cl 5	Am 2020 (323), Sch 1[2].
Cl 10	Am 2022 (564), Sch 1[3]–[6].
Cl 11	Am 2022 (564), Sch 1[7]–[11].
Cl 13	Rep 2018 No 65, Sch 8.11[2].
Cl 14	Subst 2022 (564), Sch 1[12].
Cl 14A	Ins 2022 (564), Sch 1[12].
Cl 14B	Ins 2022 (564), Sch 1[12].
Cl 15	Am 2022 (564), Sch 1[13].
Cl 16	Am 2022 (564), Sch 1[14].
Cl 17A	Ins 2022 (564), Sch 1[15].
Cl 17B	Ins 2022 (564), Sch 1[15].
Cl 20	Rep 2018 No 65, Sch 8.11[2].
Cl 25	Subst 2023 No 45, Sch 5.1[1].
Cll 32–34	Rep 2018 No 79, Sch 3.11.

Cl 36A	Ins 2021 (464), Sch 1.
Part 7, Div 1, heading	Ins 2021 (773), Sch 1[1].
Part 7, Div 2	Ins 2021 (773), Sch 1[2].
Cl 43	Rep 2018 No 65, Sch 8.11[2]. Ins 2021 (773), Sch 1[2]. Am 2022 (583), sec 3(1).
Cl 43A	Ins 2021 (773), Sch 1[2]. Am 2022 (583), sec 3(2) (3).
Cl 43B	Ins 2021 (773), Sch 1[2].
Cl 43C	Ins 2021 (773), Sch 1[2]. Am 2022 (583), sec 3(4).
Part 8, Div 1, heading	Ins 2020 (323), Sch 1[3].
Cl 44	Am 2020 (323), Sch 1[4]; 2021 (346), Sch 1[1].
Cl 44A	Ins 2024 (9), Sch 1[1].
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Cl 45	Subst 2020 (323), Sch 1[5].
Cll 45A–45E	Ins 2020 (323), Sch 1[5].
Cl 46A	Ins 2020 (323), Sch 1[6]. Am 2021 (346), Sch 1[2]; 2023 (71), Sch 1.10[1]–[3].
Cll 47, 48	Am 2020 (323), Sch 1[7].
Cl 49A	Ins 2020 (323), Sch 1[8].
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Cl 50	Am 2020 (323), Sch 1[10]–[12].
Cl 51	Subst 2020 (323), Sch 1[13].
Cl 52	Am 2020 (323), Sch 1[7] [14]–[16].
Cl 53	Subst 2020 (323), Sch 1[17].
Cl 54	Rep 2020 (323), Sch 1[17]. Ins 2023 No 44, Sch 3.2[1]. Am 2024 (9), Sch 1[2]; 2024 (215), Sch 2; 2024 (536), Sch 1.
Cl 54A	Ins 2023 No 44, Sch 3.2[1].
Cl 55	Am 2020 (323), Sch 1[18].
Cl 55AA	Ins 2024 (9), Sch 1[3].
Part 8, Div 3A	Ins 2023 No 44, Sch 3.2[2].
Sec 55A	Ins 2023 No 44, Sch 3.2[2].
Sec 55B	Ins 2023 No 44, Sch 3.2[2].
Sec 55C	Ins 2023 No 44, Sch 3.2[2].
Part 8, Div 4, heading	Ins 2020 (323), Sch 1[19].

Cl 56	Am 2020 (323), Sch 1[20].
Cl 64	Am 2021 (773), Sch 1[3].
Cl 68A	Ins 2021 (346), Sch 1[3]. Rep 2023 No 45, Sch 5.1[2].
Cl 68B	Ins 2022 (564), Sch 1[16].
Part 11	Ins 2020 (243), Sch 1. Subst 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.
Cl 69	Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]; 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.
Cl 70	Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]; 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.
Cl 71	Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]; 2021 (218), Sch 1; 2021 (402), Sch 1; 2021 (721), Sch 1. Rep 2016 (501), sec 72. Ins 2022 (265), Sch 1. Rep 2016 (501), cl 71.
Cl 72	Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]. Rep 2021 (218), Sch 1. Ins 2021 (402), Sch 1. Subst 2021 (721), Sch 1. Rep 2016 (501), cl 72.
Cl 73	Ins 2020 (243), Sch 1. Subst 2020 (660), Sch 1[1]. Rep 2021 (218), Sch 1.
Cl 74	Ins 2020 (660), Sch 1[2]. Rep 2021 No 5, Sch 1.29.
Sch 1	Am 2017 No 69, Sch 2.9. Rep 2018 No 65, Sch 8.11[2].
Sch 4	Am 2020 (323), Sch 1[21]; 2021 (773), Sch 1[4].
Sch 5	Am 2020 (323), Sch 1[22] [23]; 2021 (773), Sch 1[5]; 2023 No 45, Sch 5.1[3] [4]; 2024 No 53, Sch 1.15[1] [2].

Cited by:

Strata Schemes Management Act 2015 (NSW) [2015] NSWLegAct 50 (20 August 2024)

> *Strata Schemes Management Regulation 2016*. LW 12.8.2016.

Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020 (NSW) [2020] NSWLegSI 475 -
The Owners Strata Plan No 2227 v Navhand Pty Ltd [2023] NSWDC 568 (15 December 2023) (Russell SC DCJ)

> 163. I find that the notice served by the solicitor for the Owners Corporation satisfied the requirements of ss 86(4) and s 86(5) of the Act and cl 19 of the Strata Schemes Management Regulation 2016.

The Owners Strata Plan No 2227 v Navhand Pty Ltd [2023] NSWDC 568 -
The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

> 42. Before we can uphold the appeal and set aside or vary the Tribunal's decision, the appellant must establish that the failure to deal with the submission was material to the outcome of the proceedings. In other words, to succeed on its appeal, the appellant must establish that its submissions concerning the operation of reg 60 were correct. Neither the failure to deal with the submission nor the provision of inadequate reasons for rejecting the submission

would be sufficient reason to set aside the decision if, in fact, the submissions regarding the operation of reg 60 were without any substance and would fail in any event.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

50. The appellant submitted in reply:

> 13. As the appellant understands it, what is being put at RS [16] - [18] is that Clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) should be interpreted as being a fetter on the ability of the Secretary to give direction about the practice and procedure for a mediation. It is submitted this interpretation does not make sense, does not find any support in the text of any of the provisions pointed to by the respondent, and ought to be rejected. No authority is cited to support the approach to interpretation that is put. Each of the clauses are self-contained. Clause 59 curtails the right a party to have a representative (i.e. lawyer) attend a mediation. It is clearly directed at the parties and not the Secretary. Clause 60 is similarly directed at the parties. There is nothing in the *Schemes Management Regulations 2016* (NSW) or for that matter the *Strata Schemes Management Act 2015* (NSW) that confers power on the Secretary to impose costs on either party in respect to mediation, so the interpretation urged by the respondent does not have any proper foundation.
>
> 14. In response to RS [19], it is agreed that ultimately the issue is the proper construction and application of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however the relevant principle arising from *Anderson v Bowles* is that the legislature can make a determination that precludes from recovery a head of damage that might otherwise be recoverable at general law. Clause 60 is such a legislative determination when read in context, including the history of the strata management regulations in respect to mediation.
>
> 15. In response to RS [20] -- [22], the reliance on *Hawkins v Permarig Pty Ltd* ... is misconceived for the following reasons:
>
> a. The decision related to an appeal of a decision to strike out a claim for legal costs as damages arising from a breach of contract claim. It was not a final determination of the issue;
>
> b. RS [20] does not accurately extract the regulation being considered and omits the material part that is against the respondent's position in these proceedings. Section 4.1.23(1) is as follows:
>
> > '(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding. ' [emphasis added]
>
> c. It was the fact the statutory provision being considered in the *Hawkins* decision was expressly limited to proceedings in that particular Court that resulted to a finding the plaintiff was arguably able to claim those legal costs as damages in a separately claim. Further, the majority of the Court of Appeal in the *Hawkins* decision at [38] distinguished this *Anderson v Bowles* decision on the basis the provision considered in the

latter decision was expressed generally as opposed to the provision in the former decision being expressly limited in effect to the proceedings in a particular Court ...;

d. It is submitted when the *Hawkins* decision is read properly and in the context of the actual words of the provision being considered, it supports the appellant's position.

16. in response to RS [23], the point is not that the Appeal Panel must necessarily find in this appeal that clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was introduced to reverse the *Nicita* decision, but rather:

a. The *Nicita* decision is an example of the position at general law;

b. The *Nicita* decision was made before clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) (and indeed clause 59 and other provisions) and is not binding authority as a consequence (again noting in the *Fligg* decision relied upon by the respondent there was no claim for mediation cost at a time when the equivalent to clause 60 was in effect);

c. It is self-evident the insertion of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was to change the general law position, whether it was expressed in the *Nicita* decision or in other decisions. Clause 60 cannot be interpreted as having no effect as to do so would be to give it no meaning.

It is noted the respondent does not point to a legislative intent for clause 60 that would support her position. The legislative intent when read in context is to encourage parties in strata disputes to resolve disputes by mediation and without incurring or being threatened with legal costs. This aligns with the intent of Tribunal proceedings. It would have a chilling effect on the willingness of parties to attend and resolve dispute at mediations if it were the case one party (but not the other) could seek to recover their legal costs as "damages". It would also encourage an applicant to incur legal costs unnecessarily or make ambit claims knowing legal costs relating to the mediation could be recovered as "damages" without being subject to the requirement of special circumstances under Section 60 of the *Civil and Administrative Tribunal Act 2015* (NSW). This is particularly so in the context where the respondent party to the mediation would be precluded from giving evidence about unreasonable or other disentitling conduct during the course of the mediation."

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31. As amended, the Further Amended Notice of Appeal raised three grounds of appeal:

"1 The Tribunal below erred as a matter of mixed fact and law ... in finding the legal costs claimed by the applicant was not seriously in contention when:

(a) It was expressly put into dispute that the legal costs claimed were in relation to cost of the mediation conducted by the NSW Office of Fair Trading and that such legal costs could not be recovered by virtue of the operation of Regulation 60 of the *Strata Schemes Management Regulation 2016* (NSW);

1A. The Tribunal below erred as a matter of law in failing to determine the proper construction of and apply clause 60 of the *Strata Schemes Management Regulation 2016* (NSW).

