

Common Property

Issue 7

Legal news for the strata and company title management industry September 2011



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— L A W Y E R S —

Compulsory Appointment of a Strata Managing Agent

The *Strata Schemes Management Act* 1996 (the Act) makes provision for an adjudicator to make an order appointing a person as the strata managing agent of a Strata Scheme if certain requirements are met. Such appointments are made in accordance with an adjudicator's power pursuant to section 162 of the Act.

What is the effect of a compulsory appointment of a strata managing agent on an Owners Corporation?

Depending on the terms of a specific order, a compulsorily appointed strata managing agent may be given the power to exercise all the functions or specific functions of an owners corporation. An adjudicator may also give a compulsorily appointed strata managing agent the power to exercise all the functions or specific functions of the chairperson, secretary, treasurer or executive committee of the owners corporation. After consideration of the evidence before the adjudicator, he or she will, using their discretion, expressly set out in their decision, the scope of the compulsorily appointed strata managing agent's power.

Case in point: In *The Owners – Strata Plan 5709 v Andrews* [2009] NSWCA 189, Hodgson JA confirmed the wide scope of power given to the compulsorily appointed strata managing agent. In particular, His Honour emphasised that the functions of an owners corporation given by an adjudicator to the compulsory agent (in the case at hand, section 76(4) of the Act relating to the determination of levies at a general meeting) meant that such functions were to be acted upon by that agent and that the requirements of a general meeting had no

application. The decision in this case was later confirmed by Senior Member GJ Durie in *Hatzvy v Grossbard and Owners Corporation SP13671* (Strata & Community Schemes) [2010] NSWCTTT 477.

How does an order compulsorily appointing a strata managing agent happen?

When certain requirements are met, an adjudicator has the power to make an order upon an application being made by a party who has a legislative right to make such an application (see "Who may apply to an adjudicator for an order?" below). In certain circumstances, an adjudicator may make such an order without an application being made.

Who may apply for an order?

As with all other legal processes, only those with a certain interest in the subject strata scheme will be able to apply for an order. Those the Act recognises as interested parties are set out in s162(7) of the Act, most importantly:

- A person who obtained an order under this Act that imposed a duty on the owners corporation or on its executive committee, chairperson, secretary, treasurer and that has not been complied with, or
- A person having an estate or interest in a lot in the strata scheme concerned

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“Depending on the terms of a specific order, a compulsorily appointed strata managing agent may be given the power to exercise all the functions or specific functions of an owners corporation”

Compulsory Appointment of a Strata Managing Agent

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When will an order be made?

An order for a compulsory appointment will be made if an adjudicator is satisfied, in accordance with s162(3A), that one or more of the following is found:

- a. the management structure of the strata scheme...**is not functioning or is not functioning satisfactorily**, or
- b. an owners corporation has failed to comply with a requirement imposed on the owners corporation by an order made under this Act, or
- c. an owners corporation has failed to perform one or more of its duties, or
- d. an owners corporation owes a judgment debt.

The evidentiary test an adjudicator will apply to determine whether any of the situations set out above at (a) to (d) exist will be on a balance of probabilities and by referring to Briginshaw principles set out in the High Court of Australia decision of *Briginshaw v Briginshaw* [1938] 60 CLR 336.

Should I make an application for an order?

When considering making an application for a compulsory appointment of a strata managing agent pursuant to section 162 of the Act, always bear in mind the seriousness of such an appointment. Senior Member Durie said it best by stating in *Bushby v Owners Corporation SP64939* [2009] NSWCTTT 70 that, “*The appointment of a compulsory strata managing agent is not one to be taken lightly*”.

TIP: If you are a strata managing agent, have been asked to provide your consent to act under a compulsory appointment and would like to accept, ensure that your consent:

- is addressed to the Consumer, Trader & Tenancy Tribunal
- is provided to the person or entity requesting your consent
- is by way of formal letter
- includes details of your strata managing agent’s licence (issued under the *Property Stock and Business Agents Act 2002*)
- states that you are aware that the person or entity requesting your consent is seeking an order by an adjudicator for a compulsory appointment of a strata managing agent pursuant to section 162 of the Act states your willingness to accept the appointment

In the case of a strata managing agent that is a corporation, consent may be given by the chief executive officer of that corporation.

