The DO's and DON'TS in By-Law Drafting: How far can an Unenforceable By-Law take you?

The very nature of strata ownership and its close proximity of living environment increases the likelihood of disputes occurring and it is common to see that many owners corporations take a proactive approach to create rules and procedures to ensure that things run smoothly within the scheme. While the Strata Schemes Management Act 2015 (**SSMA 2015**) recognises the rights of an owners corporation to make by-laws for the purpose of the *"control, management, administration, use or enjoyment of the lot or lots and common property"*, the provisions under the SSMA 2015 also impose certain restrictions on the by-law making power.

The "don'ts" for by-law drafting

Section 139 of the SSMA 2015 sets out that a by-law cannot be harsh, unconscionable or oppressive. Further, section 150 of the SSMA 2015 gives the Tribunal power to make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive. It should be noted s 150(1) has two limbs – the first is where the Tribunal finds a by-law is beyond power; and second limb is where a by-law is found to be harsh, unconscionable or oppressive.

Some of the most common conditions contemplated in a management by-law (yet likely invalid) include:

(a) Deactivation of access device

In a recent case The Owners – SP No 91684 v Liu [2022] NSWCATAP 1 (**Liu's Case**), the Tribunal invalidated a short term letting by-law which confers the owners corporation the following additional functions, powers, authorities and duties to deactivate access devices and recover cost and expenses for breach of by-law. The relevant conditions of the by-law is extract as follows (omitting irrelevant parts):

> *(a)……*
>
> *(b) the power to deactivate access devices to the lot of any owner or occupier who is found to be in breach of the by-law;*
>
> *(c)-(d)….*
>
> *(e) for absolute clarity, the Owners Corporation, may recover the cost and expenses of carrying out the activities referred to in clause 9 from the respective Owner as a levy debt, due and payable at the owners corporation's direction and which, if unpaid within one month of being due, will bear simple interest at the rate of 10 percent per annum or, If the regulations provide for another rate, that other rate, until paid and the interest will form part of that debt.*

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The message is clear in *Cooper v The Owners - Strata Plan 58068* (2020) 103 NSWLR 160; [2020] NSWCA 250 stating that access is an inherent property right:

> *"A provision that removes that property right with no preconditions, no stipulations as to how and when the breach is required to be "found" so as to trigger deactivation and deprive access; and once triggered, in what circumstances access is to be denied and for how long… these provisions have inherent qualities that may impact severely on the fundamental rights of owners and occupiers at a price that exceeds and outweighs the benefits they seek to achieve."*

(b) Recovery of costs

On the question of recovery of costs, the Tribunal in Liu's Case has made it clear that *" …without a statutory power, there is no power to make the costs associated with an owner's short term rental arrangement recoverable as a levy debt"*. Section 83 of the SSMA 2015 expressly states that levies are raised *"in respect of each lot and are payable by the lot owners in shares proportional to the unit entitlements."* Recovery of costs arising from breach of by-laws is not the kind of expenditure that falls within the administration fund or the capital works fund.

Would the position be different if the notation was changed from "cost" to "levy debt"? Unfortunately, no – the issue is not whether the owners corporation can recover a debt from a lot owner, it is the *"characterisation of that debt….."* which the owners corporation lacks power to impose. That means, however the term is labelled, it is merely a mechanism for billing and recovery and that is impermissible under a by-law.

Having said that, section 82 of the SSMA 2015 creates a statutory exception where a lot owner by consent may be levied an amount for additional insurance premiums where the use of that lot causes premiums to be increased.

The "Do's" in by-law drafting

Overall, a by-law must be made within the parameters contemplated by the provisions of the SSMA 2015. Any by-laws made outside of such parameters are beyond the power of an owners corporation and will be invalidated if challenged. For instance:

- the conditions and prohibitions in a keeping of pets by-law must be made in accordance with section 137B of the SSMA 2015;
- the scope of works and exclusive use areas must be precisely outlined in a common property rights by-law made in accordance with section 108 and 143 of the SSMA 2015; and
- the conditions and any prohibition in a short term letting by-law must reflect the current planning framework and in accordance with the exemptions set out in section 137A(2) of the SSMA 2015.

We have considerable experience in advising lot owners and owners corporation on these issues and are available to provide more specific and detailed advice to the circumstance.

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