2. In the alternative, the Tribunal below erred as a matter of law in failing to give adequate reasons for the finding ... that the legal costs claimed by the applicant was not seriously in contention in the circumstances described in [1] above and/or recoverable in the circumstances of the case."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

110. Even if reg 60 should be construed as prohibiting the parties from agreeing as part of the resolution of the dispute that one party will pay the costs of the successful mediation, there is no reason why it should be limited to that purpose. In our view reg 60 clearly denies to the Tribunal and any court the power to make an order with respect to the costs of a mediation.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

50. The appellant submitted in reply:

13. As the appellant understands it, what is being put at RS [16] - [18] is that Clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) should be interpreted as being a fetter on the ability of the Secretary to give direction about the practice and procedure for a mediation. It is submitted this interpretation does not make sense, does not find any support in the text of any of the provisions pointed to by the respondent, and ought to be rejected. No authority is cited to support the approach to interpretation that is put. Each of the clauses are self-contained. Clause 59 curtails the right a party to have a representative (i.e. lawyer) attend a mediation. It is clearly directed at the parties and not the Secretary. Clause 60 is similarly directed at the parties. There is nothing in the *Schemes Management Regulations 2016* (NSW) or for that matter the *Strata Schemes Management Act 2015* (NSW) that confers power on the Secretary to impose costs on either party in respect to mediation, so the interpretation urged by the respondent does not have any proper foundation.

14. In response to RS [19], it is agreed that ultimately the issue is the proper construction and application of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however the relevant principle arising from *Anderson v Bowles* is that the legislature can make a determination that precludes from recovery a head of damage that might otherwise be recoverable at general law. Clause 60 is such a legislative determination when read in context, including the history of the strata management regulations in respect to mediation.

15. In response to RS [20] -- [22], the reliance on *Hawkins v Permarig Pty Ltd* ... is misconceived for the following reasons:

a. The decision related to an appeal of a decision to strike out a claim for legal costs as damages arising from a breach of contract claim. It was not a final determination of the issue;

b. RS [20] does not accurately extract the regulation being considered and omits the material part that is against the respondent's position in these proceedings. Section 4.1.23(1) is as follows:

> '(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding. ' [emphasis added]

c. It was the fact the statutory provision being considered in the *Hawkins* decision was expressly limited to proceedings in that particular Court that resulted to a finding the plaintiff was arguably able to claim those legal costs as damages in a separately claim. Further, the majority of the Court of Appeal in the *Hawkins* decision at [38] distinguished this *Anderson v Bowles* decision on the basis the provision considered in the latter decision was expressed generally as opposed to the provision in the former decision being expressly limited in effect to the proceedings in a particular Court ...;

d. It is submitted when the *Hawkins* decision is read properly and in the context of the actual words of the provision being considered, it supports the appellant's position.

16. in response to RS [23], the point is not that the Appeal Panel must necessarily find in this appeal that clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was introduced to reverse the *Nicita* decision, but rather:

a. The *Nicita* decision is an example of the position at general law;

b. The *Nicita* decision was made before clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) (and indeed clause 59 and other provisions) and is not binding authority as a consequence (again noting in the *Fligg* decision relied upon by the respondent there was no claim for mediation cost at a time when the equivalent to clause 60 was in effect);

c. It is self-evident the insertion of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was to change the general law position, whether it was expressed in the *Nicita* decision or in other decisions. Clause 60 cannot be interpreted as having no effect as to do so would be to give it no meaning.

It is noted the respondent does not point to a legislative intent for clause 60 that would support her position. The legislative intent when read in context is to encourage parties in strata disputes to resolve disputes by mediation and without incurring or being threatened with legal costs.

This aligns with the intent of Tribunal proceedings. It would have a chilling effect on the willingness of parties to attend and resolve dispute at mediations if it were the case one party (but not the other) could seek to recover their legal costs as "damages". It would also encourage an applicant to incur legal costs unnecessarily or make ambit claims knowing legal costs relating to the mediation could be recovered as "damages" without being subject to the requirement of special circumstances under Section 60 of the *Civil and Administrative Tribunal Act 2015* (NSW). This is particularly so in the context where the respondent party to the mediation would be precluded from giving evidence about unreasonable or other disentitling conduct during the course of the mediation."

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49. The respondent submitted:

"**Reasons other than those given by the Tribunal**

15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.

...

17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:

57 Application of Part

This Part applies to a mediation conducted under section 218 of the Act.

58 Directions of Secretary

Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.

18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That

was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
>
> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

50. The appellant submitted in reply:

> 13. As the appellant understands it, what is being put at RS [16] - [18] is that Clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) should be interpreted as being a fetter on the ability of the Secretary to give direction about the practice and procedure for a mediation. It is submitted this interpretation does not make sense, does not find any support in the text of any of the provisions pointed to by the respondent, and ought to be rejected. No authority is cited to support the approach to interpretation that is put. Each of the clauses are self-contained. Clause 59 curtails the right a party to have a representative (i.e. lawyer) attend a mediation. It is clearly directed at the parties and not the Secretary. Clause 60 is similarly directed at the parties. There is nothing in the *Schemes Management Regulations 2016* (NSW) or for that matter the *Strata Schemes Management Act 2015* (NSW) that confers power on the Secretary to impose costs on either party in respect to mediation, so the interpretation urged by the respondent does not have any proper foundation.
>
> 14. In response to RS [19], it is agreed that ultimately the issue is the proper construction and application of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however the relevant principle arising from *Anderson v Bowles* is that the legislature can make a determination that precludes from recovery a head of damage that might otherwise be recoverable at general law. Clause 60 is such a legislative determination when read in context, including the history of the strata management regulations in respect to mediation.
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> 15. In response to RS [20] -- [22], the reliance on *Hawkins v Permarig Pty Ltd* ... is misconceived for the following reasons:
>
> a. The decision related to an appeal of a decision to strike out a claim for legal costs as damages arising from a breach of contract claim. It was not a final determination of the issue;
>
> b. RS [20] does not accurately extract the regulation being considered and omits the material part that is against the respondent's position in these proceedings. Section 4.1.23(1) is as follows:
>
> > '(1) Each party to a proceeding in the court must bear the party's own costs for the proceeding. ' [emphasis added]
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> c. It was the fact the statutory provision being considered in the *Hawkins* decision was expressly limited to proceedings in that particular Court that resulted to a finding the plaintiff was arguably able to claim those legal costs as damages in a separately claim. Further, the majority of the Court of Appeal in the *Hawkins* decision at [38] distinguished this *Anderson v Bowles* decision on the basis the provision considered in the latter decision was expressed generally as opposed to the provision in the former decision being expressly limited in effect to the proceedings in a particular Court ...;

d. It is submitted when the *Hawkins* decision is read properly and in the context of the actual words of the provision being considered, it supports the appellant's position.

16. in response to RS [23], the point is not that the Appeal Panel must necessarily find in this appeal that clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was introduced to reverse the *Nicita* decision, but rather:

a. The *Nicita* decision is an example of the position at general law;

b. The *Nicita* decision was made before clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) (and indeed clause 59 and other provisions) and is not binding authority as a consequence (again noting in the *Fligg* decision relied upon by the respondent there was no claim for mediation cost at a time when the equivalent to clause 60 was in effect);

c. It is self-evident the insertion of clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) was to change the general law position, whether it was expressed in the *Nicita* decision or in other decisions. Clause 60 cannot be interpreted as having no effect as to do so would be to give it no meaning.

It is noted the respondent does not point to a legislative intent for clause 60 that would support her position. The legislative intent when read in context is to encourage parties in strata disputes to resolve disputes by mediation and without incurring or being threatened with legal costs. This aligns with the intent of Tribunal proceedings. It would have a chilling effect on the willingness of parties to attend and resolve dispute at mediations if it were the case one party (but not the other) could seek to recover their legal costs as "damages". It would also encourage an applicant to incur legal costs unnecessarily or make ambit claims knowing legal costs relating to the mediation could be recovered as "damages" without being subject to the requirement of special circumstances under Section 60 of the *Civil and Administrative Tribunal Act 2015* (NSW). This is particularly so in the context where the respondent party to the mediation would be precluded from giving evidence about unreasonable or other disentitling conduct during the course of the mediation."

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38. Mr Ton referred the Appeal Panel to the transcript of the hearing before the Senior Member in which, he submitted, the application of reg 60 was clearly raised. We did not understand Mr Forgacs to suggest that the application of reg 60 had not been clearly articulated before the Tribunal.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

45. The appellant submitted that only the first of the five invoices, dated 17 May 2022 in the amount of $650 plus GST, which was for drafting and issuing the letter of demand, was clearly not costs associated with the mediation. The appellant maintained that the balance of the invoices was costs associated with the mediation and, by reason of reg 60, could not be subject of an award of damages pursuant to s 106(5) and 232 of the SSMA.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

49. The respondent submitted:

> "**Reasons other than those given by the Tribunal**
>
> 15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.
>
> ...
>
> 17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:
>
> > **57 Application of Part**
> >
> > This Part applies to a mediation conducted under section 218 of the Act.
> >
> > **58 Directions of Secretary**
> >
> > Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.
>
> 18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.
>
> 19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.
>
> 20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent

terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
>
> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

> 96. If the particular expenses are not "costs of, and incidental to the proceedings" then they may be recoverable as damages by reason of breach of the duty under s 106 of the SSMA, subject to the other limitations on the award of damages for breach of duty under s 106 of the SSMA, including whether the type of loss is a "reasonably foreseeable loss suffered by the owner as a result of contravention of this section by the owners corporation" (s 106(5) of the SSMA); and whether the proceedings have been brought within the limitation period in s 106(6) of the SSMA. A further limitation occurs by reason of reg 60.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

102. In relation to costs associated with a mediation under the SSMA, reg 60 is a further limitation on the Tribunal's powers. We agree with the appellant's submission that, if reg 60 is valid, it has the effect that costs associated with a mediation under s 218 of the SSMA cannot be the subject of an award of damages under s 106(5); nor are such costs recoverable as costs of, or incidental to, the proceedings. That is the effect of the High Court decision in *Anderson v Bowles*.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