In the next issue of Common Property, the following important questions will be answered: “How to object to a compulsory appointment” and “How can I appeal a section 162 order”

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When has the Owners Corporation done enough to maintain and repair the common property?

When has an owners corporation done enough to maintain and repair the common property?

If you thought the responsibility ends as long as the owners corporation keeps an aging but working exhaust ventilation system in order, you'd be wrong.

Thoo's Case is the latest decision from the Supreme Court about just how far an owners corporation has to go to discharge its statutory duty to maintain and repair and renew its common property – and how individual owners are now calling the shots.

The Facts

Dr Thoo wanted to connect some retail tenancies in a lot in the Hunter Connection in Sydney to an existing common property ventilation system. Council consent conditions for the tenancies (food outlets) depended on supply of adequate ventilation. Dr Thoo was aware that the ventilation system may not be adequate for additional connections, as it had been upgraded once already to cope.

The owners corporation (**OC**) consented to Dr Thoo connecting to the system but could not guarantee that adequate ventilation would be achieved because the system was already at capacity.

The OC engaged an expert to investigate if it was feasible to upgrade the ventilation system's capacity. It was possible – at a significant cost and disruption to retail operations in the scheme. It did not proceed with any upgrade; Dr Thoo did not connect to the existing system and his tenancies could not operate.

Dr Thoo began proceedings for damages, after which the OC passed a special resolution in 2009 that it was "inappropriate for the Owners Corporation to renew or replace the mechanical exhaust system". The OC derived its authority to do so from section 62(3) of the *Strata Schemes Management Act 1996* (**Act**). That section states that an owners corporation

need not properly maintain, renew, replace or repair a particular item of common property if it specially resolves that it's inappropriate to do so and if the decision does not affect the safety of the building, structure or common property or detract from the appearance of any property.

The Questions for the Court

Qu 1 Did the OC breach its duties to maintain and repair the ventilation system under section 62(1) and (2) of the Act?

Justice Slattery distinguished the duty under section 62(1) from section 62(2).

Section 62(1) states

"(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation."

His Honour said the duty to maintain and repair under 62(1) applies to *existing* common property and the duty is to keep that common property in a state of good and serviceable repair. The duty does not extend to a complete replacement of that common property.

The OC did not breach section 62(1) because the exhaust ventilation system had not fallen into disrepair. It was operating according to its design capacity.

However, section 62(2) of the Act states:

"(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation."

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When has the Owners Corporation done enough to maintain and repair the common property?

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The Court said the duty under this section extends to replacement of a discrete system forming part of the common property. His Honour stated:

“If the system is not operating efficiently/effectively/adequately or it does not have the capability to serve the (reasonable) needs of the lot owners who wish to make use of the system, then the Courts have consistently found a breach of s62(2).”

The OC was in breach of section 62(2); a breach which required work “to make the system efficient and adequate again”.

The OC’s argument

The OC argued that Dr Thoo’s request for a certain capacity to serve his tenancies was unreasonable for several reasons.

Firstly, that Dr Thoo was aware of the limited capacity of the system when he bought the lot. His Honour found that such knowledge did not mean Dr Thoo had to limit his claim for access to what the system allowed.

Secondly, a survey of existing owners including Dr Thoo before the last upgrade returned that the upgrade would “satisfy all current and projected food court ventilation requirements” for all lots in the scheme. Dr Thoo did not identify at that time any future exhaust requirements for his lot. The judge was not persuaded that this argument or the change in use of the lot pointed to any unreasonableness on Dr Thoo’s part.

Thirdly, that Dr Thoo should have tried to solve his exhaust requirements by other means before seeking an increased exhaust capacity from the common property. But the Court stated that it was not up to Dr Thoo to adjust his request so that the OC could avoid upgrading the system.

Fourthly, because Dr Thoo’s company owned another lot in the scheme, that his usage was higher than most

other lots already, somehow suggesting that he was not entitled to the same use and enjoyment of common property because he held more than one lot. This argument failed.

