

GREENWAY CHAMBERS

Recent Developments in Strata and Construction

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Topics

1. *Strata Schemes Management Act 2015 (NSW)*: ss. 87, 139, 149, 150.
    1. Jurisdiction? Owners Corporation SP6534 v Elkhouri; Owners Corporation SP6534 v Perpetual Corporate Trust Ltd [2024] NSWCA 279 at [63]-[99].
    2. Characterisation of by-law as legislative or contractual? Elkhouri at [118], Colman v The Owners – Strata Plan 61131 [2025] NSWSC 63 at [56].
    3. Unjustness? Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250; (2020) 103 NSWLR 160; Kaye v The Owners – Strata Plan No 4350 [2022] NSWSC 1386.
    4. Reasonableness of levies? Cleggatt v OC SP 35541 [2013] NSWTTT 359 at [31]; Elkhouri (NSWSC) at [231]-[241].
2. Building and Construction Industry Security of Payment Act 1999 (NSW): s. 15(4)(b).
    1. Hynash Constructions Pty Ltd v BRP Industries Pty Ltd [2025] NSWCA 14.
    2. Kennedy Civil Contracting Pty Ltd (subject to deed of company arrangement) v Linx Constructions Pty Ltd [2024] NSWCA 243.
3. Design and Building Practitioners Act 2020 (NSW).
    1. Pleading requirements? The Owners - Strata Plan 82089 v Omaya Holdings Pty Ltd (No 3) [2024] NSWSC 1511.
    2. Supervisors? The Owners – Strata Plan 80867 v Da Silva [2024] NSWDC 263.



s. 139

139 Restrictions on by-laws

(1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.

Note. Any such by-law may be invalidated by the Tribunal (see section 150).

(2) **By-law cannot prevent dealing relating to lot** No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.

(3) **By-law resulting from order cannot be changed** If an order made by the Tribunal under this Act has effect as if its terms were a by-law, that by-law is not capable of being amended or repealed except by a by-law made in accordance with a unanimous resolution of the owners corporation and, in the case of a leasehold strata scheme, with the consent of the lessor of the scheme.

(4) **By-law cannot restrict children** A by-law for a residential strata scheme has no force or effect to the extent to which it purports to prohibit or restrict persons under 18 years of age occupying a lot. This subsection does not apply to a by-law for a strata scheme for a retirement village or housing exclusively for aged persons.

(5), (6) (Repealed)

(7) **Community management and precinct management statements prevail over by-laws** A community management statement or a precinct management statement prevails to the extent of any inconsistency with a by-law for a strata scheme that is also part of a community scheme or precinct scheme.



s. 149

149 Order with respect to common property rights by-laws

(1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds—

(a) on application made by an owner of a lot in a strata scheme, that the owners corporation has unreasonably refused to make a common property rights by-law, or

(b) on application made by an owner or owners corporation, that an owner of a lot, or the lessor of a leasehold strata scheme, has unreasonably refused to consent to the terms of a proposed common property rights by-law, or to the proposed amendment or repeal of a common property rights by-law, or

(c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.

(2) In considering whether to make an order, the Tribunal must have regard to—

(a) the interests of all owners in the use and enjoyment of their lots and common property, and

(b) the rights and reasonable expectations of any owner deriving or anticipating a benefit under a common property rights by-law.

(3) The Tribunal must not determine an application by an owner on the ground that the owners corporation has unreasonably refused to make a common property rights by-law by an order prescribing the making of a by-law in terms to which the applicant or, in the case of a leasehold strata scheme, the lessor of the scheme is not prepared to consent.



s. 150

150 Order invalidating by-law

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

(2) The order, when recorded under section 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).

(3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.



s. 87

87 Orders varying contributions or payment methods

(1) The Tribunal may, on application, make either or both of the following orders if the Tribunal considers that any amount levied or proposed to be levied by way of contributions is inadequate or excessive or that the manner of payment of contributions is unreasonable—

(a) an order for payment of contributions of a different amount,

(b) an order for payment of contributions in a different manner.

(2) An application for an order may be made by the lessor of a leasehold strata scheme, an owners corporation, an owner or a mortgagee in possession.



s. 13

13 Payment claims

(1) A person referred to in section 8 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment….

(2) A payment claim…

(b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount)

…

(5) Except as otherwise provided for in the construction contract, a claimant may only serve one payment claim in any particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in that month.

(6) Subsection (5) does not prevent the claimant from—

(a) serving a single payment claim in respect of more than one progress payment, or

(b) including in a payment claim an amount that has been the subject of a previous claim, or

(c) serving a payment claim in a particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in a previous named month.



s. 14

14 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

...

(4) If—

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant—(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served.

whichever time expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.



s. 15

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

…

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.



s. 7

7 Building practitioners

(1) In this Act, ***building practitioner*** means—

(a) a person who agrees under a contract or other arrangement to do building work, or

(b) if more than one person agrees to do building work, a person who is the principal contractor for the work.

(2) In this Act, ***principal contractor*** means a person who agrees to do building work under a contract or arrangement (the ***head contract***) and for whom work is to be carried out under one or more other contracts or arrangements as part of or incidental to the work carried out under the head contract.

(3) In this Act, a ***building practitioner is taken to do building work*** if the practitioner—

(a) agrees to do building work under a contract or other arrangement, or

(b) is the principal contractor for the work.

...



s. 36

36 Definitions

(1) In this Part—…

construction work means any of the following—

(a) building work,

(b) the preparation of regulated designs and other designs for building work,

(c) the manufacture or supply of a building product used for building work,

(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c)….



s. 37

37 Extension of duty of care

(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—

(a) in or related to a building for which the work is done, and

(b) arising from the construction work.

(2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.

(3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.

(4) The duty of care is owed to an owner whether or not the construction work was carried out—

(a) under a contract or other arrangement entered into with the owner or another person, or

(b) otherwise than under a contract or arrangement.





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Questions?