47. The appellant submitted:

> "16. The appellant's submission below was that the *Nicita* decision should be distinguished as the Court did not consider the effect of clause 60 of the *Strata Schemes Management Regulation*s 2016 (NSW). This is supported by a contextual analysis of the strata legislation. The appellant also relied upon *Anderson v Bowles* (1951) 84 CLR 310, in support of proposition that there had been a legislative determination overriding any ability to recover Fair Trading mediation costs as damages.
>
> 17. It is accepted at general law, it is possible in a proper case to claim costs that are not of the proceedings, as distinct from costs associated with litigation, as special damages. However, such costs can still be assessed by reference to their reasonableness in being incurred and amount. The *Nicita* (and *Fligg*) decision is consistent with but not exhaustive of the position at general law (in neither decision did not the Court set out in any substantive detail the legal reasoning behind its decision). In closing argument in the proceedings below, the Senior Member appeared to tend towards reading down clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) so that it did not affect the general law position.
>
> 18. However, the statutory and regulatory context of the *Nicita* decision and the introduction of the equivalent to clause 60 in the previous strata regulation is of significance to the resolution of this appeal ground as follows:
>
> a. The *Nicita* decision was made on 16 February 2010. At the time the *Nicita* decision was made, there was no equivalent to clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) contained in either the strata legislation or regulation;
>
> b. On 1 September 2010 the *Strata Schemes Management Regulation 2010* (NSW) came into effect. That Regulation included for the first time clause 25, which stated as follows:
>
> The parties to a mediation are to pay their own costs associated with the mediation.
>
> c. It is submitted the timing of introduction of clause 25 is not coincidental and clearly was intended to alter the general law position in respect to the recovery of costs associated with Fair Trading mediation as special damages. To interpret clause 25 otherwise is to give the clause no meaning;

d. Clause 25 was repeated in clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however there was also an express discouragement of the use of lawyers in clause 59(1) of 2016 Regulations. This altered the previous position where lawyers could attend as a matter of right (see clause 24 of the 2010 Regulations). It is submitted it is clear the intention of the clause 60 (and clause 25 before it), in context, is to encourage rather than discourage strata disputes to be settled by way of Fair Trading mediation without the involvement or cost of lawyers. If a party considers it is at risk of having such legal costs claimed against it, then it would be in that party(s) commercial interest to refuse to participate in mediation at all. This consideration was raised by the Tribunal below, albeit for a different purpose;

e. It is noted in the *Fligg* decision, which was made on 15 March 2012, the lot owner attended a Fair Trading mediation with the owners corporation and made no claim for the costs of same as 'damages' or at all.

19. In the above circumstances, it is submitted the principle arising out of *Anderson v Bowles* (1951) 84 CLR 310 is directly on point and supports the construction propounded by the appellant."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

115. The costs associated with the mediation were properly characterised as costs of the proceedings. As such s 106(5) is not applicable and reg 60 cannot be said to be inconsistent with section 106(5). It is not necessary to determine whether, in a case where the costs of mediation would not form part of the costs of the proceedings, reg 60 would be inconsistent with section 106(5) to the extent that it prevented the recovery of those costs as compensation for reasonably foreseeable loss arising from a failure to comply with s 106. Even if that were the case, reg 60 could be read down to exclude such cases pursuant to s 32 of the *Interpretation Act 1987* (NSW).

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

112. Section 271 of the SSMA empowers the making of regulations "not inconsistent with this Act". If reg 60 were inconsistent with s 106 of the SSMA, it would be invalid to the extent of the inconsistency. However, we do not consider that those provisions are inconsistent. Mr Forgacs' submission was that, because the costs associated with the mediation were a foreseeable loss suffered as a result of a contravention of s 106, a regulation which had the effect of denying the respondent the capacity to recover that loss must be inconsistent with s 106(5) which provides that a lot owner may recover "any reasonably foreseeable loss" suffered by the owner as a result of a breach of the obligations in s 106(1) and (2).

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

123. The parties' representatives agreed in the course of the hearing that, if we accepted the appellant's submissions concerning the effect of reg 60 and the characterisation of the legal fees included in the judgment sum, the correct amount of the judgment in favour of the respondent would be $7,019.64. Accordingly, the outcome of the appeal should be that the amount of the judgment in favour of the respondent is reduced to $7,019.64.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

49. The respondent submitted:

> "**Reasons other than those given by the Tribunal**
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> 15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.
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> 18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.
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> 19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.
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> 20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:
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> > Each party to a proceeding in the court must bear the party's own costs for the proceeding.

The majority (McPherson JA and White J) concluded that the section did not preclude the appellants from recovering damages for breach of contract occasioned by their paying their own costs of a previous Planning and Environment Court proceeding. McPherson JA stated:

> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
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> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

> 38. Mr Ton referred the Appeal Panel to the transcript of the hearing before the Senior Member in which, he submitted, the application of reg 60 was clearly raised. We did not understand Mr Forgacs to suggest that the application of reg 60 had not been clearly articulated before the Tribunal.

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> "16. The appellant's submission below was that the *Nicita* decision should be distinguished as the Court did not consider the effect of clause

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17. It is accepted at general law, it is possible in a proper case to claim costs that are not of the proceedings, as distinct from costs associated with litigation, as special damages. However, such costs can still be assessed by reference to their reasonableness in being incurred and amount. The *Nicita* (and *Fligg*) decision is consistent with but not exhaustive of the position at general law (in neither decision did not the Court set out in any substantive detail the legal reasoning behind its decision). In closing argument in the proceedings below, the Senior Member appeared to tend towards reading down clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) so that it did not affect the general law position.

18. However, the statutory and regulatory context of the *Nicita* decision and the introduction of the equivalent to clause 60 in the previous strata regulation is of significance to the resolution of this appeal ground as follows:

a. The *Nicita* decision was made on 16 February 2010. At the time the *Nicita* decision was made, there was no equivalent to clause 60 of the *Strata Schemes Management Regulations 2016* (NSW) contained in either the strata legislation or regulation;

b. On 1 September 2010 the *Strata Schemes Management Regulation 2010* (NSW) came into effect. That Regulation included for the first time clause 25, which stated as follows:

The parties to a mediation are to pay their own costs associated with the mediation.

c. It is submitted the timing of introduction of clause 25 is not coincidental and clearly was intended to alter the general law position in respect to the recovery of costs associated with Fair Trading mediation as special damages. To interpret clause 25 otherwise is to give the clause no meaning;

d. Clause 25 was repeated in clause 60 of the *Strata Schemes Management Regulations 2016* (NSW), however there was also an express discouragement of the use of lawyers in clause 59(1) of 2016 Regulations. This altered the previous position where lawyers could attend as a matter of right (see clause 24 of the 2010 Regulations). It is submitted it is clear the intention of the clause 60 (and clause 25 before it), in context, is to encourage rather than discourage strata disputes to be settled by way of Fair Trading mediation without the involvement or cost of lawyers. If a party considers it is at risk of having such legal costs claimed against it, then it would be in that party(s) commercial interest to refuse to participate in mediation at all. This consideration was raised by the Tribunal below, albeit for a different purpose;

e. It is noted in the *Fligg* decision, which was made on 15 March 2012, the lot owner attended a Fair Trading mediation

with the owners corporation and made no claim for the costs of same as 'damages' or at all.

19. In the above circumstances, it is submitted the principle arising out of *Anderson v Bowles* (1951) 84 CLR 310 is directly on point and supports the construction propounded by the appellant."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

49. The respondent submitted:

"**Reasons other than those given by the Tribunal**

15. ... [Regulation] 60 of the *Strata Schemes Management Regulation 2016 (NSW)* does not preclude the recovery of pre-litigation legal costs, including costs in relation to a mediation conducted by the NSW Office of Fair Trading, pursuant to s 106(5) of the SSMA.

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17. Regulation 60 is contained in Part 9 of the Regulation. Part 9 also contains regs 57 and 58, which are in the following terms:

57 Application of Part

This Part applies to a mediation conducted under section 218 of the Act.

58 Directions of Secretary

Subject to the Act and this Regulation, the Secretary may give written directions for regulating and prescribing the practice and procedure to be followed in connection with a mediation session, including the preparation and service of documents.

18. Read In context, it is clear that reg 60 relates to the conduct of a mediation under s 218 of the SSMA. By operation of reg 60, the Secretary is precluded from giving directions under reg 58 as to the "practice and procedure to be followed in connection with a mediation session" which would have the effect of requiring a party to pay costs. Reg 60 does not operate to prevent the recovery of the costs of a mediation pursuant to a separate cause of action.

19. The Appellant's reliance upon *Anderson v Bowles* (1951) 84 CLR 310 ... is misplaced. In that case, the relevant regulation provided that "No costs shall be allowed in any proceedings in relation to which this Part applies, not being proceedings in respect of an offence arising under this Part". Following judicial determination of one set of proceedings, in which no costs were awarded, the plaintiff sought to circumvent the effect of the regulation by seeking the costs as damages in separate proceedings. The High Court held that the plaintiff could not recover such damages. That was a conclusion reached on the terms of the regulation in that case, and in a context where the Court hearing the first set of proceedings would, but for the regulation, have had the power to award costs. It is not analogous to reg 60.

20. *Anderson v Bowles* was distinguished in *Hawkins v Permarig Pty Ltd* [2004] 2 Qd R 388. In that case, the relevant section was in equivalent terms to reg 60, providing that:

> Each party to a proceeding in the court must bear the party's own costs for the proceeding.

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> [17] . . . [T]he question is whether as a matter of policy s 4.1.23(1) imposes a general prohibition on the recovery of such costs in every court established for hearing and determining claims at law; or, on the other hand, is confined to directing the Planning and Environment Court how it is to dispose of questions of costs in proceedings before it in its particular jurisdiction.
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> [18] In my opinion that provision should be interpreted only as limiting the power to award costs in that court and not as declaring that such costs are necessarily and always irrecoverable in any proceedings based on a distinct cause of action enforceable by other means and in another forum.

21. Reg 60, which is in equivalent terms to the regulation considered in *Hawkins*, is in the same category: it is confined to specifying how the costs of a mediation are to be borne at the time of the mediation, and preventing the Secretary from making contrary directions. It does not purport to render such costs irrecoverable in any proceedings based on distinct causes of action.

22. In this case, the Respondent has a statutory cause of action under s 106(5) which entitles her to recover any reasonably foreseeable loss suffered as a result of a contravention of the owners corporation's duty. Reg 60 does not confine the categories of damages which may be recovered under s 106(5).