Fifthly, that Dr Thoo’s request for capacity was excessive. This failed, too.

Finally, it was argued that the fit out plans Dr Thoo relied on did not disclose the level of ventilation required; that it was up to Dr Thoo to make a council application stating the levels of ventilation required so that it could approve them; it had never refused Dr Thoo access to the current system; that it had no duty to allocate particular levels of exhaust usage to lots, and that it had done all it can.

Whilst the Court found there are limitations on the duty to renew or replace in this context, Dr Thoo was entitled to “reasonable” access to the system and to reasonable ventilation capacity for his lot. His requirements for a certain level of ventilation were not “capricious or unreasonable”.

Qu 2 Was the special resolution of 2009 to discontinue maintenance of the ventilation system invalid, void and of no effect?

The Court looked at 4 legal issues:

A) *Was there a proper basis for the determination to discontinue maintenance?*

The Court held the expert report the OC relied on to make the determination did not deal with the question of whether it was “inappropriate to maintain, renew, replace or repair” any particular item. Therefore, there was no “rational basis” for it to conclude that it was “inappropriate”. Additionally, even if it may have addressed part of section 62 (section 62(1)) it did not address section 62(2) at all.

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When has the Owners Corporation done enough to maintain and repair the common property?

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B) Whether it was accurate that the determination to discontinue maintenance “will not affect safety”?

The Court held that an owners corporation must look to more than just structural safety and consider commonly included “discrete systems for the supply of water, electrical power, air conditioning, ventilation, telephone and internet access, radio and free to air television reception...” . These considerations “...affect...the safety of lot owners or their visitors” .

C) Whether the determination applied to the air ventilation system qualified as a “particular item of property”?

The ventilation system was more than a single piece of property; not a “separate article or particular” item. His Honour said that the lack of detail in the report at the 2009 meeting could not give sufficient certainty about which item of the system the OC sought to exclude from its maintenance obligation.

D) Whether the determination that renewal or replacement was “inappropriate” as a bare statement was enough to satisfy section 63(3) (a).

There was no rational basis for the determination that replacement of a whole system with different functions, relying on a report that did not address such different functions. So, the OC was not equipped with enough information to make such a determination.

Qu 3 If the special resolution of 2009 was valid, should it be set aside as a fraud on the minority?

“A total upgrade or replacement may be necessary if an owner reasonably requires it”

“Fraud on the minority” in this context meant “the contemplated expropriation of minority rights to a shared use of the relevant part of the common property” (affirming *Young & Anor v Owners Strata Plan No. 3529 [2001] NSWSC 1135 at [45]* and *Lin v Owners Strata Plan 50276 [2004] NSWSC 88*).

The judge considered this question only on the basis that his conclusion about the invalidity of the 2009 resolution were incorrect. If it were incorrect, he would have decided that the special resolution was a fraud on the minority; that the denial of access to a reasonable supply once access to the system was granted was tantamount to denial of access to the system itself.

Conclusion

This case amplifies an owners corporation’s obligations in maintaining common property. Simply ensuring working order is not enough. A total upgrade or replacement may be necessary if an owner reasonably requires it. And if you think a resolution to stop maintaining multi-faceted systems is going to make the problem go away – think again. It risks being invalid unless the resolution is adequately informed and identifies which part or parts of that system are to be excluded.

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Expert Reports and Building Claims

In many cases before the Courts the costs of expert reports are more than the legal costs.

Owners Corporations can save on expert costs by choosing competent experts who have experience in litigation matters. This is particularly so in claims where there are many different types of defects.

Making the correct decisions as early as possible should save an Owners Corporations thousands of dollars in the long term.

Initially most Owners Corporations need to have some idea as to what is wrong with the property and the extent of defects caused by the builder's poor work.

They need to have a general idea as to the likely cost of the rectification.

In the early stages, it may be preferable to have a ***schedule of defects***, rather than a report, and this can be used to negotiate with the builder.

A ***schedule of defects*** in most cases is much cheaper to produce and can be used as the basis for a litigation building report later if required.

