

# ISNSW Annual Conference Strata Update



Webinar – 21 January 2021

Adrian Barden – Land Development Certificates  
Registered Certifier

[www ldc com au](http://www ldc com au)

- ▶ Strata Certificates
- ▶ Construction Certificates
- ▶ Subdivision Works Certificates
- ▶ Subdivision Certificates
- ▶ Complying Development Certificates



Thank you for inviting Rob and I once again to provide an update on the Strata and Community Legislation. In the spirit of the year that was 2020 I bring you the binge edition of the update. So buckle in as we will move quickly.

# Power

The legislative framework that grants Registered Land Surveyors power to determine boundaries

# Authority

The court of public opinion decides whether Registered Land Surveyors have legitimate power to determine boundaries



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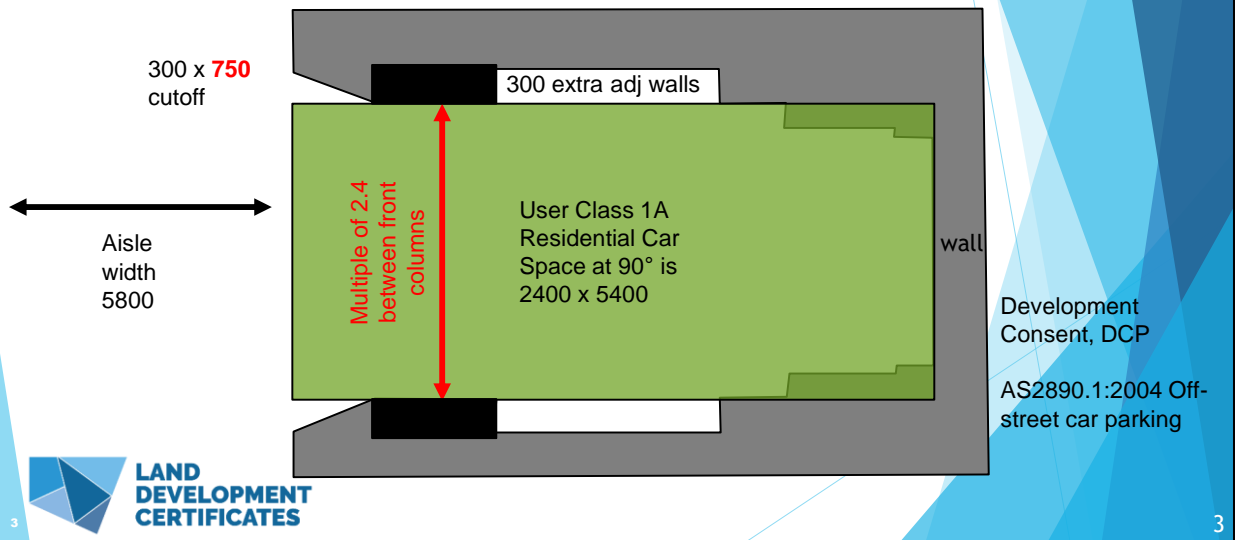
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Our household are big fans of The Crown. One of the recurring themes of the series is the interplay between Power and Authority. A widely accepted definition of Power is that developed by Max Weber who said that **power is the ability to exercise one's will over others**. Whereas Authority is considered to be accepted power or **power that people agree to follow**.

For the purpose of Registered Land Surveyors we might consider that Power is granted through legislation. It is the legislative framework that grants Registered Land Surveyors power to determine boundaries. Whereas The court of public opinion decides whether Registered Land Surveyors have legitimate power to determine boundaries.

## Car Spaces



A quick revision of the Australia Standards.

The minimum size for a space is 5.4 by 2.4 for 90 degree parking with a 5.8 wide aisle width. There is a requirement for a further 300mm where a parking space is next to a wall to allow for door opening.

A 750 by 300 cut-off is required at the front to allow for turning path movement. So a column should start at least 750mm in from the front of a car space.

