

NCAT Enforces By-Law for Renovation Works Despite Lot Owner's Refusal

Recently the NSW Civil and Administrative Tribunal (the “**Tribunal**”) held that a lot owner must consent to the terms of a by-law relating to unauthorised works that he had carried out on the common property of a strata scheme. Pursuant to section 149 of the *Strata Schemes Management Act 2015 (NSW)* (“**SSMA**”), the Tribunal held that even though he had rejected the by-law, he was required to abide by its terms and replace the works.

Section 149: Order with respect to common property rights by-laws

Changes to common property can be expensive, they can take a long time to complete and can affect all occupants and lot owners of a strata scheme. For these reasons, a common property by-law requires the following:

1. The passing of a special resolution at a general meeting. Special resolutions can only be passed if less than 25% of the owners voting oppose the motion prescribing the by-law, pursuant to section 108 of the SSMA; and
2. The written consent of each owner on whom the by-law confers rights or privileges, pursuant to section 143 of the SSMA.

This high threshold ensures that works to common property only take place if the owners corporation is entirely (or at least mostly) on board with the proposed works. Typically, if a lot owner does not wish for a common property by-law to be made, they vote against it at a general meeting. If the by-law is made via a special resolution, the owner on whom the by-law confers rights or privileges can refuse to provide their written consent.

However, pursuant to section 149 of the SSMA, if the Tribunal perceives that a lot owner has unreasonably withheld their consent to the passing of a by-law, the Tribunal can order that the by-law is made regardless.

Dehlsen Decision

In the matter of *The Owners – Strata Plan No 19341 v Dehlsen* [2022] NSWCATCD (“**Dehlsen**”), the Tribunal held that a lot owner had unreasonably withheld his consent to a by-law relating to works that he had completed on his balcony. These works were completed in 2005 and consisted of the removal of artificial turf and the replacement of the existing waterproofing membrane. The works

Page 1 of 2

also included the installation of planter boxes and a drainage system around the perimeter of the balcony. These works were alleged to have caused damage to the common property and water penetration to seep into the lot below.

The owners corporation argued that these works were unapproved, as the works were not provided in any by-law that had been passed via special resolution prior to the lot owner commencing the works. The lot owner argued that the works he had undertaken to his balcony had been approved, as he had issued a letter outlining the nature of the works to the other lot owners in the strata scheme prior to commencing the works.

In 2022, the owners corporation, passed a by-law via special resolution relating to these works specifically. This by-law provided that the lot owner was to be responsible for maintaining the works and that he must renew or replace the works *“when necessary or when reasonably required by the Owners Corporation.”*

The by-law established that the lot owner was liable for any damage caused to common property as well as other lots in the scheme that resulted from the work. The by-law also required that the lot owner must repair any damage and that he must indemnify the owners corporation against any costs or losses arising out of the works.

Unreasonable Refuse of a By-Law

The lot owner refused to provide his consent to the making of the by-law. The Tribunal rejected his refusal on the basis that this was unreasonable.

In determining whether the lot owner’s refusal was unreasonable, the Tribunal looked to the submissions of the owners corporation and then to the actions of the lot owner refusing to provide his consent.

The Tribunal held that it was reasonable for the by-law to provide that the lot owner was to perform maintenance on the works and to replace the works when requested by the owners corporation. The Tribunal held that the letter he had issued to the other lot owners in 2005, provided mostly the same conditions that the proposed by-law intended to enforce. The only significant difference was that the letter did not provide that the lot owner was liable for the damage the works caused to the common property or the other lots in the Scheme. This letter would also not bind subsequent owners of the lot.

By-laws must be reasonable. Should you wish to pass a by-law for works relating to common property, or if a lot owner is refusing to consent to a by-law, please submit an enquiry with our By-law experts at by-laws@bannermans.com.au or on 02 9929 0226.

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Page 2 of 2



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