23. The Appellant's submissions to the contrary, purporting to identify the legislative intent of reg 60 ..., are entirely speculative. No intention to reverse the decision in *Nicita* is apparent from the explanatory note to the Strata Schemes Management Regulation 2010: the object of the Regulation is described as being to "remake with minor modifications the Strata Schemes Management Regulation 2005", and no specific reference to the costs provision appears in the explanatory note at all. To draw inferences in the manner suggested ... would be to adopt an erroneous approach to statutory interpretation."

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

> 102. In relation to costs associated with a mediation under the SSMA, reg 60 is a further limitation on the Tribunal's powers. We agree with the appellant's submission that, if reg 60 is valid, it has the effect that costs associated with a mediation under s 218 of the SSMA cannot be the subject of an award of damages under s 106(5); nor are such costs recoverable

as costs of, or incidental to, the proceedings. That is the effect of the High Court decision in *Anderson v Bowles*.

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

115. The costs associated with the mediation were properly characterised as costs of the proceedings. As such s 106(5) is not applicable and reg 60 cannot be said to be inconsistent with section 106(5). It is not necessary to determine whether, in a case where the costs of mediation would not form part of the costs of the proceedings, reg 60 would be inconsistent with section 106(5) to the extent that it prevented the recovery of those costs as compensation for reasonably foreseeable loss arising from a failure to comply with s 106. Even if that were the case, reg 60 could be read down to exclude such cases pursuant to s 32 of the *Interpretation Act 1987* (NSW).

The Owners Strata Plan No 21563 v Rutherford [2023] NSWCATAP 326 (12 December 2023) (D Robertson, Senior Member, G Sarginson, Senior Member)

36. As clarified at the hearing by Mr Ton, we understand the appellant's grounds of appeal to be:

    1. The Tribunal erred with respect to a question of law by failing to engage with and determine a clearly articulated argument, that is, that the effect of reg 60 was that legal costs associated with the mediation could not be the subject of compensation pursuant to s 106(5).

    2. That to the extent that the Tribunal did deal with that submission, it made an error with respect to a question of law by failing to provide adequate reasons for not accepting the submission.

    3. That the award of damages pursuant to s 106(5) in respect of the legal costs associated with the mediation involved an error with respect to a question of law because reg 60 precluded the award of damages in respect of costs associated with the mediation.

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Vojkovic v Savva [2023] NSWCATCD 141 -
Sorrenson v Versluis [2023] NSWCATCD 151 (12 September 2023) (D Robertson, Senior Member)

60. I note that, in *Cooper*, at [37], Basten JA referred to the provisions of the Model By-Laws contained in Schedule 3 to the *Strata Schemes Management Regulation 2016* (NSW), including clause 12, which provides:

> (1) The owner or occupier of a lot must not, without the prior written approval of the owners corporation, maintain within the lot anything visible from outside the lot that, viewed from outside the lot, is not in keeping with the rest of the building.
>
> (2) This by-law does not apply to the hanging of any clothing, towel, bedding or other article of a similar type in accordance with by-law 14.

Sorrenson v Versluis [2023] NSWCATCD 151 -
BlueHouseCoffs Pty Ltd v The Owners Strata Plan No 61419 [2023] NSWCATCD 145 -
Lopez v The Owners Strata Plan No 54321 [2023] NSWCATCD 58 -
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The Owners - Strata Plan No 95230 v Maister [2022] NSWCATAP 390 -
Coscuez International Pty Ltd v The Owners Strata Plan No 46433; The Owners Strata Plan No 46433 v Coscuez International Pty Ltd [2022] NSWCATCD 201 (16 November 2022) (G Ellis SC, Senior Member)

40. The Tribunal considers Special By-Law 8 to be invalid for the following reasons. First, clause 1(e) is caught by s 136(2) because it contradicts the combined effect of s 137 of the Act and cl 36 of the Regulations.

Coscuez International Pty Ltd v The Owners Strata Plan No 46433; The Owners Strata Plan No 46433 v Coscuez International Pty Ltd [2022] NSWCATCD 201 (16 November 2022) (G Ellis SC, Senior Member)

Strata Schemes Management Regulation 2016 (NSW), cls 36, 60

Coscuez International Pty Ltd v The Owners Strata Plan No 46433; The Owners Strata Plan No 46433 v Coscuez International Pty Ltd [2022] NSWCATCD 201 (16 November 2022) (G Ellis SC, Senior Member)

36. The Lot owner's submissions suggested that clause 1(e) was inconsistent with cl 36(1) of the Regulations, and that clause (4) pre-empted any decision as to costs by a court or tribunal. It was noted that cl 60 of the Regulations provides that "*The parties to a mediation are to pay their own costs associated with the mediation*". Reference was also made to s 60 of the *Civil and Administrative Tribunal Act 2013* and s 98 of the *Civil Procedure Act 2005*. Reference was made to the decision in *The Owners – SP No 91684 v Liu; The Owners – SP No 90189 v Liu* [2022] NSWCATAP 1 (*Liu*).

Coscuez International Pty Ltd v The Owners Strata Plan No 46433; The Owners Strata Plan No 46433 v Coscuez International Pty Ltd [2022] NSWCATCD 201 -
ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 (09 November 2022) (P French, Senior Member)

83. Additionally, and in any event, I am satisfied that Mr King's email to Ms N of 16 July 2020 is an exempt disclosure under s 25 of the PPIP Act. In this respect, at the material time, Mr King

was carrying out under delegation the statutory functions of the Secretary under s 218 of the SSM Act. Specifically, he was arranging mediation in accordance with the SSM Regulation. In accordance with r 59 it was necessary for Mr King to determine the parties to the mediation to provide for their attendance. He was also required to determine if he would exercise the discretion conferred by r 59(2) to grant leave for non-parties to attend the mediation session. It must be accepted that this reasonably required him to consult the applicant for the mediation about a request from a non-party to the mediation application to participate in the mediation. I am satisfied that a purposive reading of s 218(2) and r 59 leads to the conclusion that Mr King was lawfully authorised by those provisions to notify Ms N of the applicant's request to participate and to ascertain her views as to whether that was appropriate: s 25(1)(a). Additionally, or alternatively, non-compliance with IPP 11 in these circumstances is necessarily implied by s 218(2) and r 59.

ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 (09 November 2022) (P French, Senior Member)

84. I note r 58 of the SSM Regulation. If the Secretary has issued directions in accordance with that Regulation they are not in evidence, and thus do not take the matter any further.

ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 (09 November 2022) (P French, Senior Member)

83. Additionally, and in any event, I am satisfied that Mr King's email to Ms N of 16 July 2020 is an exempt disclosure under s 25 of the PPIP Act. In this respect, at the material time, Mr King was carrying out under delegation the statutory functions of the Secretary under s 218 of the SSM Act. Specifically, he was arranging mediation in accordance with the SSM Regulation. In accordance with r 59 it was necessary for Mr King to determine the parties to the mediation to provide for their attendance. He was also required to determine if he would exercise the discretion conferred by r 59(2) to grant leave for non-parties to attend the mediation session. It must be accepted that this reasonably required him to consult the applicant for the mediation about a request from a non-party to the mediation application to participate in the mediation. I am satisfied that a purposive reading of s 218(2) and r 59 leads to the conclusion that Mr King was lawfully authorised by those provisions to notify Ms N of the applicant's request to participate and to ascertain her views as to whether that was appropriate: s 25(1)(a). Additionally, or alternatively, non-compliance with IPP 11 in these circumstances is necessarily implied by s 218(2) and r 59.

ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 (09 November 2022) (P French, Senior Member)

> Further, an agency is exempt from compliance with s 18 if non-compliance is reasonably contemplated under an Act or any other law. Part 12, Division 2 of the *Strata Schemes Management Act 2015* and Part 9 of the *Strata Schemes Regulation 2016* provide for alternate dispute resolution.

ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 (09 November 2022) (P French, Senior Member)

83. Additionally, and in any event, I am satisfied that Mr King's email to Ms N of 16 July 2020 is an exempt disclosure under s 25 of the PPIP Act. In this respect, at the material time, Mr King was carrying out under delegation the statutory functions of the Secretary under s 218 of the SSM Act. Specifically, he was arranging mediation in accordance with the SSM Regulation. In accordance with r 59 it was necessary for Mr King to determine the parties to the mediation to provide for their attendance. He was also required to determine if he would exercise the discretion conferred by r 59(2) to grant leave for non-parties to attend the mediation session. It must be accepted that this reasonably required him to consult the applicant for the mediation about a request from a non-party to the mediation application to participate in the mediation. I am satisfied that a purposive reading of s 218(2) and r 59 leads

to the conclusion that Mr King was lawfully authorised by those provisions to notify Ms N of the applicant's request to participate and to ascertain her views as to whether that was appropriate: s 25(1)(a). Additionally, or alternatively, non-compliance with IPP 11 in these circumstances is necessarily implied by s 218(2) and r 59.

ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 -
ENS v Commissioner for Fair Trading [2022] NSWCATAD 356 -
Fitzgerald v Waterstop Solutions (NSW) Pty Ltd [2022] NSWCATCD 84 (20 June 2022) (P French, Senior Member)

> For the purposes of section 13(1)(h) of the Act, the following functions of an owners corporation are prescribed as functions that may be delegated to or conferred only on a member of the strata committee or strata managing agent –

Fitzgerald v Waterstop Solutions (NSW) Pty Ltd [2022] NSWCATCD 84 (20 June 2022) (P French, Senior Member)

> Regulation 4 of the *Strata Schemes Management Regulation* 2016 (NSW) is made pursuant to s 13(1)(h) of the Act. It relevantly provides:

Fitzgerald v Waterstop Solutions (NSW) Pty Ltd [2022] NSWCATCD 84 (20 June 2022) (P French, Senior Member)

> Regulation 4 of the *Strata Schemes Management Regulation* 2016 (NSW) is made pursuant to s 13(1)(h) of the Act. It relevantly provides:

Jalnz Constructions Pty Ltd v Commissioner of Fair Trading [2022] NSWCATAD 188 (08 June 2022) (T Simon, Principal Member)

> 13. Nothing contained in cl 56 provides for a right of review in relation to s 207 of the SSMA. There is nothing in the enabling legislation (the SSMA) which would give rise to review of a decision made under s 207 of the SSMA. For that reason, I am not satisfied that any decision in relation to payment of a strata building bond is an administratively reviewable decision for the purposes of the ADR Act. Further, there is nothing that would enable the Tribunal to make an order compelling the respondent to provide a letter exempting the applicant from paying the strata building bond.