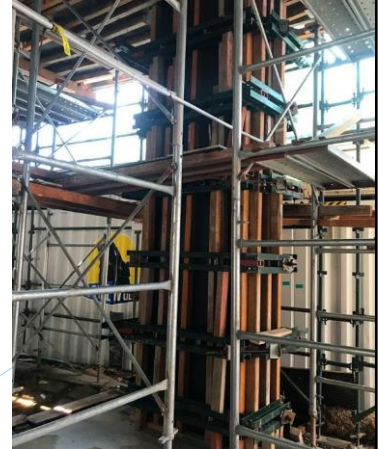
CP	2.4	2.55	2.55	2.4	2.55	2.55	2.4	2.55	2.55	2.4	2.55	2.55	2.4	2.55	4.95	2.55	2.55
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Be wary of signing off on a strata plan that has perfect measurements. Has a draft plan been inserted by mistake?

Undersized carspaces should be designated as “small car space” where a traffic engineer has given this advice. A purchaser or future purchaser needs this information disclosed so that they can make an informed decision.

Registered Surveyors should measure boundaries in the public interest without fear of favour.



In this example the carparking spaces are all exactly the right size. The 2.4x5.4 on car spaces without columns. And typically the columns are 300mm wide, so 2.55x5.4 on car spaces with a column. And if we had a wall, then 2.7 minimum to allow for the wall.

Formwork for the column is typically held upright by a series of braces. It is highly recommended that a check of the distance between columns be undertaken when the formwork is fully braced ready for pouring. Taking into account the thickness of the formwork, the width between columns should be a multiple of at least 2.4. 4.8 and 7.2 are the most common. Anything less must be notified prior to the pour so that an adjustment can be made. The checks are easily done. Probably not by disto with all the bracing and props.

If a site has been sold off the plan, an undersized carparking space is a change to “material particulars”. These changes must be notified using the approved form. There is a value difference between a full size car parking space and a small car parking space.

Again once the formwork is stripped, the distance between columns should be remeasured to confirm the dimension is at least a multiple of 2.4 so that each car space between the columns can be a full size space. If the distance is not available then the developer needs to engage a traffic engineer to confirm that the car parking space can be a small car parking space. These small carparking spaces are 5000 x 2300 minimum but there are other considerations like turning path and aisle width.

So what is the take home message for basement carparking. Measure at least 2.4, 4.8 or 7.2 between columns. Do this as early as possible in the construction program so that the necessary adjustments can be made to the sales contracts. Changing a carspace from full size to small is a material particular. You will see on the form that it is urging purchasers to seek advice from their lawyer and that they “may be able to end” their “contract or seek compensation”.

As a registered surveyor, just be aware of signing a strata plan that looks too perfect. Perhaps the draft basement was put into the strata plan by accident. It won't take long for another surveyor or even a lot owner to measure between columns and come asking the question. Particularly if their car or a tenants car gets damaged getting into or out of a spot that is too tight. The strata plan stays with the registered surveyor for the life of the strata plan. Remember power and authority. They go hand in hand and every surveyor needs to act in the public interest.