If negotiations break down with the builder, or agreement cannot be reached in relation to all the defects, then the OC can make decisions on which further expert reports will be required to prove the defects.

As the cost of expert evidence is so expensive, Owners Corporations need to be properly advised in relation to the role of experts; that different experts will be needed for different areas of expertise and the importance of expert evidence in proving the builder's work was defective and ultimately winning their claim.

Owners Corporations need to make the right decisions at the beginning.

The Right to Make a Building Defects Claim

Owners Corporations are able to make building defect claims, in relation to common property defects, against builders and developers for breach of contract. This is so, even though Owners Corporations are not parties to a building contract with the builder or the developer.

Sections 18C & 18D of the Home Building Act 1989 NSW provides for successors in title to make claims even though they were not party to the building contract.

The provisions of Section 18C & 18D, overcome the common law rule that only parties to a contract have a right to enforce their obligations under the contract. The common law rule is known as privity of contract.

Where there is damage or defects to property within an individual lot, the individual lot owner has to make the claim on their own behalf.

The individual lot owner's claim is made in the same proceedings as that of the Owners Corporation.

Building Expert Reports

As a result of the rules of evidence, building experts who prepare reports, for the purposes of litigation, are bound to comply with, the guidelines issued by the courts in relation to the preparation of their reports.

Without being unfair to building experts, it is not uncommon for them when they prepare their reports to merely do a list of defects in a manner not dissimilar to a shopping list. The rules issued by the courts require a lot more.

The admission of expert evidence into court proceedings is an exception to the usual rule of admissibility. Normally persons giving evidence in court are only permitted to give factual evidence in relation to events of which they have actual knowledge and opinion evidence is excluded. Expert opinions are the exception.

For this reason the courts are very strict to ensure that when an expert gives his or her opinion that they do so in a way which can be verified, shows that they have used proper methods of investigation and stated clearly their assumptions and their reasons for their opinions and conclusions in relation to the factual matters under investigation.

This is particularly true of matters that are before the District and Supreme Courts. For expert reports to be accepted into evidence they must conform to the rules of admissibility. If they do not conform to the rules of admissibility, it is open to the Court to

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Expert Reports and Building Claims

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reject part or all of the report. District and Supreme Court judges often reject part or all of an expert's evidence.

The law of evidence does not apply in the Consumer, Trader and Tenancy Tribunal. However when preparing expert evidence in the tribunal it is wise to ensure that the expert report complies with the Chairperson's directions in relation to the preparation of expert reports.

The tribunal member has discretion to reject the report if it does not comply with the Chairperson's directions or if it accepts the evidence, it can be given little or no weight if the Member concludes that the report has not been properly or adequately prepared.

It is especially important for the expert to be unbiased in his or her investigations and in expressions of their views and opinions. If the court comes to the conclusion that an expert witness is taking sides then the court will place little weight on their evidence.

The primary duty of the expert is to the court. It is not to the Owners Corporation who has engaged the expert.

Multiplicity of Experts

In complicated legal proceedings it is not unusual for an Owners Corporation to have to engage several experts with different areas of expertise. It may be necessary to appoint a general building expert, a structural or civil engineer, a waterproofing expert and a quantity surveyor. In more recent times it is quite common to have to engage experts who are experts in fire services.

It is not unusual for one expert to have to rely upon the expert evidence of another expert. For example, where there is a problem with a concrete driveway, an engineer may have to base his opinion as to the structural integrity of the driveway not only as to how the driveway itself was constructed but also as to whether the base and the soil on which the driveway was constructed was sound.

To answer the second question, the structural engineer will be relying upon the factual evidence and opinion of a geotechnical engineer. If in the course of the proceedings it is shown that the assumptions the structural engineer has made in relying upon the findings of the geotechnical engineer are incorrect, then the whole basis of the structural

engineer's report or a large part of it may be inadmissible in the court proceedings.

It is important for Owners Corporations to ensure that when they are engaging experts, the experts are experienced in preparing reports for court proceedings.

It is not uncommon when an Owner's Corporation becomes aware that the common property has building defects for it to engage a building consultant to investigate the defects on its behalf.

