OWNERS CORPORATION NETWORK
ABN 99 153 981 205

10 July 2019

NCAT Statutory Review
Director, Courts Strategy
Department of Justice
GPO Box 5341
SYDNEY NSW 2001

By email: policy@justice.nsw.gov.au

Dear Sir/Madam

NCAT STATUTORY REVIEW

Strata is the fastest growing form of residential property ownership in Australia. Over half the new dwellings to be built in our metropolitan areas over the next decades will be strata titled. The growth of this sector raises increasingly important questions over property ownership and governance.

The Owners Corporation Network of Australia Limited (OCN) is the peak consumer body representing residential strata and community title owners and residents. As such, OCN is uniquely positioned to understand the impact that the legislative framework has on day-to-day machinations and community living. We have a lived experience and a practical hands-on approach to strata administration, issues management and resolution, and harmonious living.

Strata apartment buildings are often referred to as 'the fourth tier of government' as they make laws (by-laws) and collect taxes (levies). Yet these increasingly complex buildings and communities, worth approximately $350m in NSW alone, are managed by untrained volunteers with a wide range of skills and relevant experience.

There is little to no training available to committee members or to individual owners and, all too often, limited understanding of the demands of 'co-operative living'. As a result, disputes arise all too often and can involve malice and divisive behaviour.

The purpose of NCAT is to provide a simple, quick and effective process for resolving disputes. However, that is not what is often reported by OCN members and members of the public seeking OCN assistance.

As a key consumer voice in this review, OCN welcomes the opportunity to provide feedback and is eager to engage with the Department] on any aspect of this submission, and to be involved in the proposed face to face roundtables.

Sincerely

Submission

General Comments

1. **Jurisdiction** – NCAT does not have jurisdiction to hear cases where the parties reside in different states, leaving those parties with no option other than court action. Yet QCAT is set up to be able to do so. We consider this is an area for attention in NSW.

2. **Ensuring simple, quick and effective resolution of disputes** – the parties might benefit from a median step where NCAT accredited subject matter experts are appointed to audit scheme management in response to prima facie evidence of disputes involving mismanagement e.g. lack of building maintenance, inappropriate exercise of strata committee authority for personal benefit, poor financial management practices, or poor knowledge of the relevant legal requirements.

   Audit reports could help inform both mediation and Tribunal decisions, reducing the cost and evidential burden on all parties, as well as reducing the time required to process applications. Audit reports could also be of assistance to NSW Fair Trading with its investigations and action where appropriate.

3. **Enforcement powers** – even when NCAT finds in favour of a lot owner against their owners corporation (e.g. failure to repair and maintain) there is no simple process to enforce non-financial Orders. OCN is aware of a number of protracted cases where the owners corporation has failed to act by the set deadline or carried out work in a manner contrary to orders. As a result, lot owners have had to repeat the process at considerable expense and ongoing inconvenience while their issues remained unaddressed. It would appear that NCAT requires increased powers for dealing with enforcement of non-financial orders. Once again, the ability to appoint an independent auditor to confirm compliance may have a role.

4. **Appointment of compulsory strata managers** – this process does not appear to be as clear or transparent as it could be, including the criteria applied in determining the suitability of strata managers to be appointed as compulsory managers by NCAT. Given the significance of their role, i.e. acting as the strata committee, it is important that there are clear reporting requirements and NCAT oversight to ensure that the compulsory manager effectively and cost-effectively deals with the issue/s that prompted their appointment.

   OCN has received reports of strata managers charging higher fees than the incumbent manager, failing to deal with the issue that triggered their appointment, failing to communicate with owners as to their activity, and re-appointing themselves. It is essential that such a pivotal process is carefully managed to protect all owners in the strata scheme. Again, there appears to be a role for an independent auditor appointed by NCAT both in determining or otherwise the need for a compulsory manager and to monitor and report on the performance of that manager.

Specific Comments

Please see attached our letter to NCAT dated 28 May 2019 which sets out some of the issues faced by parties and practitioners in the strata and home building lists.