# Construct NSW – Six Pillars

## The Construct NSW Transformation Program



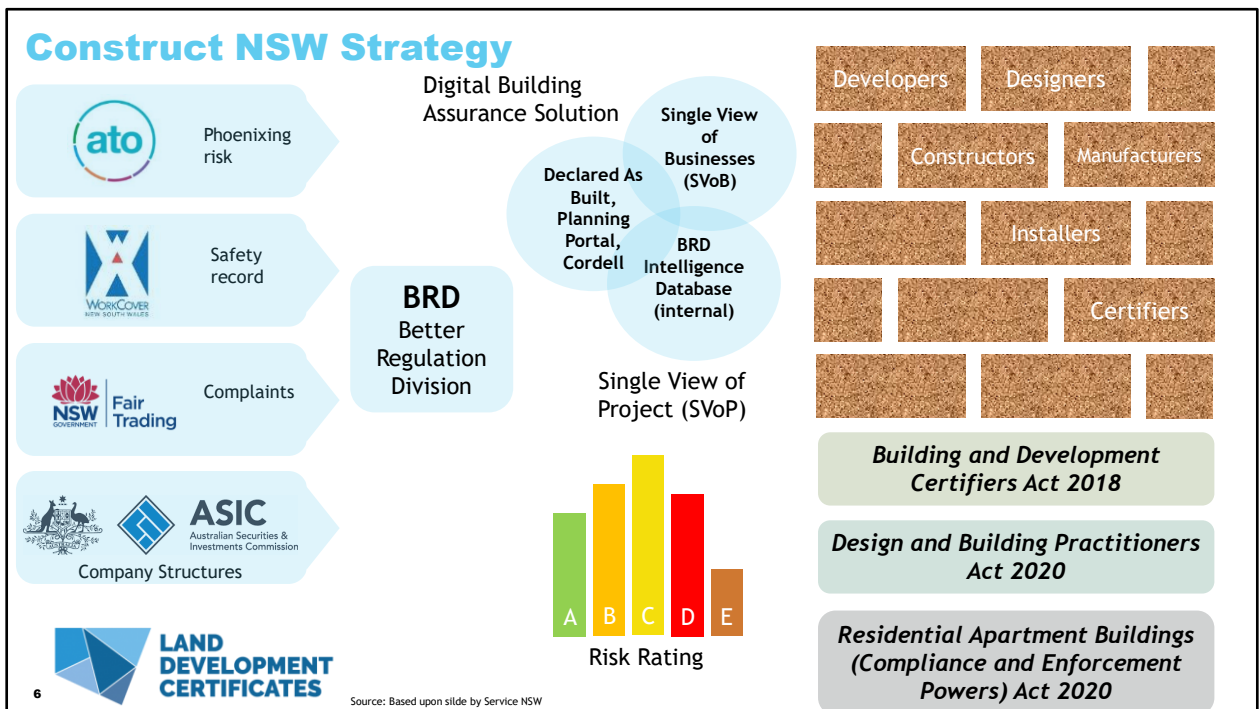
Source: <https://www.nsw.gov.au/customer-service/news-and-events/news/building-reforms-boosted-new-transformation-team>

Pillar	Actions	Outcomes
<b>Building a better regulatory framework</b>	Implementing legislation and regulation and transforming the focus of the regulator	Ensure that NSW has a strong customer focused regulatory framework
<b>Building rating systems</b>	Work with ratings agencies, insurers and financiers to assist in better selection of industry participants	Move away from one-size-fits-all participant recognition and better identify risky players
<b>Building skills and capabilities</b>	Improve accreditation of construction related programs through improved standard modules	Shared minimum learning content and open source resources for all institutions
<b>Building better procurement methods</b>	Establish clear standards for engagement and outputs	Viable risk allocation and performance accountability
<b>Building a digital future</b>	Digitise the NSW Building Industry and move away from analogue record keeping	Shared industry wide platforms that build confidence
<b>Building the reputation for quality research</b>	Evidence based approach to accessing and closing the gap via case studies and other research	Baseline and measurement against our ability to improve confidence in the industry

There has been a lot of reform in the apartment sector over the last 18 months so I thought it important to give surveyors an overview of that reform and how it affects construction documentation and particularly construction setout and works as executed surveys. So here are the six pillars that are guiding the reforms by the Building Commissioner.

1. Reforms to the regulatory framework are bringing the purchaser, the customer, back into forefront of the legislation. After all it is the purchaser that is putting up the money for the apartment.
2. The NSW government have already put out to tender for a **digital building assurance solution**. Customer Services have already done a lot of ground work on the Strata Portal. All of government are working together to create a single point of truth by integrating the data from the planning portal with other available data sources. The **digital twin** is offering a visualisation of as built data.
3. Tafe NSW are on board to deliver updated information on new building technologies. Registration of design and building consultants is also bringing CPD requirements of 60 hours for some disciplines.
4. There is now a statutory duty of care for **Design and Building Practitioners**. The department have developed model clauses for use with construction and design consultancy contracts to assist in construction only and design construct contracts to help parties understand the declaration obligations commencing in July 2021.
5. As built drawings will be required to be lodged within 90 days of the release of the occupation certificate. These drawings will help inform the owners corporation as they seek to maintain the building.
6. The sixth pillar involves case studies. The building commissioner has already stated that he is prepared to name and shame risky players who have harmed the apartment industry.

I have included a detailed table from the building commissioner on the six pillars.  
Source: <https://www.nsw.gov.au/customer-service/news-and-events/news/building-reforms-boosted-new-transformation-team>



The Construct NSW Strategy is heading up major legislative reform. With the increased use of digital systems the Better Regulation Division (BRD) is seeking to bring about a major reform of the building sector. By pulling together information from many digital platforms the Building Commissioner has introduced a rating system for developers, designers, constructors, manufacturers, installers and certifiers with the aim of improving performance or chasing those who don't improve out of the sector.

There is strong correlation between the corporate behaviour like phoenixing, safety record, consumer complaints and dubious company structures and or directors, and the quality of buildings.

The *Building and Development Certifiers Act 2018* introduces a stronger code of conduct and conflict of interest.

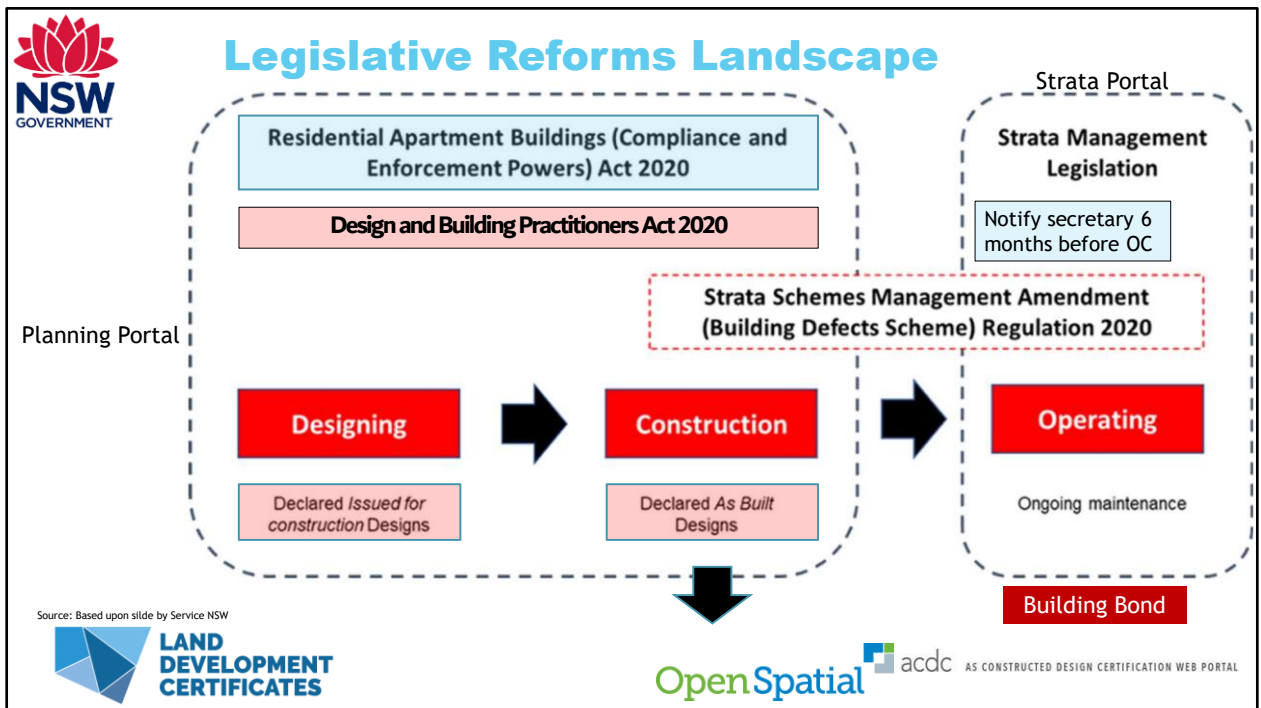
The *Design and Building Practitioners Act 2020* and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* bring registration of designers and constructors.

The legislative reforms to each of these Acts helps build a strong foundation for the apartment sector and bring back confidence for purchasers of new apartments.

A rating tool will be available for the public and for insurers so that they can assess the risk posed by different practitioners and builders.

A new industry-wide principle of duty of care has been introduced. And this can't be delegated by a contract. This applies to all new buildings and retrospectively to buildings less than 10 years old.