Jalnz Constructions Pty Ltd v Commissioner of Fair Trading [2022] NSWCATAD 188 (08 June 2022) (T Simon, Principal Member)

> 12. Section 213 deals with reviews of decisions under the SSMA. Sub-section 213(3) provides that the regulations may prescribe reviewable decisions for the purposes of the section. Clause 56 of the Regulation sets out the types of decisions that may be reviewed.

Jalnz Constructions Pty Ltd v Commissioner of Fair Trading [2022] NSWCATAD 188 -
Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 44. It follows that the party bringing the application must identify and establish the particular non-compliance with the SSM Act or the Regulations that occurred *"in relation to the meeting"* which affected the conduct or outcome of the meeting; not matters that involve purported non-compliance with legislation other than the SSM Act or the Regulations; or a breach of the common law. Further, non-compliance with the SSM Act or the Regulations that was not *"in relation to the meeting"* falls outside the ambit of s 24 of the SSM Act.

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 46. There is nothing in the reasons of the Tribunal or the submissions of the appellant that satisfies us the appellant raised any non-compliance with the SSM Act or Regulations "*in relation to the meeting*" in respect of the AGMs on 18 June 2020 and 18 June 2021 other than Motion 16's purported inconsistency with the Development Approval of the strata scheme and local Council parking requirements. The only other matters raised involved alleged parking on common property and rubbish left on common property. They are not matters that involve any particular non-compliance with the SSM Act or the Regulations *"in relation to the meeting"* which affected the conduct or outcome of the meeting.

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 46. There is nothing in the reasons of the Tribunal or the submissions of the appellant that satisfies us the appellant raised any non-compliance with the SSM Act or Regulations "*in relation to the meeting*" in respect of the AGMs on 18 June 2020 and 18 June 2021 other than Motion 16's purported inconsistency with the Development Approval of the strata scheme and local Council parking requirements. The only other matters raised involved alleged parking on common property and rubbish left on common property. They are not matters that involve any particular non-compliance with the SSM Act or the Regulations *"in relation to the meeting"* which affected the conduct or outcome of the meeting.

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 42. Section 24 of the SSM Act is not enlivened merely because there has been some non-compliance with the SSM Act or the Strata Schemes Management Regulation 2016 (NSW) ('the Regulations'). As the Appeal Panel stated in Read at [45] and [50], the non-compliance with the SSM Act or the Regulations needs to be "*in relation to the meeting*" (emphasis added).

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 42. Section 24 of the SSM Act is not enlivened merely because there has been some non-compliance with the SSM Act or the Strata Schemes Management Regulation 2016 (NSW) ('the Regulations'). As the Appeal Panel stated in Read at [45] and [50], the non-compliance with the SSM Act or the Regulations needs to be "*in relation to the meeting*" (emphasis added).

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 43. Consequently, the first step is establishment of non-compliance with the SSM Act or the Regulations *"in relation to the meeting"* that involved the passing of a particular Resolution or the election of persons to the strata committee at the meeting. Relevant matters include the meeting procedures in Sch. 1 of the SSM Act.

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

> 45. It is only if the party bringing the application establishes there has been a non-compliance with the SSM Act or the Regulations *"in relation to the meeting*" which affected the conduct or outcome of the meeting that the discretion of the Tribunal to invalidate any Resolution passed at the meeting or the election of persons at the meeting is enlivened under s 24 (1) of the SSM Act; involving the considerations in s 24 (3) of the SSM Act.

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 (13 April 2022) (G Sarginson, Senior Member, E Bishop, Senior Member)

53. It is unclear whether all Lot owners provided their written consent in accordance with s 143 (1) of the SSM Act. However, that was not a matter raised by the appellant before the Tribunal as a failure to comply with the SSM Act or the Regulations pursuant to s 24 of the SSM Act.

Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 -
Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 -
Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 -
Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 -
Harris v The Owners-Strata Plan No 34056 [2022] NSWCATAP 111 -
Bruce v The Owners - Strata Plan No. 98803 [2022] NSWCATCD 83 (11 April 2022) (S Hanstein, General Member)

5. The by-law adopted by the Owners Corporation in respect of the keeping of pets is option B of by-law 5 of the Model By-laws contained in the *Strata Schemes Management Regulation 2016* ("Regulation"), which provides relevantly:

> Option B
>
> (1) An owner or occupier of a lot may keep an animal on the lot or the common property with the written approval of the owners corporation.
>
> (2) The owners corporation must not unreasonably withhold its approval of the keeping of an animal on a lot or the common property and must give an owner or occupier written reasons for any refusal to grant approval.
>
> (3) If an owner or occupier of a lot keeps an animal on the lot, the owner or occupier must—
>
> (a) keep the animal within the lot, and
>
> (b) supervise the animal when it is on the common property, and
>
> (c) take any action that is necessary to clean all areas of the lot or the common property that are soiled by the animal.
>
> ...

Bruce v The Owners - Strata Plan No. 98803 [2022] NSWCATCD 83 -
Bruce v The Owners - Strata Plan No. 98803 [2022] NSWCATCD 83 -
The Owners - SP No 91684 v Liu; The Owners - SP No 90189 v Liu [2022] NSWCATAP 1 (05 January 2022) (R C Titterton Oam, Senior Member, J Kearney, Senior Member)

46. In *Cooper,* Basten JA said at [12]

> It follows that by-laws may (i) confer specific functions on the owners corporation with respect to the use and enjoyment of the lots and the common property, (ii) make provision directly in relation to the use and enjoyment of the lots and the common property, but for the purpose of managing, administering or controlling the strata scheme. That reading is consistent with the terms of the model by-laws, which may be found in Sch 3 to the Strata Schemes Management Regulation 2016 (NSW).

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

36. Sections 24 and 25 of the SSMA state:

24 Order invalidating resolution of owners corporation

(1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.

(2) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of Part 10 (other than Division 6 or 7) of the *Strata Schemes Development Act 2015* have not been complied with in relation to the meeting.

(3) The Tribunal may refuse to make an order under this section only if it considers—

(a) that the failure to comply with the provisions of this Act or the regulations, or of the *Strata Schemes Development Act 2015*, did not adversely affect any person, and

(b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

(4) The Tribunal may not make an order invalidating a resolution under subsection (2) if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.

(5) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

25 Order where voting rights denied or due notice of item of business not given

(1) The Tribunal may, on application by a person entitled to vote on a motion for a resolution of an owners corporation at a general meeting, order that a resolution passed at the general meeting be treated as a nullity on and from the date of the order.

(2) The Tribunal must not make the order unless the Tribunal is satisfied that the resolution would not have been passed but for the fact that the applicant for the order—

(a) was improperly denied a vote on the motion for the resolution, or

(b) was not given due notice of the item of business in relation to which the resolution was passed.

(3) An application for an order may not be made unless—

(a) an application for mediation of the dispute was made not later than 28 days after the date of the meeting at which the resolution was passed, or

(b) if an application for mediation was not made, the application for the order was made not later than 28 days after the date of the meeting at

which the resolution was passed.

(4) If a resolution that is to be treated as a nullity by an order changes the by-laws and the order has been recorded in the Register under this Act, the by-laws have force and effect on and from the date the order is so recorded to the same extent as they would have had if the change had not been made.

(5) Subsection (4) is subject to the by-laws having been or being changed in accordance with this Act and to any relevant order made by a superior court.

(6) The Tribunal may not make an order under this section if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.

(7) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

44. The 2020 AGM on 24 August 2020 was conducted by way of videoconference. Although the submissions of the applicant are critical of the manner in which the meeting was conducted, there is nothing in the evidence or submissions of the applicant to satisfy the Tribunal that the decision to hold the meeting electronically contravenes Clause 10 of Schedule 2 of the SSMA; Reg. 14 of the SSM Regulations; or Part 11 of the SSM Regulations.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

51. As discussed previously, even if Mr Kuskis sought to appear only as an "observer" without speaking or prompting the applicant to speak, there is nothing in the SSMA or SSM Regulations that gave him the right to do so. The SSMA and/or SSM Regulations did not give Mr Kuskis a right to attend the meeting as a mere observer, even if he had attended previous meetings of the owners corporation in that capacity as the partner of the Lot owner.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

36. Sections 24 and 25 of the SSMA state:

24 Order invalidating resolution of owners corporation

(1) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of this Act or the regulations have not been complied with in relation to the meeting.

(2) The Tribunal may, on application by an owner or first mortgagee of a lot in a strata scheme, make an order invalidating any resolution of, or election held by, the persons present at a meeting of the owners corporation if the Tribunal considers that the provisions of Part 10 (other than Division 6 or 7) of the *Strata Schemes Development Act 2015* have not been complied with in relation to the meeting.

(3) The Tribunal may refuse to make an order under this section only if it considers—

(a) that the failure to comply with the provisions of this Act or the regulations, or of the *Strata Schemes Development Act 2015*, did not adversely affect any person, and

(b) that compliance with the provisions would not have resulted in a failure to pass the resolution or affected the result of the election.

(4) The Tribunal may not make an order invalidating a resolution under subsection (2) if an application for an order has been made under Division 6 of Part 10 of the *Strata Schemes Development Act 2015* in relation to the same or a related matter.

(5) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

25 Order where voting rights denied or due notice of item of business not given

(1) The Tribunal may, on application by a person entitled to vote on a motion for a resolution of an owners corporation at a general meeting, order that a resolution passed at the general meeting be treated as a nullity on and from the date of the order.

(2) The Tribunal must not make the order unless the Tribunal is satisfied that the resolution would not have been passed but for the fact that the applicant for the order—

(a) was improperly denied a vote on the motion for the resolution, or

(b) was not given due notice of the item of business in relation to which the resolution was passed.

(3) An application for an order may not be made unless—

(a) an application for mediation of the dispute was made not later than 28 days after the date of the meeting at which the resolution was passed, or

(b) if an application for mediation was not made, the application for the order was made not later than 28 days after the date of the meeting at which the resolution was passed.

(4) If a resolution that is to be treated as a nullity by an order changes the by-laws and the order has been recorded in the Register under this Act, the by-laws have force and effect on and from the date the order is so recorded to the same extent as they would have had if the change had not been made.

(5) Subsection (4) is subject to the by-laws having been or being changed in accordance with this Act and to any relevant order made by a superior court.

(6) The Tribunal may not make an order under this section if an application for an order has been made under Division 6 of Part 10 of the

Strata Schemes Development Act 2015 in relation to the same or a related matter.

