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# ARE WE ON THE BRINK? CAN NCAT RESOLVE STRATA DISPUTES?

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## ARE WE ON THE BRINK? CAN NCAT RESOLVE STRATA DISPUTES?

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What would you think if you were told that NCAT could not order an owners corporation to carry out repairs to common property or order a lot owner or tenant to comply with a by-law? No doubt you would think that could not be correct. However, recent decisions by the Appeal Panel of NCAT have cast doubt on NCAT's power to resolve most types of strata disputes. So where does that leave us?

### **Introduction**

In January 2020, the Appeal Panel of NCAT decided that NCAT did not have power to award compensation to lot owners in claims made against owners corporations to recover losses owners sustain as a result of the failure by an owners corporation to repair common property. That decision was thought to put an end to the controversy as to whether NCAT could award compensation in claims of that type. However, in that decision the Appeal Panel suggested that NCAT's powers to make orders to resolve strata disputes are quite limited. Indeed, the Appeal Panel suggested that NCAT could only make an order to resolve a strata dispute where the strata legislation gave it a specific power to do so and that the general order making power in that legislation (which NCAT often relies on) does not allow NCAT to make orders to resolve strata disputes; see *The Owners – Strata Plan No. 74835 -v- Pullicin*; *The Owners – Strata Plan No. 80412 -v- Vickery* [2020 NSW CATAP5]. This last aspect of the Appeal Panel's decision was overlooked by most until now.

### **East on Byron Case**

On 7 September 2020, the Appeal Panel of NCAT published its decision in *The Owners – Strata Plan No. 76830 -v- Byron Moon Pty Ltd* [2020] NSWCATAP 186. This case concerned the East on Byron Resort in Byron Bay, NSW. The resorts contains 30 lots and common property. All but three of the lots are residential lots. Lots 1-22, which are residential lots, are supplied with hot water from three common property hot water tanks. The hot water tanks are connected to the common property electricity supply. Since 2006 all of the costs of the electricity used to heat the water in the hot water tanks was paid by the owners corporation through levies it raised and which were paid by all of the owners including the owners of the lots whose hot water was not supplied from the hot water tanks.

The owners of two of the commercial lots did not want to contribute to the cost of the electricity that was used to heat the water in the hot water tanks. In June 2019, the commercial owners applied to NCAT for orders to (among other things) require the owners corporation to repay so much of their levies to the administrative fund that were attributed to the cost of the electricity for the heating of the three hot water tanks. They were successful and NCAT ordered the owners corporation to reimburse the commercial owners for that proportion of their levies.

The owners corporation appealed against NCAT's decision. The appeal was successful. The Appeal Panel held that there were only two possible sections in the *Strata Schemes Management Act 2015* (**Strata Act**) which could have given NCAT power to make the reimbursement order that it did but neither of those sections conferred power on NCAT to do so.

#### **Power to Reduce Levies Payable by One Owner**

Section 87 of the Strata Act allows NCAT to reduce the amount of levies that have been raised by an owners corporation if it considers that the amount levied is excessive. The commercial owners argued that their proportion of the levies was excessive because they had to contribute to the cost of heating the hot water in the three hot water tanks which did not supply hot water to their commercial lots. The Appeal Panel rejected that argument. In doing so the Appeal Panel concluded that section 87 refers to the aggregate amount of levies raised by the owners corporation and therefore does not permit any differential treatment of any individual owner by reference to the amount of those levies. This meant that section 87 did not allow NCAT to reduce the levies payable by one owner but not all owners.

#### **Narrowing NCAT's Powers**

The commercial owners also relied on the general order making power given to NCAT under section 232 of the Strata Act. This section allows NCAT to make an order to settle a complaint or dispute about (among other things) the operation, administration or management of a strata scheme or the exercise of functions conferred on an owners corporation under the Strata Act or by-laws. The commercial owners argued that their complaint related to the functions of the owners corporation to raise levies to meet expenditure. The Appeal Panel agreed. However, the Panel cited the following passage from the decision in *Pullicin* to conclude that section 232 could not be relied on as an independent source of power for NCAT to make orders:

While it is not necessary for us to determine comprehensively the scope of the order making power in section 232, our view is that the Tribunal is limited to making orders which it otherwise has power to make under specific or general order making powers in the 2015 Management Act or the NCAT Act. The word "settle", like the word "resolve" or "resolution" does not confer order making powers.

For these reasons, the Appeal Panel concluded that in order for NCAT to have power to make an order under section 232 of the Strata Act the person seeking the order must identify another provision in the Strata Act which entitles NCAT to make an order of the kind contemplated. The Appeal Panel concluded that NCAT's order which required the owners corporation to pay money to the commercial owners to reimburse them for levies which they had paid towards the cost of the electricity to heat the water in the hot water tanks which they had not consumed was not of a kind contemplated by any other power



created by the Strata Act. For that reason, the Appeal Panel overturned NCAT's order for reimbursement.

### **The Wash Up**

Where does this leave us? If the decision in *Pullicin* is applied by NCAT (as it is in the East on Byron case) then it means that NCAT does not have power to make orders to resolve most types of strata disputes. For example, it means that NCAT cannot order an owners corporation to carry out repairs to common property or order an owner or tenant to comply with a by-law. That would be a surprising and unfortunate outcome. But there is some light at the end of the tunnel. The decision of the Appeal Panel in *Pullicin* has been appealed to the NSW Court of Appeal. The appeal was heard by the Court in June 2020 and it is expected that the Court will hand down its decision later this year. The Court's decision will have an important bearing not just on NCAT's power to make orders for payment of compensation but also the scope of its power to make orders to resolve most types of strata disputes. Until then, the ability of NCAT to resolve many strata disputes is unclear.

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### **About JS Mueller & Co Lawyers**

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collection.

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