Facilitate or Discriminate

One of the greatest difficulties for strata schemes and their strata managing agents is balancing the parallel objectives of efficient cost effective administration and an inclusive harmonious environment. Those objectives are often in tension.

Owners and occupiers can have very different ideas about what arrangements are appropriate for assisting those with special needs to access and use their lots and common property facilities, participate in scheme meetings and observe cultural traditions. These disputes can become extremely acrimonious, with aggrieved owners and occupants pursuing on-line and other protests against strata committee members and strata managing agents perceived to be acting unfairly.

Further, it can be very difficult to determine what the law requires in a strata context. Discrimination law generally relates to actions in the public arena, i.e. the boundary between public and private activity is very important and that boundary can be hard to establish in a strata context. The area is governed by a web of Commonwealth and NSW laws and these laws have overlaps, inconsistencies and gaps. Also, the laws differ from state to state, so people moving interstate or owning properties in multiple states need to adapt to different rules.

Generally, these laws have limited application and only prohibit conduct if certain things can be established. In particular:

- That the action related to a specified characteristic of the aggrieved person, e.g. gender, race, sexuality, disability or illness status, marital or domestic status or carer's responsibilities.

- That the aggrieved person experienced discriminatory conduct. This can be direct, e.g. exclusion of a particular group or indirect, e.g. imposition of a requirement which in theory applies to everyone, but actually operates against particular groups. Also, some related conduct is prohibited, e.g. vilification, victimisation, harassment and sexual harassment.

- That the conduct occurred in a specified context. This depends on the characteristic and conduct involved and varies widely. For example, many of these rules are limited to an employment context, while others apply to broader areas of public life, e.g. supply of goods and services, education, accommodation and participation in registered clubs.

- That no defence is available. These also vary widely, e.g. in some contexts a requirement may not apply if compliance would involve "unjustifiable hardship" or if a restriction is "reasonable in all the circumstances".

The most common disputes we see are:

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- Harassment of strata managing agent employees or owners corporation committee members or employees. This can be particularly nasty and take various forms, ranging from physical harassment to online vendettas. The law here is fairly straightforward, as they have clear rights under discrimination law, employment law and defamation law. However, those rights can be hard to enforce effectively. Also, where claims are based on work health and safety laws, it can be more complicated, as it may be necessary to identify and allocate responsibility between employers, "persons conducting a business or undertaking" and "persons with management or control of a workplace", which can be tricky with strata common property.

- Requests to retrofit common property to facilitate use of or access to a lot or common property facilities. New buildings and certain modifications of existing buildings must meet design standards, e.g. in relation to disability access, but historically it has not been clear how far this extends to existing structures. However, recent cases suggest that owners corporations may be required to undertake such works and at their own cost. The key points seem to be:

    - The *NSW Anti-Discrimination Act 1977* ("ADA") does not contain a provision expressly requiring an owners corporation to modify common property to facility disability access. This contracts with the position in Victoria, where Section 56 of the *Equal Opportunity Act 2010* requires an owners corporation to do so, subject to certain conditions, including that the lot owner bear the cost.

    - The ADA does contain a more general provision, Section 49M, which prohibits discrimination against a person on the ground of disability by refusing to provide goods or services or by the terms on which he or she provides those goods or services. There are some qualifications, especially where compliance would cause unjustifiable hardship to the supplier.

    - NSW & Victorian cases suggest that an owners corporation is providing services, that the means of accessing the lot and common property facilities are one of the terms on which those services are provided and that generally the need to modify common property to facilitate disability access will not involve unjustifiable hardship. Consequently, it seems that owners corporations may need to make such modifications and at their own cost.

      Hulena v Owner's Corporation Strata Plan 13672 [2010] NSWADTAP 27

      Owners Corporation OC1-POS539033E v Black [2018] VSC 337

    - Some of these propositions are dubious and potentially vulnerable to being overturned by higher courts. Further, whether requested modifications are reasonable or cause unjustified hardship would turn on the facts of a particular case. That said, they are a genuine cause for concern.

- Requests for special measures to facilitate access to or participation at meetings for the benefit of persons with special needs, e.g. ground floor venues for meetings, provision of documents in large font format and steno-captioning at meetings. The key issues here are:

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- Whether the owners corporation or strata managing is required to take such measures. Are they doing one of the things to which the law applies, e.g. providing accommodation or goods and services?

- If yes, would compliance involve "unjustifiable hardship"? This would depend on the relative need, proportion of persons benefitted and cost.

- If no, whether it should be done anyway, in the interests of scheme harmony and inclusion. Again, this would depend on the relative need, proportion of persons benefitted and cost.

- The cases referred to in the previous paragraph suggest that owners corporations and strata managing agents will have obligations, but that the precise extent will turn on the facts of the particular case.

- Disputes about observance of cultural traditions. Our multicultural society is reflected in strata buildings, many having occupants from diverse backgrounds and tensions can arise. A group may wish to celebrate an occasion, but be perceived by others to be causing a nuisance. Practices may be long standing tradition with one group, but be perceived as offensive by another, e.g. display during a festival of a "swastika" symbol, being an ancient and benign symbol in some cultures, but having become deeply offensive to others. These disputes need to be carefully managed, as they can become extremely acrimonious and result in long running feuds.

- Complaints about "enclaves". Suspicions can arise that action is being taken to restrict ownership or occupation of lots to members of a particular group. That can be benign, e.g. where the strata scheme comprises a retirement village or housing exclusively for aged persons. Odious restrictions, e.g. based on race or religion, are effectively prohibited in NSW, as:

    - This can't be achieved by by-law, as the strata management legislation provides that a by-law must not be "harsh, unconscionable or oppressive" and is not "capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot". Although, it is fairly clear from decided cases that this could operate indirectly by restricting non protected activities such as smoking or pet ownership, it would not permit a restriction by say race or religion.

    - Although it appears that, in NSW, a property owner can refuse to sell to a member of a particular religion, one would expect that a combination of enlightenment and self-interest on the part of other owners would prevent this having much impact on a strata building.

- Assistance animals. Although by-laws can restrict or prohibit pet ownership, that doesn't extend to "assistance animals". We encounter misconceptions in this area, e.g. that this is restricted to guide dogs or that formal training and/or certification is required. Owners corporations can require evidence that an animal is an assistance animal, but it is sufficient that the animal alleviates the effect of a disability and is owner trained.

- Age restrictions. Restriction to senior accommodation is permissible. Prohibition of minors is not, except in a retirement village or aged persons accommodation.

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- Occupant numbers. By-laws restricting occupant numbers are permissible, but there are some limits. The limit can't be less than two adults per bedroom. Further, the limit won't apply if all adults are related, defined so as to include de facto spouse, carer and indigenous kinship relationships.

Given how disruptive and expensive such disputes can be, they need to be carefully managed and it would be well worthwhile for owners corporations and their strata managing agents to develop policies and training in this area.

In particular, it is important to appreciate that these often arise out of perception rather than reality, i.e. a mistaken understanding of another person's agenda and can often be pre-empted by good communication. Of course, people are not always sensible and there will be situations where firm action will be required to prevent escalation of a dispute.

We have considerable experience with these issues and could help you pre-empt difficulties in this area.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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