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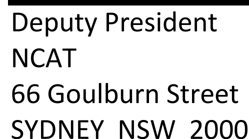
28 May 2019



Deputy President
NCAT
66 Goulburn Street
SYDNEY NSW 2000

Dear

Home Building Consultative Forum – May 2019

We refer to the NCAT Consultative Forum for the Home Building ("HB") List on 21 May 2019. We confirm the feedback points raised by the Owners Corporation Network as follows:

1. Electronic "filing" or submission of documents to NCAT should be accepted. Courts are all moving to this as the preferred filing method. We note NCAT is currently considering utilising the Justicelink/eRegistry service used by the main courts, but is having to submit a business case for the costs involved.

   To the extent OCN can assist or make any submissions in support of such a business case, then please let us know.

2. The current standard directions and short timetable for evidence in the HB List is unrealistic for many cases, especially large and complex ones. This is especially so when proceedings are commenced to protect the 2 year "non-major" defects warranty period as is now quite common, and/or to inspect large schemes.

   There is also no allowance for settlement discussions to take place, which NCAT/CTTT was previously quite willing to do (and which even Supreme Court allows for) but the clear focus is now on progressing matters quickly. We suggest that the standard timetable should be used as a guide only, and larger and more complex matters case managed on their merits and facts. We would also appreciate a review of the repeated refusal of NCAT Members to adjourn or set a timetable even when represented parties agree.

3. The pleadings process needs to be standardised, with Points of Claim required, and the process should require Points of Defence before an Applicant's evidence, so the parties are clear on what facts and matters are not in dispute and what needs to be proved. Exchange of evidence before closing pleadings is completely inappropriate.

4. There needs to be a standard "running order" for the actual Hearing, which currently is not standard eg opening submissions, Applicant tender of evidence, Applicant witness evidence in chief, etc.
5. There needs to be a clear written guideline as to when NCAT will expect or provide a technical Member for expert conclave, and provide a Mediator or not. There is clearly an internal guideline being used, as indicated verbally at Directions by Members, which needs to be made clear publicly.
6. Although more applicable for urgent and/or interim applications in the Strata & Community List, we suggest NCAT should provide a duty Member to deal with urgent applications and a clear written process for such applications.
7. There should be a clear written process to deal with applications for leave for legal representation on the papers in chambers prior to first Directions, where such can be made in sufficient time. Perhaps by inclusion and space for submissions/grounds in the application form.
8. A standard form should be provided for advising NCAT of the details of legal representative appearance after a grant of leave, to ensure contact details are provided and recorded correctly. Often the first thing NCAT does is send a Notice of Order indicating grant of leave, addressed to the party directly.
9. We urge NCAT to source an approved or recommended transcription service, to avoid parties having differing transcripts from their own services. Perhaps NCAT is able to use the main service used by other courts.
10. Owners Corporations are unable or unwise to appear for themselves. The committee or strata manager cannot properly be delegated to. Committees are unpaid volunteers, who should not bear this responsibility or inevitable backlash within the strata community. Strata managers are not qualified and, in any case, charge their time to attend as Schedule B fees, which are not recoverable as costs. When the Owners Corporation is a respondent, legal costs are usually covered under any defence costs insurance policy.

In addition, due to time limitations we did not have the chance to raise the following issues:

11. OCN supports NCAT publishing all decisions, although in uneditable format, even to parties. It was not doing so previously, but has been seeking to do so more recently.
12. A clear procedure for cross claims is required. Currently these are usually simply dealt with by fresh applications then needing to be ordered to be dealt with together.
13. If section 48MA of the *Home Building Act 1989* (as to builder being given a chance to return and do work, under a work order) is an issue, then the issue arises as to whether the parties waste time and costs on quantum evidence. Even if not an issue, a truncated evidence timetable should be allowed, with evidence on liability to be served first then followed by quantum.
14. There should be a clear process for expert conclaves, as to how these are to be conducted and the guidelines for the format of the joint report to be issued, which can be dependent on the experience and agreement of the experts, and can sometimes be lacking.

15. A party agreeing to not seek costs as part of being granted leave for legal representation can often be a condition of granting same, but is arguably breach of the *Civil & Administrative Tribunal Act*. Circumstances entitling a party to a claim for costs may come or arise later. The costs jurisdiction/discretion should not be exercised until the end of a case. If an order is to be made that there be no costs, this should be "subject to further orders".
16. Directions are not occasions to be making decisions on preliminary or interlocutory issues - they are to case manage matters to Hearing. However, Members can sometimes seek to do so.

In respect of the latter issues we can, of course, offer additional detail if explanation is required.

Yours sincerely