Design and Construct contracts are also in wide use within the apartment sector. Often a reputable designer or architect is engaged by the developer to get the drawings to the point of approval and off the plan sales. However, once the construction goes out to tender the builder brings in their own consultants to get the building to construction certificate. This sort of approach leads to shortfalls in the design process. Poor documentation leads to poor construction outcomes.

According to the commissioner's office, many builders welcome the idea of a minimum standard for the declaration of construction designs. Too many times builders are left doing further design work due to inadequate documentation.

The Design and Building Practitioners Act 2020 requires a design compliance declaration. The declaration for the construction design must be lodged on the planning portal from 1 July 2021. If there are changes to a design then a variation must also be lodged with the planning portal, and when the building is nearing occupation certificate another declaration is required together with the complete set of as built documentation. Open Spatial have developed a web portal for as constructed design certification called ACDC.

The as built documentation can be utilized by owners corporations and strata managers to inform decision making about building maintenance or changes to a structure.

Under the **(RAB Act)** *Residential Apartment Building (Compliance and Enforcement*

*Powers) Act 2020* a developer must give the secretary of the Department of Customer Service at least 6 months, but not more than 12 months notice of intention to lodge an application for an occupation certificate. The lodgement of the building bond under the *Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2020* will now be through the NSW Planning Portal.

# Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)

## How do I notify the Secretary of the date I intend to seek an OC?



Is your planning application in the NSW Planning Portal?

Your Notice should be lodged in the [NSW Planning Portal](#)

OR

If your planning application is not in the NSW Planning Portal?

Your Notice should be lodged on the [Fair Trading website](#).



What do I need to do if the date changes?



If circumstances change and the expected completion date has moved, you must amend your expected completion date within 7 days.

“Within 60 days of the expected date specified”  
(s 8(4))

Note: Councils and Principal Certifying Authorities (PCAs) in the Sydney Metropolitan, Illawarra, Central Coast and Newcastle areas commenced using the ePlanning Digital Services from 1 July 2020, and must process all planning applications this way from 31 December 2020



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Source: <https://www.mbanks.asn.au/media/industry-news/rab-act-comes-effect>

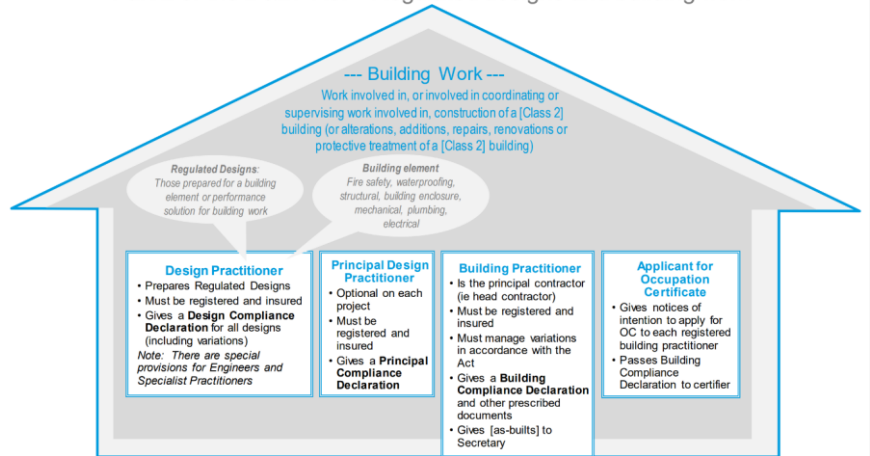
The RAB Act requires developers to lodge an expected completion notice with either the NSW Planning Portal or the Fair Trading Website (via Microsoft forms). **Section 8 Notification of change to expected date** (4) This section does not apply if the new expected date is within 60 days of the expected date specified in the expected completion notice given to the Secretary in relation to the building work.

