

Launch of *Strata Law in New South Wales*

and

Joske's Law and Procedure at Meetings in Australia

21 July 2022

The Hon. A S Bell, Chief Justice of New South Wales

Supreme Court of New South Wales

- 1 On cold, wet winter nights, such as those to which we have now become accustomed, there's nothing better than curling up in front of the fire with a glass of red wine and a good book or two.
- 2 People's reading taste varies greatly and I dare say you could get very long odds indeed on even the nerdiest lawyer nominating the first edition of *Strata Law in New South Wales* and the 12th edition of *Joske's Law and Procedure at Meetings in Australia* as being at the top of their recreational reading lists.
- 3 But then again, you may never have met Dr now Justice Elisabeth Peden and Mr Wayne Muddle of Senior Counsel.
- 4 I do not mean to imply by my levity that the two books we launch tonight are not great reads. And there is no doubt that they will definitely be invaluable to practitioners.
- 5 I also hope that Justice Peden and Mr Muddle will not mind me teasing them a little for their choice of topics. I well remember David Jackson QC, after I had written yet another article on anti-suit injunctions, asking me who was the other person interested in the subject!
- 6 So, to the books. Let's start with *Meetings*. Actually, let's start with meetings and human nature.

- 7 What could possibly go wrong? People are so rational; human nature is so calm and predictable. But then to imbue a meeting with legal significance, even legal personality when we speak of “the company in general meeting”, things can get interesting. Stakes can be raised and outcomes can become critical.
- 8 And of course, as we all know, everything that is said at a meeting will be faithfully and accurately recorded in the minutes of the meeting! Not!
- 9 As Sir Humphrey Appleby explained to James Hacker:
- “The purpose of minutes, Minister, is not to record events; it is to protect people. Minutes are there to reflect what people thought they should have said, with the benefit of hindsight.”
- 10 Now that’s all very well if there is one set of minutes and no controversy afoot but we’ve all done cases where there are several sets of minutes, sometimes with one only bearing a passing resemblance to the other.
- 11 And then there are minutes written before the meeting and those on the eve of litigation. The former kind reflects something Jim Spigelman once told me: “Never go into a meeting without knowing what the outcome will be!” He was a very shrewd Chief Justice! In respect of the latter type of minutes, those composed with litigation in mind, my forensic advice to those practitioners in the audience tonight would be: “Always call for the metadata.”
- 12 It is now a decade since the last edition of *Joske’s Law and Procedure at Meetings*. That edition (and a number before it) were written by the late but redoubtable Professor Eilis Magner who taught me at Sydney University Law School before moving to the University of New England to become a Foundation Professor of Law at that University’s new law school. Winter mornings in Armidale may have reminded her of her native Canada. Sadly Eilis passed away too young in 2014. Justice Peden and Mr Muddle appropriately pay tribute to her in their preface to the 12th edition.
- 13 *Joske’s Law and Procedure at Meetings in Australia* has always been an invaluable book for any practitioner to have on his or her shelf. The problems

presented by company meetings tend to arise urgently and so an authoritative handbook containing the answers and principles, explicated by the case law, is exactly what a competent lawyer needs. The manner in which this edition is structured and indexed is extremely helpful.

14 Although this is not a rapidly evolving or fast changing area of the law, and one would not expect it to be, the book integrates references to various cases heard throughout Australia over the decade since the last edition including:

- *Rana v Survery* [2013] NSWCA 234, which affirmed that where a company's constitution designates meeting minutes to be "conclusive evidence" of proceedings, those minutes bind the participants in the meeting and bar the tender of contradictory evidence;
- *Clark-Ugle v Clark* [2016] VSCA 44, in which the Court upheld an order, made by analogy to s 249G of the *Corporations Act 2001* (Cth), that a meeting had been validly convened, on the basis that a minority of members had misused quorum requirements to frustrate the majority;
- *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* (2016) 248 FCR 280; [2016] FCAFC 80, which held that enclosure of a proposed resolution that may be *ultra vires* does not prevent a member's request to call a meeting from being carried out in a lawful manner;
- *Agricultural Societies Council of NSW Ltd v Christie* (2016) 340 ALR 560; [2016] NSWCA 331, which considered whether the extinguishment of a (former) member's "right to work" may enliven a court's power to interfere with an expulsion order (see, also, *DEF v Trappett* [2016] NSWSC 1698; [2017] NSWCA 163);
- *Obeid v R* (2017) 96 NSWLR 155; [2017] NSWCCA 221, in which it was recognised that whilst assemblies are entitled to protect their

proceedings from interruption, that does not equate to a right to inflict punishment on a member;

- *Moala v Free Wesleyan Church of Tonga in Australia (Victoria) Inc* [2019] VSC 205, which held that whether the presence of unauthorised participants at a meeting invalidates an otherwise valid resolution is to be determined by considering whether such presence made a material difference to the outcome of the meeting (see, also, *Wykrota v Polish Club Ltd* [2020] NSWSC 239); and
- *Briant v Martin* [2020] FCA 1009, which considered the factors relevant to determining whether the conduct of a meeting partially by telephone is appropriate.

