

Annual Fire Safety Statement in the Context of Commercial Strata Schemes

1. What is an Annual Fire Safety Statement (AFSS) in the context of commercial strata schemes?

An AFSS is an annual statement prepared by the owners corporation and lodged with the local council and fire brigade. It confirms that the fire safety measures within a building - such as alarms, fire exits and sprinklers- are functioning correctly and meet the required standards.

Pursuant to clause 89 of the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* (NSW), for all buildings, other than a Class 1a building (i.e. single dwelling such as a town house) or a Class 10 building (a non-habitable building) or a temporary structure, it is the responsibility of the owners corporation to ensure that a fire safety statement is prepared and lodged with the relevant authority. Failure to do so may result in penalties, sometimes significant.

For the purpose of this article, the AFSS responsibilities in relation to Class 1a and Class 10 buildings are not addressed as these buildings are not normally applicable to commercial strata schemes.

2. Does this mean the owners corporation is responsible for maintaining **ALL** fire safety measures?

This is not necessarily the case.

While the owners corporation, on behalf of all lot owners, is responsible for preparing and lodging the AFSS, the same general rule for repair and maintenance applies:

- Lot owners are responsible for items that form part of their lot property; and
- The owners corporation is responsible for common property (unless there is a common property rights by-law granting an exclusive use and impose repair and maintenance responsibility on the lot owner(s)).

Most fire safety measures would be considered common property (or common infrastructure). However, some fire safety measures are not common property, such as a standalone smoke alarm or fire extinguisher located within a lot. The individual lot owners are directly responsible for these lot property fire services.

3. What does it mean in the context of commercial strata schemes?

In the context of commercial strata schemes, the situation can be more complex. Lot owners or occupiers typically carry out fit-out works to accommodate the intended commercial use of their lot. These works may involve modifying existing fire safety measures or installing additional ones as often required by the local council and/or government authorities.

Therefore, at the time of installation or modification, the owners corporation should ensure that any approval is provided in the form of a by-law authorising the works and clearly stating that the lot owner is responsible for the fire safety measures installed or modified as part of their fit-out work.

4. What rights/powers does an owner corporation have?

Given its responsibility for preparing and lodging the AFSS and maintaining common property fire safety measures, the owners corporation has extensive rights and powers.

a) In relation to lot property:

The lot owner is responsible for the repair and maintenance of their own lot property. The owners corporation may directly undertake the repair works under section 120(1) of the *Strata Schemes Management Act 2015 (SSMA)* only where a notice has been issued to the lot owner by a public authority and the lot owner fails to comply.

b) In relation to common property located within a lot:

The owners corporation has the right to enter the lot to inspect and to carry out rectification works under section 122 of the SSMA. The owners corporation should first request access from the occupier. However, in the event that the occupier refuses to provide access, the owners corporation may apply for an access order at the NSW Civil and Administrative Tribunal (**NCAT**) pursuant to section 124 of the SSMA.

c) In relation to common property that a lot owner carried out subsequent works or fit-out under a by-law:

As noted in question 3 above, any fire safety measures installed by a lot owner as part of a fit-out or the subject of an exclusive use by-law are the responsibility of that lot owner. If they fail to repair them, the owners corporation may require them to undertake the necessary repair works. If the lot owner does not comply, the owners corporation may directly undertake the works and recover the costs from the lot owner under section 120(2) of the *Strata Schemes Management Act 2015 (NSW) (SSMA)*.

5. Can the owners corporation recover its costs from a lot owner for repairing fire safety measures for which that owner is responsible?

Yes, in circumstances where the owners corporation undertakes repair works on behalf of the lot owner (scenarios 4(a) and 4(b) above), the owners corporation can recover the associated costs as a debt pursuant to s120(5) of the SSMA.

However, it is important to note that a costs recovery by-law does not provide an owners corporation with any greater right to recover its costs than it would through the courts or NCAT. Any cost recovery by-law that purports to grant more extensive rights is likely to be considered invalid. Therefore, for any damage caused to fire safety measures by an owner or occupier for which they are responsible, the owners corporation may consider commencing proceedings in a court or NCAT for rectification or to recover the costs of rectification.

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