# Design and Building Practitioners Act 2020 (DBP Act)

## Quick guide – Practitioners and their roles

Part 2 of the D&BP Act – Regulated designs and building work

- ▶ Statutory duty of Care
  - ▶ Can't be delegated (s 39) or contracted out (s 40)
- ▶ Retrospective
  - ▶ Existing buildings 10 years
- ▶ Design and Building Work
- ▶ Registration with Department of Customer Service
  - ▶ Designers
  - ▶ Engineers
  - ▶ CPD
- ▶ Enforcement Powers
  - ▶ Stop Work Orders
  - ▶ Court Orders
  - ▶ Investigation and Audit



Please note this diagram is intended for guidance only. You should refer to the D&BP Act for details.  
ME\_173887913

This document is for guidance only. Each person should seek their own legal advice. This document is a draft only.



Source: Model Clauses - Construct Only Contract NSW Building Commissioner (p2)

This diagram is from page 2 of the model clauses for construct only contracts.

The *Design and Building Practitioners Act 2020* has introduced a statutory duty of care 11 June 2020 with the bulk of provisions starting 1 July 2021. The duty of care can't be delegated or contracted out.

The Act is retrospective too, covering not only new buildings but building less than 10 years old.

The Act covers designers and builders. Existing registration schemes for engineers and architects may qualify for registration provided that the organisations meet the requirements for a Professional Standards Scheme (PSS). CPD for Design Practitioners is 60 hours.

Enforcement powers include stop work orders, court orders and auditing. The building commissioner can also prevent the settlement of properties that have defects.

## Commencement of Part 6 EPAA1979

- ▶ Occupation Certificate (OC) – no longer interim or final certificate.
  - ▶ Expected completion notice (RAB s 7)
- ▶ Subdivision Works Certificate (SWC) – for Notice of Determination issued after 1 December 2019.
- ▶ Construction Certificate (CC)

**Subdivision works** means any physical activity authorised to be carried out in connection with a subdivision under the conditions of a development consent for the subdivision of land.



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### **New subdivision works certificate provisions**

Under Part 6 of the EP&A Act, a construction certificate can no longer be used to certify 'subdivision work'. A construction certificate will still be required to certify building work.

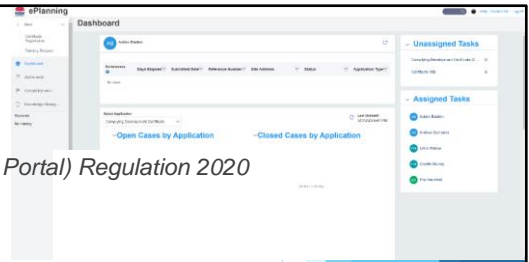
A subdivision works certificate will be required to be issued by the Certifier for all DA's issued after 1 December 2019.

**Subdivision works** means any physical activity authorised to be carried out in connection with a subdivision under the conditions of a development consent for the subdivision of land.



## NSW Planning Portal

- ▶ *Environmental Planning and Assessment Amendment (Planning Portal) Regulation 2020*
- ▶ From 31 December 2020 (**relevant local government area**)
  - ▶ Development Consent
  - ▶ Modification of Development Consent
  - ▶ Review of Determination
  - ▶ A construction certificate
  - ▶ A subdivision works certificate
  - ▶ An occupation certificate
  - ▶ A subdivision certificate (including strata certificate)
- ▶ All Council areas from 1 July 2021.
- ▶ Additionally, many other notices and certificates must go through the portal including complying development certificates, appointment of principal certifier, intention to commence subdivision work or erection of building



The NSW Planning Portal is now compulsory for a “relevant local government area”.

**relevant local government area** means the local government areas of Bayside, Blacktown, Blue Mountains, Burwood, Camden, Campbelltown, Canada Bay, Canterbury-Bankstown, Central Coast, Cessnock, Coffs Harbour, Cumberland, Fairfield, Georges River, Hawkesbury, Hornsby, Hunters Hill, Inner West, Kiama, Ku-ring-gai, Lake Macquarie, Lane Cove, Liverpool, Maitland, Mid Coast, Mosman, Newcastle, North Sydney, Northern Beaches, Parramatta, Penrith, Port Macquarie-Hastings, Port Stephens, Randwick, Ryde, Shellharbour, Shoalhaven, Strathfield, Sutherland, City of Sydney, The Hills, Tweed, Waverley, Wingecarribee, Willoughby, Woollahra, Wollondilly or Wollongong.