- 15 Turning then to *Strata Law in New South Wales*, the very idea of producing a specialist text not only for lawyers but also strata managers and, no doubt, various body corporate members, is an extremely good one.
- 16 It is just over sixty years since the introduction of the first strata legislation in New South Wales (the *Conveyancing (Strata Titles) Act 1961*), and after the third significant set of modifications to the legislative scheme represented by the *Strata Schemes Management Act 2015* (NSW) and the *Strata Schemes Development Act 2015* (NSW), it is trite to observe that a growing number of people – approximately one sixth of the population of NSW – now live within a strata title development.
- 17 The scope for a wide variety of disputes to arise in connection with the form of shared property created by our strata legislation is obvious, and this is evidenced by the range of matters that come before NCAT, its Appeal Panel and the Supreme Court, many filtering up to the Court of Appeal.
- 18 Disputes between neighbours — though of course this is not the only kind of dispute that arises — can take on a deal of complexity in the context of a strata scheme. A notorious recent case of this kind involved the Watermark building

in Manly (*Murray v Raynor* [2019] NSWCA 274). In that case, emails had been exchanged between a tenant of the building and the chair of the strata committee (a resident proprietor) in relation to the security of the mailboxes in the complex. The exchange culminated in an email sent by the tenant to the committee chair, and copied to 16 other residents, containing what the tenant accepted to be a number of defamatory imputations to the effect that the committee chair was not only wasting all residents' time with petty emails concerning mailbox security, but had also maliciously harassed the tenant and attempted to humiliate her publicly in emails to other residents. Ultimately the appeal was resolved in the tenant's favour, on the basis that the defamatory imputations were sufficiently connected to an occasion of privilege, namely communication to residents of the strata scheme on the topic of building management.

- 19 Although published last year, the authors were able to include in their coverage the New South Wales Court of Appeal's decision in *Cooper*, the famous case involving Angus the nine-kilogram schnauzer and the Horizon building in Darlinghurst — *Cooper v The Owners – Strata Plan No 58068* (2020) 103 NSWLR 160; [2020] NSWCA 250. About that decision Professor Sherry has written:

“*Cooper v The Owners – Strata Plan No 58068* is arguably the most significant decision to date for millions of Australians who live in strata schemes. While it is the first New South Wales superior court consideration of pet regulation, as well as the s 139(1) prohibition on by-laws that are ‘harsh, unconscionable or oppressive’, the decision goes much further. The Court held that owners corporations have no power to make any by-law that regulates activity that has no meaningful effect on other people.”

- 20 Unfortunately, the important 2021 decisions of the New South Wales Court of Appeal in *Trentelman v The Owners – Strata Plan No 76700* (2021) 106 NSWLR 227; [2021] NSWCA 242, concerning, inter alia, how an owners corporation proves reliance in a proprietary estoppel claim; and *Australian City Properties Management Pty Ltd v The Owners – Strata Plan No 65111* [2021] NSWCA 162, concerning the statutory and general law duties of caretakers of strata-titled properties and their regulation by the savings and transitional provisions in schedule 3 to the *Strata Schemes Management Act*, came too late

for inclusion in this book. I am sure that will come as music to the ears of the publisher!

- 21 NCAT in its 2021 Annual Report noted strata and community title matters within its top ten matter types by volume, with over 1,600 applications to the Tribunal over the year. Those sort of statistics should bode well for sales. And I'm sure that if I put Justice Peden in charge of the Real Property List, there will be a wealth of new judgments for the next volume, and the one after that, and after that!
- 22 Seriously, such is the importance of the subject, the pervasive nature of strata title and, I would observe, the ageing nature of many buildings that are subject to the strata title regime and will increasingly require contributions from unit holders to sinking funds (with all of the scope for disputation that that involves), that this book may well go the same way as *Miller's Annotated Trade Practices Act*, now in its 44th edition as *Miller's Australian Competition and Consumer Law Annotated*; Odgers, *Uniform Evidence Law* (17th ed, 2022); and *Mann's Annotated Insurance Contracts Act* (7th ed, 2016).
- 23 The book reproduces in their entirety the two 2015 statutes, namely the *Strata Schemes Development Act* and the *Strata Schemes Management Act*, together with the accompanying 2016 Regulations. That, in itself, will be invaluable. But prior to that, there is an extended discussion of the statutory scheme, and particular sections of this extended discussion are then noted after relevant sections of the statutes so that a reader is directed back to relevant commentary. Those sections of the legislation which have been considered in decisions of the Supreme Court or Appeal Panel of NCAT are also specifically annotated.
- 24 When asked to launch a book, I am always reminded of the caustic observations of the late Justice R P Meagher. The author or the publisher of a book on trusts innocently asked him to launch or review it. Roddy did so, writing that "Nobody should yield to the temptation to buy this book, and the author,

the publisher, and the editors ... ought all be ashamed of themselves and of each other.”

25 We live in far kinder times, and such barbs would be singularly inappropriate in relation to these two publications in any event. The law is a diffuse thing, statutes are complex and the case law abounds and grows like topsy. Books such as those launched tonight are invaluable tools for the busy practitioner. They facilitate the comprehension of often complex legislation, make the law more accessible and, as such, play an important role in the administration of justice.

26 I congratulate the authors on their industry and wish them many more editions into the future!