(7) The Tribunal may not make an order under this section invalidating a decision by an owners corporation to approve, or not to approve, the appointment of a building inspector under Part 11.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

105. In essence, the submission made by the first and second respondents is that Ms Parks had not engaged in any conduct sufficient to satisfy the Tribunal that she should be disqualified from office; the issues identified by the applicant did not involve any breach of the SSMA and the SSM Regulations (for example, the Agenda for the EGM on 15 April 2021 left off the applicant's proposed Motions because of an honest mistake of the strata manager that was corrected expeditiously by the circulation of an amended Agenda); much of the applicant's complaints were focussed on matters where there had been a proper delegation of power to the strata manager (e.g. the role of Chairperson presiding at general meetings of the owners corporation).

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

51. As discussed previously, even if Mr Kuskis sought to appear only as an "observer" without speaking or prompting the applicant to speak, there is nothing in the SSMA or SSM Regulations that gave him the right to do so. The SSMA and/or SSM Regulations did not give Mr Kuskis a right to attend the meeting as a mere observer, even if he had attended previous meetings of the owners corporation in that capacity as the partner of the Lot owner.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

46. The SSMA and the SSM Regulations do not proscribe the general procedures to be adopted by the Chairperson of a strata committee (or their delegate) when presiding over a meeting of the owners corporation.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

44. The 2020 AGM on 24 August 2020 was conducted by way of videoconference. Although the submissions of the applicant are critical of the manner in which the meeting was conducted, there is nothing in the evidence or submissions of the applicant to satisfy the Tribunal that the decision to hold the meeting electronically contravenes Clause 10 of Schedule 2 of the SSMA; Reg. 14 of the SSM Regulations; or Part 11 of the SSM Regulations.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 (08 December 2021) (G Sarginson, Senior Member)

55. Under these circumstances, it was the action of the applicant that led to her not participating and voting at the meeting without Mr Kuskis being in attendance, rather than her being precluded from doing so in a manner that contravened the SSMA or the SSM Regulations. The Tribunal also accepts the evidence of Ms Hopkins that after the applicant's connection was terminated by Ms Hopkins she did not further attempt to log into the meeting.

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 -
Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 -
Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 -

Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 -
Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 -
Linney v The Owners - Strata Plan No. 11669 [2021] NSWCATCD 123 -
Foong v Scutella [2021] NSWCATAP 225 -
Read v The Owners-Strata Plan No 2533 [2021] NSWCATAP 218 -
McGregor v The Owners - Strata Plan No 74896 [2021] NSWCATCD 1 (01 March 2021) (R C Titterton Oam, Senior Member)

> The applicants, Mr Scott McGregor and his partner Ms Bernadette Eichner (the Applicants) seek an order allowing them to keep their pet dog "Jimmy" on their lot. They say that Jimmy, who is a 12 year old miniature fox terrier, is a very quiet and well-trained dog. He weighs 4kgs, and has no history of noisy, aggressive or anti-social behaviour. The Applicants' property is in the Altro building which forms part of the City Quarter Complex in Camperdown. The Applicants say that they have observed other dogs living in the City Quarter Complex. They also say that the Altro by-laws are not consistent with the Model By-Laws set out in the Strata Schemes Management Regulation 2016 (SSM Regulation) or with community standards.

McGregor v The Owners - Strata Plan No 74896 [2021] NSWCATCD 1 (01 March 2021) (R C Titterton Oam, Senior Member)

8. On 3 February 2020, Mr McGregor gave the Owners (through the Strata Manager) a letter stating:

> My partner and I have recently purchased Apartment 710 at [address omitted] Camperdown.
>
> In accordance with Schedule 3, Item 5 of the Strata Schemes Management Regulation 2016, we are bringing our little dog with us.
>
> Jimmy is an 11 year-old miniature Fox Terrier who is very quiet, well-trained and experienced at apartment living. He is fully vaccinated, very social, non-aggressive and charms everyone he meets. Please see attached a reference for Jimmy from John Miller, Secretary of the Carnegie strata committee in Alexandria, where Jimmy has been residing on and off for the last 8 years.
>
> We are responsible owners and will most certainly ensure that he doesn't cause anyone any convenience.
>
> We're very much looking forward to being part of the Altro and wider City Quarter community.

McGregor v The Owners - Strata Plan No 74896 [2021] NSWCATCD 1 (01 March 2021) (R C Titterton Oam, Senior Member)

45. In that document, the Applicants also state that prior to purchasing their apartment:

> We were aware of the By-Law 22, which allows for cats, birds and fish to be kept as pets, and while it does not include dogs, it not does not expressly exclude them. However, we had noticed numerous 'No Dogs' signs around the complex. Our enquiries of real estate agents and dog owners alike (including some who sit on their own building strata committees) met with the same response "Well, the By Law doesn't expressly exclude dogs but it doesn't include them. Its just that they need something to fall back on if a dog becomes a problem. Just bring your dog and as long as he doesn't cause any problems you'll be fine".

We noted the By-Law was inconsistent with the model By-Laws set out in Schedule 3 of the Strata Schemes Management Regulation 2016 and sought legal advice on this. We were advised that essentially a Strata Committee could make any By-Laws it wanted and enforce them. However, it was noted that a By-Law that allows the keeping of some pets but excluding a small dog was perplexing, as it was both inconsistent with the usual By-Law model that either includes a small dog or rules out pets altogether and was inconsistent with community standard. To be honest, we have found the whole thing rather confusing! What we have come to understand though, is that Altro seems to be the only building in the City Quarter complex that takes an inflexible approach to dogs.

We are asking that they make exceptions where it is reasonable to do so and come into line with how the other buildings in the City Quarter are approaching the dog issue.

In our conversations with past and present owners at Altro, it has become apparent that until 2010, dogs were present at Altro. We understand that at that time, a new owner aggressively and vigorously sought to have them all removed.

We're seeking a ruling on this matter because we believe

- the By-Law is out of step with community standards
- it is harsh and unreasonable that we be forced to either rehome or euthanise Jimmy at this stage of his life
- it is harsh and unreasonable that we be forced to be separated from a treasured pet who brings us so much joy and good mental health
- the 'no dogs' ruling at Altro is being aggressively driven by a single person

McGregor v The Owners - Strata Plan No 74896 [2021] NSWCATCD 1 -
McGregor v The Owners - Strata Plan No 74896 [2021] NSWCATCD 1 -
Cooper v Owners - Strata Plan No 58068 [2020] NSWCA 250 (12 October 2020) (Basten and Macfarlan JJA, Fagan J)

12. It follows that by-laws may (i) confer specific functions on the owners corporation with respect to the use and enjoyment of the lots and the common property, (ii) make provision directly in relation to the use and enjoyment of the lots and the common property, but for the purpose of managing, administering or controlling the strata scheme. That reading is consistent with the terms of the model by-laws, which may be found in Sch 3 to the Strata Schemes Management Regulation 2016 (NSW). These are in a common form, of which by-law 9, “Smoke penetration”, is an example:

> (1) An owner or occupier, and any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property.
>
> (2) An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.
>
> ...

Cooper v Owners - Strata Plan No 58068 [2020] NSWCA 250 -

Walker v The Owners - Strata Plan No 1992 [2020] NSWCATAP 192 (16 September 2020) (S Westgarth, Deputy President, M Gracie, Senior Member)

> Pursuant to s 188(2) of the Strata Schemes Management Act 2015, within 21 days of the date of these reasons, the respondent is to make available to the appellant for inspection at a time and place to be agreed between the parties the levy register required by regulations 22 and 23 of the Strata Schemes Management Regulation 2016 in the custody or control of the respondent or held on behalf of the respondent by its strata manager, relating to Strata Plan 1992 for the financial years 2018-2019 and 2019-2020;

Walker v The Owners - Strata Plan No 1992 [2020] NSWCATAP 192 -
The Owners - Strata Plan No 55773 v Roden; Spiers v The Owners - Strata Plan No 77953 [2020] NSWCATAP 95 (27 May 2020) (Armstrong J, President, M Harrowell, Deputy President, L Wilson, Senior Member)

> 46. For present purposes, the following matters are relevant to a resolution of these appeals:
>
> 1. Under the SSMA and the 1996 Management Act, the original by-laws for a particular strata scheme are those which were "adopted or lodged with the strata plan" when registered: s 134(1) and (2), SSMA.
>
> 2. For strata schemes in existence before the commencement of the 1996 Management Act, the by-laws were as set out in the regulations then applicable: s 134(3), SSMA.
>
> 3. In all cases, the by-laws as applied on registration of the strata scheme can be amended as provided in the SSMA or the previous applicable legislation: see s 134, SSMA.
>
> 4. Section 138 of the SSMA provides that the regulations may prescribe model by-laws which may be adopted as the by-laws for a strata scheme. As with previous legislation, the SSMA does not mandate the adoption of such model by-laws. However, unlike the 1996 Management Act and regulations, the model by-laws prescribed under the SSMA do not include a by-law prohibiting the keeping of animals: see Strata Schemes Management Regulation 2016 (NSW) (2016 Management Regulation), Sch 3 (Model by-laws for residential strata schemes), by-law 5 (Keeping of animals), Option A and Option B.
>
> 5. By-laws can be made in relation to "control, use or enjoyment of the lots or the common property and lots of a strata scheme". However, a by-law has no force and effect to the extent it is inconsistent with the SSMA or any other Act or law: s 136, SSMA.
>
> 6. The power under s 136(1) of the SSMA to make by-laws in respect of "control, use or enjoyment of lots or the common property and lots of a strata scheme" includes a power to prohibit or restrict activities on lot property. In this regard, when considering s 58(2) of the now repealed *Strata Titles Act 1973* (NSW) (Strata Titles Act), which is in identical terms to s 136(1) of the SSMA, the Court of Appeal of the Supreme Court of New South Wales (NSW Court of Appeal) in *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd and Another* (1991) 5 BPR 11,432 (*Sydney Diagnostic Services*) at 11,434, concluded that:
>
> > Parliament must have intended bodies corporate to have power to pass by-laws regulating 'the use' of each lot in a strata plan and ... [that this power] extended to regulating

what trades, avocations and activities could and could not be conducted on each lot.

Other cases recognising by-laws may prohibit particular uses of lot property include *Casuarina* at [43], *Bapson Pty Ltd v Puyeti Pty Ltd* (unreported) NSWSC 24 May 1990, BC900245 at [8] and *Salerno v Proprietors of Strata Plan No 42724* (1997) 8 BPR 15,457 at 15,458-15,459.