## Other Strata Issues

- ▶ Project Remediate
  - ▶ Interest free loans to rectify combustibile cladding on Class 2 residential apartment buildings
- ▶ Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020
  - ▶ Embedded networks
- ▶ Low Rise Medium Diversity Housing Code
- ▶ Short term rental accomodation
- ▶ Electronic Dealings from 22 March 2021
  - ▶ Majority of dealings must now be lodged via electronic lodgment network (ELNO)



Lacrosse tower, Melbourne, 2015



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A quick overview of other recent initiatives affecting Strata Schemes.

Project Remediate

Embedded Networks

Low Rise Medium Density Housing Code

Short term Rental Accomodation

Electronic Dealings – Positive Covenants, Restrictions

## Recent Case Law

Surveyors should advise their clients to seek independent legal advice.

It is the authors opinion that the best Lawyer to advise on a strata or community matter is a member of the Australian College of Strata Lawyers. **A member directory is available on the colleges website.** Alternatively, seek a referral directly from the NSW Law Society for an accredited specialist in property law.

The following summaries are provided for your personal information only. It is not legal or professional advice nor should it be used as a substitute for such advice. You and your clients should seek legal advice for your specific circumstances.



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Here is a plug for the Australian College of Strata Lawyers. A list of the members of the college is on their website. There is a listing for each state and territory. It is my opinion that Registered Surveyors should be recommending members of this college or to contact the NSW Law Society for information on lawyers who specialise in Strata and Community Law.



## Common Property Right By-Laws

### Khadvizad v The Owners - Strata Plan 53457 [2019] NSWSC 157

- ▶ In December 1999 the owners corporation had passed a special resolution to repeal the existing by-laws and replace them with new by-laws.
- ▶ Mr Khadvizad and his wife bought lot 9 in April 2000.
- ▶ Lot 9 had a common property right by-law for a car parking space listed in schedule 2 of the title and marked on the strata plan as an area "H"
- ▶ a lawyer wrote a letter to the owners corporation threatening to take action
- ▶ The owners corporation registered the change of by-law in November 2001 without the owners permission
- ▶ The court ruled that the then s 52(3) of the Act presume "that condition or preliminary step precedent is conclusively presumed to have taken place if no challenge is made to the by-law within two years."



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Common Property Rights By-Laws are covered by Division 7 Part 3 of the Strata Schemes Management Act 2015.

Now this is partially a case of buyer beware. Anyone entering into the purchase of a strata lot should inspect the minutes of the meetings and seek independent legal advice if required.

In December 1999 Mr Khadvizad and his wife found an apartment they liked in Milsons Point and started moving towards the purchase. In the same month the Strata Scheme held its Annual General meeting. At this meeting the owners corporation passed a special resolution repealing all of the by-laws and replacing them with new by-laws.

Mr Khadvizad and his wife purchased lot 9 in the scheme in April 2000. The title to lot 9 listed an exclusive use by-law as item 3 in schedule 2 of the title. Mr Khadvizad leased out the apartment. The tenant corresponded with the owner regarding the strata manager putting up visitor parking signs on the exclusive use area and the executive committee parking all manner of vehicles in these car spaces. There were in fact 9 carspaces with these exclusive use rights. The tenant even offered to get the owner in touch with the other owners. Mr Khadvizad engaged a lawyer who wrote to the owners corporation and insisted that the use of the carspace by other vehicles cease lest the owner took action against the owners corporation.

The owners corporation registered the change of by-law dealing with the then LPI in November 2001.

In 2019, the NSW Supreme Court ruled that under the then s 52(3) of the *Strata Schemes Management Act 1996* the owner had to have taken an action against the owners corporation in a court of competent jurisdiction within two years of the special resolution to change the by-laws.

An owner must be aware of any changes proposed to common property rights by-laws and must take action in order to preserve these rights if required.

