BY-LAWS: Referee won't blow the Whistle?

A sporting game can become an ugly affair when the referee blows the whistle for every infringement, seems to be blowing it in favour of one team or fails to blow it all. It works the same way with enforcement of strata by-laws. A scheme can quickly become dysfunctional when the strata committee is over or under active or seems to be favouring one group of owners over another.

So what can an owner do if unhappy with the way the strata committee has been administering the by-laws of the scheme? Key considerations:

- It is always best to try to resolve these issues amicably. Talk to strata committee members. Ask them to explain their stance on the by-law. Try to explain your concerns. Remember that strata committee members need to balance conflicting considerations and need to exercise judgement with when and how to exercise their powers.

- By-laws operate as an agreement between the owners corporation and owners and are binding on them. However, this is an agreement imposed by legislation known as a statutory contract and there are some legal differences between this kind of contract and a standard contract, including how they are enforced and what remedies are available. This makes it all the more important to obtain legal advice before commencing court or tribunal proceedings if you are trying to enforce by-laws or trying to make the owners corporation do so.

- The strata management legislation does not impose an express obligation on an owners corporation to enforce its by-laws. In fact, the legislation provides that an owners corporation may issue a notice to comply and even that is conditional. The owners corporation must be satisfied that the relevant owner has contravened the relevant by-law and the owners corporation must have approved by general resolution the issue of the particular notice or at least notices for the particular kind of contravention.

- The position may be different in a community association context, as the community management legislation contains a provision (not mirrored in the strata management legislation) to the effect that a community association must implement its decisions. It is unclear whether NCAT would consider that as extending to enforcement of by-laws.

- Strata committee members have statutory and common law obligations, including to exercise their functions with due diligence in the best interests of the scheme. Accordingly, it may be possible to obtain appropriate orders where strata committee members have been overzealous, underactive or biased in performance of their functions, with detrimental impact on the scheme.

- Decided NCAT cases suggest that NCAT is reluctant to get involved in such issues, particularly if non-compliance of the relevant by-law has not been established and may well leave the

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.

issue to a general meeting. Accordingly, an aggrieved owner may need to frame an application on one of the following bases:

- An application for orders to the effect that the owners corporation be required to enforce a particular by-law, i.e. an application against the owners corporation focused on owners corporation/strata committee member failure to exercise functions in an unbiased manner or at all.

- Application for orders to the effect that a particular owner comply with a particular by-law, i.e. a direct application against the relevant owner focused on the breach by the relevant owner.

The first would provide a more comprehensive solution, but won't always be realistic.

However, in a recent decision of *Wheeldon Amigh Pty Ltd ATF the Whelldon Amight Trust v Life Fitness Australia P/L and The Owners – SP No 85582* [2022] the Tribunal did get involved in such a dispute. In this matter, the owners corporation was not enforcing its by-laws. The Tribunal ordered that the first respondent (a tenant of a lot in the scheme) comply with the by-laws of the scheme and comply with its obligations under the Strata Schemes Management Act not to use or enjoy the common property in a manner or for a purpose that interferes unreasonably with the use or enjoyment of any other lot pursuant to section 153(1)(c).

In addition, the Tribunal ordered that the owners corporation was to take all reasonable steps to enforce the by-laws of the scheme, including by issuing notices to owners and occupiers under section 146 of the Strata Schemes Management Act 2015 for infringements of by-laws, and by bringing an application under section 147 of the Strata Schemes Management Act 2015 seeking the imposition of a civil penalty for continued breaches of the schemes by-laws.

It is worthwhile to note that the Applicants in this matter were also seeking an order for the appointment of a compulsory strata managing agent of the scheme pursuant to section 237 of the Strata Schemes Management Act 2015 which the Tribunal was definitively reluctant to grant, as set out in the decision. The specificity of the orders in relation to the owners corporations obligations to enforce the by-laws of the scheme may be as a result of the Tribunal's unwillingness to appoint a compulsory strata manager and setting stringent orders in place for the owners corporation to ensure that it manages itself properly to avoid any further alleged dysfunction.

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

Key takeaways

- Strata by-laws are binding agreements between the owners corporation and owners.
- Owners should first attempt to resolve by-law issues amicably with the strata committee.
- Legal advice is crucial before pursuing court or tribunal action regarding by-law enforcement.
- NCAT may be reluctant to intervene unless non-compliance is clearly established.
- Strata committee members have obligations to act in the best interests of the scheme.

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.

****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.*

Prepared by Bannermans Lawyers
Updated 15 March 2022

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

Liability limited by a scheme approved under Professional Standards Legislation

© Copyright Bannermans Lawyers 2022.