7. The SSMA makes impermissible by-laws which prohibit or restrict:

    1. the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot: s 139(2);

    2. persons under 18 years of age occupying a lot (except a by-law in a retirement village or housing exclusively for aged persons): s 139(4); and

    3. the keeping of an assistance animal as referred to in the *Disability Discrimination Act 1992* (Cth): s 139(5).

However, the limitation in s 139(2) does not operate to invalidate a by-law restricting the use of lots. In *White v Betalli & 1 Or* [2006] NSWSC 537, when considering s 49(1) of the 1996 Management Act (the equivalent of s 139(2) of the SSMA) White J (as he then was) said at [54]:

> Subsection 49(1) has been construed narrowly. In one sense, a by-law which restricts the user of the lot, restricts the right of the lot owner to deal with the lot. Most by-laws, including the by-laws in schedule 1 to the *Strata Schemes Management Act*, include restrictions on the use of a lot. For example, by-law 16 in schedule 1 provides that an occupier of a lot must not keep any animal on the lot without the approval in writing of the owners corporation. This by-law restricts the right of a lot owner to grant a lease permitting the lessee to keep animals on the lot. It could not be said that it is on that account invalid. The cases show that a mere restriction on use of a lot which might limit the number of potential transferees or lessees of a lot does not amount to a restriction on dealing so as to contravene subs 49(1) (*Bapson Pty Ltd v Puyeti Pty Ltd* (1990) NSW Title Cases 60,054; *Sydney Diagnostic Services Pty Ltd v Hamlena Pty Ltd*; *Salerno v Proprietors of Strata Plan 42724* (1997) 8 BPR 15,457 at 15,458-15,459; *Regis Towers Real Estate Pty Ltd v Kin Fung* (2001) NSW Conv R 55-960 at [22], and compare *Regis Towers Real Estate Pty Ltd v CSS Holdings Pty Ltd* [2001] NSWSC 139 at [21].) It is not necessary to consider further the question of whether or when a by-law which restricts the use of a lot may be a restriction on dealing. Whatever may be the limits of subs 49(1), they do not affect the validity, as distinct from the possible operation, of by-law 20.

8. There is no provision in the SSMA that expressly makes impermissible a by-law which prohibits the keeping of animals on lot or common property. There is no other Act or law to which we have been referred that would render such a by-law of "no force and effect" because of any inconsistency of a type referred to in s 136(2) of the SSMA.

9. The SSMA provides that by-laws in force for a strata scheme coming into existence prior to commencement of the SSMA are the by-laws applicable to that strata scheme following commencement of the SSMA: s 134(2) and (3), SSMA. Such by-laws include by-laws of the type found in Option C of the 2010 Management Regulation, which prohibits the keeping of animals on a lot or common property, the terms of which we have set out above.

10. In Sch 3 (Savings, transitional and other provisions) to the SSMA, cl 4(2) provides:

Despite any other provision of this Act, a by-law in force by this Act is taken to be a valid by-law if it was a valid by-law immediately before the commencement of this clause.

The Owners - Strata Plan No 58068 v Cooper [2020] NSWCATAP 96 (27 May 2020) (Armstrong J, President, M Harrowell, Deputy President)

57. Under the SSMA:

1. there is no list of matters which could be the subject of by-laws, rather, the SSMA simply provides that by-laws can be made in relation to the management, administration, control, use or enjoyment of the lots or the common property: see s 136(1);

2. the model by-laws in respect of the keeping of animals prescribed in the Strata Schemes Management Regulation 2016 (NSW) (2016 Management Regulation) do not include an option to impose a blanket prohibition on the keeping of animals; and

3. unlike the 1996 Management Act, and its predecessor the *Strata Titles Act 1973* (NSW) (repealed), s 139(1) introduced "a limit beyond which by-laws could not be made or amended, notwithstanding they might relate to the management, administration, control, use or enjoyment of the lots or the common property (s 136) and notwithstanding they have the support of a sufficient number of all lot owners to pass a special resolution (s 141)".

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

For the purposes of section 206(7) of the Act, the following reasons are prescribed—

Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 (01 January 2020)

An owners corporation must, not later than 6 months after transferring money from, or using, the administrative fund or the capital works fund in the manner referred to in section 76 of the Act, determine the amount to be levied, as a contribution to the fund from which the transfer or use was made, to reimburse the amounts paid from the fund.

Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 (01 January 2020)

relevant strata meeting has the same meaning as in section 271A of the Act.

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

For the purposes of section 209(2) of the Act, an application to pay the whole or part of the amount secured by a building bond to the owners corporation must be made not later than 14 days before the last day on which the amount must be claimed or realised under that section.

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

a decision under section 200(2)(a) of the Act to arrange for a final inspection and report,

Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 (01 January 2020)

Schedule 1 Amendment of Strata Schemes Management Regulation 2016

Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 (01 January 2020)

> An instrument or document may, as an alternative to being affixed with the seal of an owners corporation in the presence of the persons referred to in section 273 of the Act, be signed by those persons (each of whom is, in that capacity, a ***signatory***) in the presence of those persons (each of whom is, in that capacity, a ***witness***).

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

> The object of this Regulation is to amend the *Strata Schemes Management Regulation 2016*, in relation to the scheme for rectifying building defects in new strata schemes under Part 11 of the *Strata Schemes*

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

> Schedule 1 Amendment of Strata Schemes Management Regulation 2016

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

> For the purposes of section 214(1)(a3) of the Act, the Secretary may impose a condition on the exercise of building inspector functions by a building inspector.

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 (01 January 2020)

> Schedule 1 Amendment of Strata Schemes Management Regulation 2016

Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 (01 January 2020)

> Schedule 1 Amendment of Strata Schemes Management Regulation 2016

Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
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Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 -
Strata Schemes Management Amendment (COVID-19) Regulation 2020 (NSW) [2020] NSWLegSI 243 -
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020 (NSW) [2020] NSWLegSI 323 -

Ho v Lau [2019] NSWSC 1609 -
Owners – Strata Plan No 58068 v/ats Cooper [2019] NSWCATCD 62 (21 November 2019) (G K Burton SC, Senior Member)

45. The model by-laws in Sch 3 to the *Strata Schemes Management Regulation 2016* (NSW) (the 2016 Regulation) were empowered to be adopted as by-laws for a strata scheme under cl 37 of the 2016 Regulation and SSMA s 138.

Owners – Strata Plan No 58068 v/ats Cooper [2019] NSWCATCD 62 (21 November 2019) (G K Burton SC, Senior Member)

Strata management – by-law excluding pets - refusal to amend or replace with new by-law - SSMA ss 134, 135, 136, 138, 139, 146, 147, 148, 149, 150, 153, 156, 157, 158, 159, 232; 1996 Regulation cll 35, 37, Sch 2, Sch 3.

Shih v The Owners - Strata Plan No 87879 [2019] NSWCATAP 263 (31 October 2019) (The Hon F Marks Principal Member, K Ransome Senior Member)

56. By Regulation 34(5) of the Strata Schemes Management Regulation 2016 the Tribunal is given jurisdiction under section 125 to make orders concerning the payment of the cost of disposing of abandoned motor vehicles:

> **125 Disposal of abandoned goods on common property**
>
> The regulations may make provision for or with respect to the following matters:
>
> (a) conferring power on an owners corporation to store or dispose of, or authorise the disposal of, goods left on common property,
>
> (b) notices to owners and other persons as to disposal or proposed disposal of goods by an owners corporation,
>
> (c) the passing of title to any goods on disposal by an owners corporation,
>
> (d) the payment of the proceeds of disposal of goods by an owners corporation,
>
> (e) conferring jurisdiction on the Tribunal to make directions and orders relating to the disposal of goods, including orders for the payment of compensation and as to the payment of the costs of disposing of goods.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

70. Under Schedule 2, Clause 17, of the former SSM Regulation, Option A allowed keeping of animals, subject to approval by the owners corporation. The approval could not have been unreasonably withheld. Option B allowed an owner or occupier to keep a cat, a small dog, a small caged bird, or fish kept in a secure aquarium, on the lot without the prior written approval of the owners corporation. Option C allowed, subject to s 49(4) of the former SSM Act wherein a by-law could not the prevent keeping of a guide dog, to have a blanket ban on the keeping of any animal on the lot or the common property.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

68. The model by-laws introduced in the 2016 SSM Regulation, Schedule 3, Clause 5, permit in Option A an owner or occupier of a lot to keep an animal with certain conditions such as

giving written notice to the owners corporation that an animal is being kept on the lot. In Option B, an owner or an occupier of a lot may keep an animal on the lot or traverse the common property with the written approval of the owners corporation (see paragraph 21 above). The owners corporation must not unreasonably withhold its approval of the keeping of an animal. The owners corporation must give an owner or an occupier written reasons for any refusal to grant approval.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

36. The applicant submitted that the model by-law introduced in the 2016 SSM Regulation no longer includes an option for a blanket ban of animals. The model by-law allows pets after notification to the body corporate, or with consent of the body corporate.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

71. The above summary of the legislative provisions illustrates that, under the former SSM Regulation, which was in force from 1 September 2010 until the change in the legislation on 30 November 2016 and the passing of the 2016 SSM Regulation, it was permissible for a strata scheme to ban keeping animals on the lot or the common property. The new by-laws did not apply to the strata scheme unless they were adopted by the owners corporation.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

20. The applicant submitted that Schedule 3, Clause 5 of the *Strata Schemes Management Regulation 2016* ("SSM Regulation") contains model by-laws in respect of keeping of animals.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

71. The above summary of the legislative provisions illustrates that, under the former SSM Regulation, which was in force from 1 September 2010 until the change in the legislation on 30 November 2016 and the passing of the 2016 SSM Regulation, it was permissible for a strata scheme to ban keeping animals on the lot or the common property. The new by-laws did not apply to the strata scheme unless they were adopted by the owners corporation.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

20. The applicant submitted that Schedule 3, Clause 5 of the *Strata Schemes Management Regulation 2016* ("SSM Regulation") contains model by-laws in respect of keeping of animals.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

37. Option C, in Schedule 2 of the former SSM Regulation, which permitted a blanket prohibition of animals as pets, was removed in Schedule 3 of the 2016 SSM Regulation.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

45. The respondent stated that the strata scheme was registered prior to 30 November 2016 and it was therefore not compelled to adopt either Option A or Option B in Schedule 3 of the SSM Regulation (the model by-laws), having undertaken the mandatory review of by-laws for strata schemes registered before 30 November 2016.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

> The applicant stated that the 2016 Regulation no longer includes the option for a universal blanket exclusion of animals which existed in the former SSM Regulation.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 (18 September 2019) (N Vrabac, Senior Member)

> 37. Option C, in Schedule 2 of the former SSM Regulation, which permitted a blanket prohibition of animals as pets, was removed in Schedule 3 of the 2016 SSM Regulation.

Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 -
Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 -
Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 -
Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 -
Roden v The Owners-Strata Plan No 55773 [2019] NSWCATCD 61 -
Pollack v The Owners - Strata Plan No. 2834; The Owners - Strata Plan No. 2834 v Pollack [2019] NSWCATAP 227 (16 September 2019) (S Westgarth, Deputy President, M Anderson, Senior Member)

> 60. The submissions in support of the above Grounds of Appeal put forward by the Owners Corporation may be summarised as follows:
>
> 1. The Tribunal erred in not deciding that the lot 44 owners continued occupation of the roof area to the exclusion to the Owners Corporation and other owners and occupiers after 30 June 2018 did not infringe the proprietary rights of the Owners Corporation in connection with that area, or result in a breach of their statutory duty under s 153 of the SSM Act or a contravention of their covenants in by-laws 3 and 28. The only reason given by the Tribunal on this issue was that the lot 44 owners had continued to have exclusive use of the roof area since 30 June 2018 arising from the interim orders;
>
> 2. The Tribunal proceeded on the basis that the lot 44 owners continued occupation of the roof area "arising from" the interim orders was something that was mutually exclusive to, and could not overlap with, any infringement of the proprietary rights of the Owners Corporation or any breach of the statutory duty of the lot 44 owners in s 153 of the SSM Act or their covenants in by-laws 3 and 28. There was no cogent reason for the Tribunal to adopt that approach. Once the Tribunal rejected the Owners Corporation's contention that an infringement of its proprietary rights and breach of the legislation and by-laws, the Tribunal concluded that considerations as to compensation payable by the lot 44 owners for breach of duty or mesne profits did not arise. The Tribunal should not have rejected that contention and neither should the Tribunal have dismissed the claim for payment of an occupation fee;
>
> 3. Section 153 of the SSM Act imposes a statutory duty on an owner not to use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of the common property by the owner or occupier of any lot. By-law 3 in Sch 2 to the 2016 Regulation contains terms which have the effect that an owner or occupier must not obstruct lawful use of common property by any person. It follows that by continuing to use the rooftop to the exclusion of the Owners Corporation and the owners and occupiers of other lots, the lot 44 owners infringed the rights of the other parties under the general law, contravened s 153 and breached by-laws 3 and 28;

4. The Tribunal has a broad power to make orders to resolve disputes – see ss 232, 241 and 249 of the SSM Act. In *Crawley v Cochrane* the Court, dealing with the 1996 Act and considering the sections which were the predecessor to s 232, stated that wide powers were given to the Adjudicator (in that context the decision maker) so as to permit a resolution of disputes without the need to apply to a Court;

5. In the circumstances, the entitlement of the Owners Corporation was to an occupation fee in the form of mesne profits. They are calculated on the open market value of the premise and the measure of mesne profits is a reasonable sum in the nature of rent (see *Biviano v Natoli* (1998) 43 NSWLR 695). The Owners Corporation was entitled to an occupation fee in the form of mesne profits payable by the penthouse owners at the rate of $3,970.00 per month having regard to the evidence of Mr Keen; and

6. The Owners Corporation submits that there was no reason why the Tribunal could not make an order requiring the lot 44 owners to pay the Owners Corporation an amount of money. In *The Owners Strata Plan No 30621 v Shum* the Appeal Panel held that the Tribunal has jurisdiction under s 232 of the SSM Act to make an order for payment of compensation and that there is no monetary limit to the jurisdiction of the Tribunal in that respect. *Shum* involved a claim by a lot owner against an Owners Corporation for payment of compensation for breach of the statutory duty to repair common property. However, the key finding in *Shum* is that the power given to the Tribunal in s 232(1) to "settle a dispute or complaint" should be construed in a way that enables the determination of a claim for damages by the Tribunal, particularly because s 3(b) indicates that the object of the SSM Act is to "provide for resolution of disputes arising from strata schemes": see *The Owners Strata Plan No 30621 v Shum* at [64]. The Appeal Panel's conclusion in that case makes it clear that the Tribunal has power to make a money order for the award of damages not confined to only a claim for damages made by a lot owner against an Owners Corporation for breach of statutory duty.

Pollack v The Owners - Strata Plan No. 2834; The Owners - Strata Plan No. 2834 v Pollack [2019] NSWCATAP 227 -
Application by the Owners – Strata Plan No 61299 [2019] NSWLEC 111 (08 August 2019) (Pain J)

11. Owners corporation operation, meeting procedures and requirements for service of documents are set out in the SSM Act and Strata Schemes Management Regulation 2016 (SSM Regulation).

Fair Trading Legislation Amendment (Miscellaneous) Act 2018 (NSW) [2018] NSWLegAct 79 -
Endre v The Owners - Strata Plan No. 17771 [2019] NSWCATAP 93 (17 April 2019) (M Harrowell, Principal Member, J McAteer, Senior Member)

> The work to be carried out by the respondent (owners corporation) is to include the installation of window safety devices for each skylight as required by s 118 of the *Strata Schemes Management Act 2015* and in accordance with Reg 30 of the *Strata Schemes Management Regulation 2016* (NSW).

Endre v The Owners - Strata Plan No. 17771 [2019] NSWCATAP 93 (17 April 2019) (M Harrowell, Principal Member, J McAteer, Senior Member)

> (c) The work to be carried out by the respondent (owners corporation) is to include the installation of window safety devices for each skylight as required by s 118 of the Strata Schemes Management Act, 2015 and in accordance with Reg 30 of the Strata Schemes Management Regulation, 2016.

Endre v The Owners - Strata Plan No. 17771 [2019] NSWCATAP 93 -

Anderson v The Owners - Strata Plan No. 61034 [2019] NSWCATAP 61 (19 March 2019) (Dr R. Dubler SC, Senior Member, J. McAteer, Senior Member)

35. Next, the Appellants complained about the "pre-meeting voting" at the general meeting of 23 October 2017. It was alleged that this was in breach of the Strata Schemes Management Regulation 2016, Regulation 14 and Resolution 5 of the EGM of 27 April 2017. To counter any such allegations, the Owners Corporation arranged for further meetings to be held.

Longhurst v Randwick City Council [2019] NSWLEC 1011 -
Longhurst v Randwick City Council [2019] NSWLEC 1011 -
Ashbee v The Owners - Strata Plan No 11761 [2018] NSWCATCD 80 (04 December 2018) (P Boyce, Senior Member)

1. This is an application filed with the Tribunal on 22 February 2018 by a lot owner in a strata scheme for an order pursuant to section 126 and 127 of the *Strata Schemes Management Act 2015 (NSW)* ("SSMA") for orders to consent to the applicant's proposed air-conditioning installation, unreasonably refused by the respondent and a declaration that the proposed air-conditioning installation is a "minor renovation" under s 110 of the SSMA and reg 28(d) of the *Strata Schemes Management Regulation 2016 (NSW) (SSMR)*.

Ashbee v The Owners - Strata Plan No 11761 [2018] NSWCATCD 80 -
Hoare and Ors v The Owners-Strata Plan No 73905 [2018] NSWCATCD 45 (28 August 2018) (G. J. Sarginson, Senior Member)

III. For the Tribunal to make orders under s 232 and s 241 of the SSMA 2015, the applicant must establish that:

1. The "complaint or dispute falls within s 232 (1) (a)-(f) of the SSMA 2015; and

2. The Tribunal should exercise its discretion to make an identified type of order that will resolve the "complaint or dispute". In this regard, the Tribunal must be satisfied that it should exercise its discretion to make an injunctive order that will rectify the identified breach (or restrain the breach from continuing) and will achieve the outcome of a party complying with its obligations under the SSMA 2015 (or, if relevant, the *Strata Schemes Management Regulation 2016*). Further, the order must be sufficiently clear that the party knows "exactly in fact" what it is required to do (*Redland Bricks Ltd v Morris* [1970] AC 652 at 666; *Queensland v Australian Telecommunications Commission* [1985] HCA 25; (1985) 59 ALR 243).

Bate v Owners SP 60549 [2018] NSWCATCD 36 (03 August 2018) (G.J Sarginson, Senior Member)

73. The Tribunal is not satisfied in Mr and Ms Birdsall's proceedings that an order should be made at this stage that the awnings be removed. Rather, the Tribunal is satisfied that the following course of action is appropriate to resolve the dispute regarding the awnings:

1. The owners corporation be directed to convene a general meeting within 6 weeks of the date of this decision to consider Motions that (i) the owners corporation consent to the installation of the awnings on Lot 3; and (ii) an exclusive use by-law be passed in respect of the awnings.

2. Ms Bate is to provide to the owners corporation, in accordance with the relevant provisions of the SSMA 2015 and the Strata Schemes Management Regulation 2016 a copy of a proposed exclusive use by-law prior to the general meeting.

3. If the Motions are not passed: (i) Ms Bate may file fresh proceedings in the Tribunal seeking orders under s 149 of the SSMA 2015; and (ii) the owners corporation, or any "interested person" within the meaning of the SSMA 2015 may file fresh proceedings in the Tribunal seeking an order that the owner of Lot 3 remove the awnings and restore common property.

Bate v Owners SP 60549 [2018] NSWCATCD 36 (03 August 2018) (G.J Sarginson, Senior Member)

(5) The owner of Lot 3 is to provide to the owners corporation, in accordance with the relevant provisions of the Strata Schemes Management Act 2015 and the Strata Schemes Management Regulation 2016 a copy of a proposed exclusive use by-law prior to the general meeting.

Yardy v Owners Corporation SP 57237 [2018] NSWCATCD 19 -
Electronic Transactions Legislation Amendment (Government Transactions) Act 2017 (NSW) [2017] NSWLegAct 25 (27 June 2017)

[2] Amendment of Strata Schemes Management Regulation 2016

Omit "1 July 2017" from clause 2 (2). Insert instead "1 January 2018".