

# Extensions of Time & Renewal of NCAT Proceedings: Non – Compliance with Orders

## Work Orders for Defects/Incomplete Works

In NSW, residential homeowners can make a claim in the New South Wales Civil and Administrative Tribunal (**Tribunal**) seeking orders regarding any home building dispute/matter.

The Tribunal then has the power to make decisions against any relevant builder, developer, registered building practitioner and/or registered designer pursuant to the:

- Home Building Act 1989 (NSW) ('**HBA**'); and
- Design and Building Practitioners Act 2020 ('**D&BPA**');

for defective and/or incomplete building works.

The Orders which the Tribunal can make include the following:

- Orders for parties to rectify the defective and/or incomplete building works (often referred to as a '**Work Order**'); and
- Orders for parties to provide monetary compensation to the applicant, to allow the applicant to engage a separate builder/contractor to rectify the defective and/or incomplete building works (often referred to as a '**Money Order**')

The Tribunal preferences Work Orders when making decisions in favour of an applicant, as the Tribunal must pay heed to section 48MA of the **HBA** which states:

### **48MA Rectification of Defective Work is Preferred Outcome in Proceedings**

*A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the "**responsible party**") is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.*

An Applicant in NCAT Proceedings may object to the making of a Work Order if it can demonstrate that the quality of work and/or behaviour of the builder was such that the builder should not reasonably be given an opportunity to rectify its own defects.

## **What Happens if a Builder (or Non-compliant Party) does not Comply with the Tribunal's Order?**

If a Work Order is made but a party fails to comply with the Tribunal's Orders by either not completing the remedial work in a good and workmanlike manner or failing to complete the remedial work by the ordered date, the applicant is then eligible to renew the proceedings in accordance with Section 8 of Schedule 4 of the *Civil and Administrative Tribunal Act 2013 (CAT Act)*.

Section 8(2) of Schedule 4 of the Civil and Administrative Tribunal Act 2013 (**CAT Act**) states:

### **8 Renewal of proceedings in respect of certain Division decisions**

*2) If an order has not been complied with within the period specified by the Tribunal, the person in whose favour the order was made may renew the proceedings to which the order relates by lodging a notice with the Tribunal, within 12 months after the end of the period, stating that the order has not been complied with.*

To renew proceedings in the Tribunal, a party must apply within **12 months of the end of the time set out in the original NCAT Order**. If no time was specified, the renewal application should be lodged within **12 months** after the work was to be completed as previously agreed.

### **What Orders Can't be made in Renewal Proceedings**

Section 8(4) of Schedule 4 of the CAT Act states that:

- (4) When proceedings have been renewed in accordance with this clause, the Tribunal--*
- (a) may make **any other appropriate order** under this Act or enabling legislation as it could have made when the matter was originally determined, or*
  - (b) may refuse to make such an order.*

The NCAT Appeal Panel has now held that the wording “*any other appropriate order*” means that the Tribunal in Renewal Proceedings cannot simply make the same or an extension of the time to the original order as this would merely be an extension of the original order and not another type of order.

Therefore in Renewal Proceedings a party needs to seek either:

- a. a Money Order claiming the cost of the remedial work that was previously ordered but not undertaken; or
- b. some other order not substantially similar to the original Work Order.

### **Possible Alternative - Extensions of Time**

Pursuant to section 41 of the *CAT Act*,

- 1) *The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.*
- 2) *Such an application may be made even though the relevant period of time has expired [emphasis added]*



T: (02) 9929 0226      M: 0403 738 996      ABN: 61 649 876 437  
E: dbannerman@bannermans.com.au      W: www.bannermans.com.au  
P: PO Box 514      NORTH SYDNEY NSW 2059      AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

In layman terms, it is possible the Tribunal or any person may seek to make any application to the Tribunal, seeking an extension of an Order of the Tribunal, in effect to extend the period of time to comply with the Order.

An interesting aspect of the provision are the words, “under any legislation in respect of which the Tribunal has jurisdiction [...] *despite anything to the contrary under that legislation*”, which seem to give the Tribunal wide power to extend time.

The Tribunal is given general jurisdiction over a matter, including jurisdiction to make an interlocutory decision to extend the period of time for the doing of anything under say, the Home Building Act 1989 (NSW) (being “any legislation in respect of which the Tribunal has jurisdiction”) despite anything to the contrary under that legislation. That is, s 41 is expressed as overriding any provision to the contrary in the legislation which confers general jurisdiction on the Tribunal, which essentially means that “*so far as the subject matter of s 41 is concerned, s 41 is to be treated as the dominant provision and any limitation in the legislation which conferred general jurisdiction is to be treated as the subordinate provision*”: *Hua Nan Trading Pty Ltd v The Owners Strata Plan No 32396* [2023] NSWCATAP 66 (6 March 2023), at [96].

Again, this ensures that the Tribunal has wide jurisdiction to extend time in various circumstances.

In passing, it should also be noted that the issue of the extension of time may be relevant to two factors in the context of the s 41. First an extension of time in relation to Work Orders i.e. extending the time allotted to the Builder say, to perform the rectification; and second an extension of time as related to the renewal application, for a Money Order for example.

### **Extension of Time – Time Expiration period – Case Law**

In 2021, the Administrative and Equal Opportunity Division (**NSWCATAD**) of the Tribunal in *EJF v Commissioner of Victims Rights* [2021] NSWCATAD 168, at [23], considered when an application for an extension of time is made, ‘*even though the relevant period of time has expired*’.

*“[T]he Tribunal is not required to determine whether an out of time application has been supported by a reasonable explanation for the delay in making the application. Section 41 of the NCAT Act does not import the same language as the former s57. However the authorities indicate that there must be some explanation for the delay when the Tribunal is called upon to exercise its discretion.”*

### **Governing Principles surrounding Extension of Time Grant**

The principles in relation to any kind of amendment are generally well known and have been ventilated in various cases before the Tribunal.