Often the report prepared by the building consultant at the initial stage is not a report that can be used for the purposes of litigation. The Owners Corporation should be made aware that further reports will be necessary. The preliminary report can be useful to enable the Owners Corporation to make a commercial decision as to whether they wish to institute proceedings or arrange to do the repairs itself.

The Owners Corporation should be made aware that if it commences proceedings against the builder or the developer in either the District Court or the Supreme Court that the cost of preparing reports can be extremely expensive.

The cost of preparation of a proper forensic expert report prepared for the purposes of litigation is often in excess of \$10,000 and it is not uncommon for an expert's report to be in excess of \$50,000.

One way that an Owners Corporation can save money on expert reports, is by engaging experts from the start who have experience in preparing reports for litigation.

It can often be a very expensive exercise to have to train the so-called expert in how to write reports for District and Supreme Court's proceedings.

A report prepared by an inexperienced expert will often go through several drafts before a report is produced which is compliant with the rules of court.

The cost of doing this can be avoided if proper experts are engaged from the start.

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Building action and the Supreme Court

Limitation periods abound in relation to claims against builders and developers for defective construction of residential property in New South Wales.

Under the *Home Building Act* 1989, owners who discover defective building work have 7 years from completion of the work to make a claim against a builder and developer. They have 6 years to make a Home Warranty Insurance claim for structural defects and 2 years to make a Home Warranty Insurance claim for non-structural defects, but can only make a Home Warranty Insurance claim if the builder and developer have died, disappeared or become insolvent.

The *Limitations Act* 1969 affords owners 6 years from when they first become aware of the defective work to make a claim in negligence against builders and developers.

Section 109ZK of the *Environmental Planning and Assessment Act* 1969 (EPA Act) imposes a 10 year limitation period from the date of issue of the relevant occupation certificate in relation to claims against a builder or developer for loss or damage arising out of or concerning defective building work.

Pursuant to section 109ZK of the EPA Act builders and developers can potentially escape liability for defective building work if home owners do not commence proceedings for negligence within 10 years from the issuing of the occupation certificate.

The question that arises is whether or not section 109ZK applies in situations where a building was constructed prior to 1 July 1998 when Occupation Certificates did not exist.

The Supreme Court recently considered the operation of section 109ZK in *The Owners Strata Plan 56963 v Australand* [2011] NSWSC 710. In that case the Owners Corporation became aware of building defects in 2009. The defects related to serious waterproofing problems

potentially costing millions of dollars to fix.

The building was completed in 1998. The Certificate of Classification was issued on 24 April 1998. Thirteen years later, the owners corporation - being aware that it was statute barred in relation to Home Building Act claims - decided to commence legal action in negligence against the builder (Australand). The owners corporation also joined the former strata managing agent and former on-site manager to the proceedings, for breach of contract and negligence.

In its defence Australand, relied on section 109ZK(1) of the EPA Act in relation to the "Certificate of Classification" issued on 24 April 1998 with respect to the building work. The Certificate of Classification was issued under the *Local Government Act* 1993 which prohibited occupation of a property until a certificate of classification was issued.

Australand argued that any claim by the owners in relation to negligent building work needed to be commenced by 24 April 2008, being ten years from the date of issue of the "Certificate of Classification".

The Court agreed that date of the "Certificate of Classification" fell within the realm of section 109ZK of the EPA Act and dismissed the proceedings against Australand, leaving the owners corporation with no recourse to recover the loss and damage caused by the defective building work.

Even though owners have a right to pursue an action in negligence for up to six years after being apprised of the defects, the operation of section 109ZK effectively provides a "drop dead" date when building actions in negligence for loss and damage can be commenced by owners. This could potentially leave owners out of time to sue even before they become aware of defects.

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Building and Construction Industry Security of Payment Act

The *Building and Construction Industry Security of Payment Act* ("SOPA") was enacted to ensure that any party undertaking building work in New South Wales (other than residential building work) can obtain and is capable of recovering unpaid progress payments for work carried out under building contracts.

