

NCAT's Unlimited Jurisdiction - Work Orders

The Owners – Strata Plan No 93227 v In Style Developments Pty Ltd [2023] NSWCATCD

The recent decision in *The Owners – Strata Plan No 93227 v In Style Developments Pty Ltd* [2023] NSWCATCD provides insight in relation to the interplay of works orders, money orders and the transfer of proceedings to a Court.

Under section 48O of the Home Building Act 1989 (**HB Act**), the Tribunal can make one or more of the following:

(a) an order that one party to the proceedings pay money to another party or to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,

(b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,

(c) an order that a party to the proceedings--

(i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of any agreement, or

(ii) do or perform, or refrain from doing or performing, any specified act, matter or thing.

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The applicant (**OC**) in this matter was seeking a work order rather than a money order.

The respondent in this matter (**In Style**) made an application for the transfer of proceedings to a Court having regard to the value of the rectification works exceeding \$500,000, given that section 48K of the HB Act states:

“(1) The Tribunal has jurisdiction to hear and determine any building claim brought before it in accordance with this Part in which the amount claimed does not exceed \$500,000 (or any other higher or lower figure prescribed by the regulations)..”

The OC opposed the transfer and submitted that if a work order was made then no amount was being awarded, and therefore there was no issue with the section 48K(1).

The Tribunal, not being aware of any decisions that specifically dealt with whether or not NCAT had jurisdiction under the HB Act to make a work order exceeding the total value of \$500,000, refused the transfer application and gave reasons summarised as follows:

1. Section 48K(1) of the HB Act uses the phrase “the amount claimed”, it does not use the phrase “the amount claimed or in dispute”; nor does it use the phrase “the value of the orders sought”. The plain and logical meaning of “the amount claimed” is that there must be a claim for damages for there to be an “amount claimed”; rather than seeking that a builder or developer perform work to rectify defects.

2. While the Tribunal has the discretion under s 48O to award damages or a work order, it would be entirely inappropriate other than in exceptional circumstances to make an award of damages for the cost of rectifying defective work when an applicant has explicitly stated that it is not seeking such an order.
3. There is no basis to fetter or restrict the Tribunal's power to make work orders under s 48O of the HB Act. If there were, Parliament would have said so in the words of the statute.
4. Interpreting the s 48K (1) of the HB Act as allowing the Tribunal to have jurisdiction to make remedial work orders under s 48O of the HB Act to any value is not inconsistent with any other provision of the HB Act; nor does it lead to irrational or absurd results; nor inconsistencies with other legislation such as orders to repair and maintain under sections 106; 232 and 241 of the Strata Schemes Management Act 2015 (NSW), which can be made irrespective of the cost or value of the repairs.
5. The reference to "the amount claimed" in s 48K (1) simply reflects that if there is a claim for damages, the Tribunal cannot order an amount be paid in excess of \$500,000 **and there is no basis for extrapolating that onto a separate power of the Tribunal to make a work order** in a manner that would restrict the jurisdiction of the Tribunal unless there are words in the statute imposing such a restriction.
6. The renewal provision powers under Sch 4. Cl. 8 of the NCAT Act only arise if a work order has been made and has not been complied with within 12 months of the date that compliance was required pursuant to the order. If an applicant then renews proceedings in the Tribunal and makes a "claim" for an "amount" (i.e. damage for the cost of engaging another builder to perform work) then the jurisdiction restriction of \$500,000 operates by reason of s 48K (1) of the HB Act. That, however, is an entirely separate issue to the power of the Tribunal to make a work order in the original proceedings, and principles of statutory interpretation do not permit the issues to be conflated when interpreting s 48K (1) of the HB Act in the original proceedings.

Essentially, this decision cements the fact that the Tribunal can make a work order of unlimited value, irrespective of the value of the work to be performed.

So, should a matter be transferred to a Court if the value of the works is revealed to be over \$500,000?

There are many reasons for and against transferring a matter to a Court and each case will depend on its own facts and circumstances. Some matters to be considered are set out below.

1. Implications on Home Owners Warranty Insurance.
2. The prospects of a builder complying with a work order.
3. The extent to which the value of works exceeds \$500,000.
4. The likelihood of a builder completing a large amount of the works, such that if a non-compliance occurs at later stage, whether the value of the remaining works might fall below \$500,000.
5. The potential for the matter to be transferred to a Court during renewal proceedings.
6. Whether the matter would be transferred to the Supreme Court or the District Court.
7. Delays it will cause the matter.

Ultimately, it will depend on the circumstances of each case and Bannermans Lawyers have considerable experience providing recommendations and in assisting Owners Corporations make an informed decision.

For legal advice, please contact one of our experienced legal practitioners.

Prepared by Bannermans Lawyers
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