## Unlocked Mailbox - *Murray v Raynor* [2019] NSWCA 274

- ▶ Mr Raynor emailed Ms Murray advising that her letterbox was being left unlocked.
- ▶ Several months on, Mr Raynor emailed all the lot owners stating Ms Murray's open letterbox may have been the source of thieves sourcing a master key to access to the letterboxes.
- ▶ Ms Murray wrote to Mr Raynor in a sarcastic reply. Her email accused Mr Raynor of using email to shame, harass, menace and threaten.
- ▶ Ms Murray was eventually taken to NCAT to order her to lock the letterbox.
- ▶ Furthermore, Mr Raynor took Ms Murray to the District Court and was awarded \$120,000 in damages over the sarcastic email being defaming.
- ▶ Ms Murray went to the Court of Appeal and had the defamation set aside and was awarded costs of \$200,000.



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Careful what you write in correspondence and certainly don't post your squabble on social media.

We end with a cautionary tale of how expensive court proceedings can be. So let's set the scene. Ms Murray commences lease of an apartment in Manly and gets a welcome email from the strata committee chair Mr Raynor. Here is the building, the front letterbox area that is contended to be well surveilled, and the letterbox that is left unlocked in case the postman wants to leave a bigger package.

Mr Raynor emailed Ms Murray advising that her letterbox was being left unlocked. Mr Raynor again emailed "Residents have again expressed their concern over your mailbox being left open all the time.

There have been a number of incidents in Manly of thieves searched thru mailboxes looking for mail and identity papers and having (boxes) obviously open can only encourage them. Would you mind closing the box."

Several months on all the mailboxes were opened during the night. Mr Raynor emailed all the lot owners requesting they lock their mailboxes and included a daily telegraph news article on stealing mail from letter boxes for identify theft and for bank cards. Mr Raynor emailed Ms Murray a few days later asking that perhaps she was away and could she lock her mailbox as soon as possible. He also stated that the open letterbox may have contributed to the ease with which thieves had apparently obtained a master key to open all the mailboxes.

Ms Murray and Mr Raynor engaged in a series of emails back and forward on the master key theory. This ended with a sarcastic reply from Ms Murray stating that it was highly unlikely that thieves pulled off a mission impossible style robbery of the mail boxes and asked Mr Raynor to stop using email “to shame me publicly is cowardly. It is also offensive, harassing and menacing through the use of technology to threaten me. Please stop.”

Ms Murray was eventually taken to NCAT to order her to lock the letterbox. Furthermore, Mr Raynor took Ms Murray to the District Court and was awarded \$120,000 in damages over the sarcastic email being defaming.

Ms Murray went to the Court of Appeal and had the defamation set aside and was awarded costs of \$200,000. In part the defence for the case related to the correspondence being privileged, a defence that would not have worked if published publicly such as on social media.

# Strata Legislation Review

- ▶ It has been 5 years since the commencement of the new Strata legislation
- ▶ Discussion Paper
- ▶ Comments close on **7 March 2021**
- ▶ Please send your comments to ISNSW as soon as possible so they can be incorporated into our submission.

**Have  
your say**

[Home](#) > [Have your say](#) > [Help shape the future of strata in NSW](#)

**Help shape the future of strata  
in NSW**

If you own, live or rent in a strata property, such as a townhouse or apartment, or work in strata, we want to hear your views on how the laws are working.

**We're reviewing the rules**

#### Timeline

##### Consultation open

Have your say to help shape the future of living and working in strata. Submissions close **5pm, 7 March 2021**

##### Under review

Contributions to this



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The State Government is presently seeking comments on the discussion paper for areas where the law needs to be reviewed and improved. Download the discussion paper and get your comments into the ISNSW as soon as possible so that we can put together our joint submission.

As you can see we will need to incorporate s 143 of the *Strata Schemes Management Act 2015* to reform common property rights by-laws and owners consent.

## Questions

[www.ldc.com.au](http://www.ldc.com.au)

Download Summary and PowerPoint from our Resources section

[adrian@ldc.com.au](mailto:adrian@ldc.com.au) or phone (02)47228278



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As always you can download a summary and the PowerPoint from the resources section of our website at [ldc.com.au](http://ldc.com.au). Feel free to chat to our friendly team regarding your strata project. You can also get in touch with me by email. And we are more than happy for you to get onto our mailing list where we can alert you and your colleagues of legislative changes as they occur throughout the year.