The SOPA was amended earlier this year by the *Building and Construction Industry Security of Payment Amendment Act 2010* (NSW) ('Amending Act') to improve security of payment for subcontractors in the building industry. The Amending Act came into force on 28 February 2011.

The SOPA now provides subcontractors with express rights against a principal contractor to secure payments due to it from the contractor.

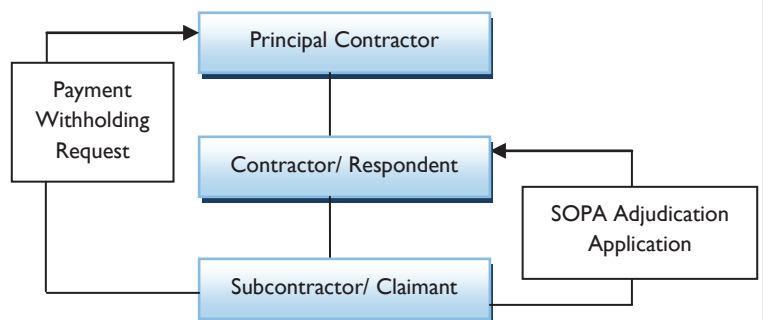
Payment disputes under the SOPA involve 3 key players:

1. The subcontractor known as the claimant, and
2. The contractor (often, a builder) who owes the subcontractor money. The contractor is also known as the respondent, and
3. The principal contractor (often, an owner) which has the contractual agreement with the respondent.

Before the commencement of the Amending Act, the SOPA had been widely applied by subcontractors to obtain adjudication determinations for disputed payment claims however the SOPA did not provide a mechanism to assist subcontractors in ensuring that respondents would make the payments to the subcontractor that were outlined in the adjudication determination. Before the commencement of the Amending Act, the subcontractor was forced to go through the courts to have the respondent's funds

frozen under the *Contractors Debts Act 1997* (NSW). The amendments to the SOPA addressed this issue.

Under the new sections, a subcontractor, who has made an adjudication application for a payment claim can compel a principal contractor to retain funds to cover the claimed amount out of the money that is or becomes payable by the principal contractor to the respondent. This is done by the subcontractor issuing a 'payment withholding request' with a supporting statutory declaration verifying the authenticity of the debt to a principal contractor.



The principal contractor's obligation to retain money continues until the first of the following occurs:

- the claimant withdraws the adjudication application (the subcontractor must give the principal notice this has occurred within five business days of doing so);
- the respondent pays the subcontractor the amount claimed;
- the subcontractor serves a notice of claim on the principal contractor for the purposes of section 6 of the *Contractors Debts Act 1997* (NSW); or
- 20 business days passes after a copy of the adjudicator's determination is served on the principal contractor

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Building and Construction Industry Security of Payment Act

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A principal contractor that does not comply with a payment withholding request becomes jointly and severally liable with the contractor for the debt owed to the subcontractor. This provision puts principal contractors at significant risk if they do not properly comply with the procedure outlined above regarding the payment withholding request.

The effect of these amendments is that the principal contractor is now exposed to payment disputes between subcontractors and the contractor. The principal contractor is now compelled to become involved in payment disputes that it could previously avoid.

These amendments to the legislation are retrospective. This means that, from the date of the commencement of the Amending Act, the amendments apply to all construction contracts in force in New South Wales other than contracts for residential building work which are exempt from the SOPA.

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“A principal contractor that does not comply with a payment withholding request becomes jointly and severally liable with the contractor for debt owed to the subcontractor”

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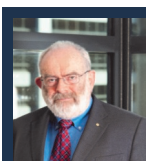
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September 2011

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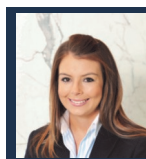
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Back issues

All issues of our Common Property newsletters are available online at www.makdap.com.au.

Articles in the two previous issues include:

Issue 6, February 2011

- A proxy - what can they do or say?
- Law reform: Strata Title Law reform Bill introduced
- Dysfunctional Executive Committees
- Cases

Issue 5, August 2009

- Duty of care and its applicability to agents
- Company constitutions and forfeiture of shares
- Levies: can they be determined retrospectively?
- Cases

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