The 2019 NSWCATD decision of *Giammarco and Giammarco v Chief Commissioner of State Revenue* [2019] NSWCATAD 77, further considered the principles regarding an extension of time pursuant to section 41 of the CAT Act, referring approvingly to *Daoud v Chief Commissioner of State Revenue* [2013] NSWCATAD 53 in which it was held:

*“Such an application may be made even though the relevant period of time has expired[.] “Accordingly, the discretion to extend time is broad and unfettered. However, it must be exercised judicially and having*



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437  
E: dbannerman@bannermans.com.au W: www.bannermans.com.au  
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

*regard to s 36 of the Act and the need "to facilitate the just, quick and cheap resolution of the real issue in the proceedings".*

In light of the legislation and the *case law*, when seeking an extension of time under section 41 of the CAT Act, the Tribunal is flexible in its application, as the Tribunal has unfettered power to extend time.<sup>1</sup>

Such power, though unfettered, must be exercised “judicially” by the Tribunal, (i.e. although the Tribunal is not a judicial body, it is still required to exercise its discretion such that it is exercised not by reference to irrelevant or extraneous considerations, but upon the facts connected with or leading up to the litigation) and with regard to the statutory imperative of the CAT Act, section 36, which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

### Relevant Considerations as to the Discretion to grant an Extension of Time

Although in this following specific case, the ‘extension’ related to an extension of time for an appeal, the relevant considerations as to the exercise of the discretion set out in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 (Jackson) at [22] apply and include:

- The length of the delay;
- The reason for the delay;
- The appellant’s prospects of success, that is usually whether the appellant has a fairly arguable case; and
- The extent of any prejudice to the respondent.

### Further Considerations

#### i. Statutory limitations

The recent New South Wales and Administrative Tribunal Appeal Panel (NSWCATAP) decision of *Hua Nan Trading Pty Ltd v The Owners – Strata Plan No 32396* [2023] NSWCATAP 66 considered the Tribunal’s power in granting an extension of time with respect to statutory limitations. The NSWCATAP dismissed the Tribunal’s restrictive interpretation of section 41 of the CAT Act, and concluded that the two year time limitation period stipulated in section 106(6) of the SSMA could be extended via section 41 of the *Cat Act*.

The Appeal Panel referred to the principles of statutory interpretation as summarised in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, that “the process of construction must always begin by examining the context of the provision that is being construed” and that a court must “give effect to harmonious goals” of legislative instruments.

The Appeal Panel cautioned that this result did not give permission to owners to sit on their hands, they would still need to convince the Tribunal that time should be extended.

---

<sup>1</sup> *Giammarco and Giammarco v Chief Commissioner of State Revenue* [2019] NSWCATAD 77, at [7];; *Copeland v Commissioner of Police, NSW Police Force* [2023] NSWCATAD 40 (10 February 2023), at [11]

## ii. Monetary Jurisdictional Issue

In cases of default in relation to Work Orders, it is possible that rather than simply seeking an extension of time, what could be sought is another order or in the words of the Section 8(4) of Schedule 4 of the CAT Act, “any other appropriate order under this Act” which may include a ‘Money Order’.

This would of course involve seeking the renewal of proceedings, again as per Section 8(2) of Schedule 4 of the CAT Act and as set out above, seeking monetary orders in lieu of the previously breached Work Order.

Interestingly, there may be a possibility that an extension of time to complete works, could be sought at the same time as an alternative Money Order. However it seems that this area of law is not certain because of a lack of case law on the matter. In theory it is possible that alternatives could be pleaded since section 41 of the CAT Act says nothing about a preclusion of a money order under Schedule 4, and in fact, it provides that the Tribunal can extend the time “despite anything to the contrary under that legislation”. Hence it seems that having a two-pronged approach may well be a possibility.

Moreover there may also be a possibility to seek monetary related orders in excess of what was previously sought in the Tribunal and even amounts in excess of the Tribunal jurisdiction. At Bannermans, we currently have on foot a matter in which work orders were made and breached (there was default in respect of the completion time). The scheme decided to, among other things, seek ‘other orders’. However an expert provided further evidence that the quantum of the defects was well in excess of the \$500,000 jurisdictional limit of the Tribunal, and so an election was made to transfer the matter to the Supreme Court of NSW. The Tribunal ultimately made orders (by consent) for the transfer pursuant to Clause 6 of Schedule 4 of the CAT Act, and the matter currently subsists and is on foot in the Supreme Court and has progressed there for some time.

Finally, it certainly is important for schemes to carefully (and urgently) consider their options in terms of a ‘Money Order’ if the defect rectification pursuant to any Work Orders has not taken place and where there has been a default.

Moreover extensions of time for the completion can be sought.

The sooner this is done the better, especially in the premise of the 12 month limitation period which applies to renewal applications for example.

No matter how one looks at this, it is simply better to file applications early rather than try to explain the delay later on in the Tribunal, even if the threshold for an extension of time is not too high and the Tribunal has wide discretionary powers in that regard.

For more information on extensions of time and renewal of NCAT proceedings please contact one of our building defect experts on 02 9929 0226 or at [enquiries@bannermans.com.au](mailto:enquiries@bannermans.com.au).

**Prepared by Bannermans Lawyers**

**17 July 2023**



T: (02) 9929 0226                      M: 0403 738 996                      ABN: 61 649 876 437  
E: [dbannerman@bannermans.com.au](mailto:dbannerman@bannermans.com.au)                      W: [www.bannermans.com.au](http://www.bannermans.com.au)  
P: PO Box 514                      NORTH SYDNEY NSW 2059                      AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation