

Passing on Unnecessary Costs Caused by Owners & Occupiers – How far can you go?

Managing unnecessary costs or charges to strata schemes caused by owners and occupiers can be a major source of frustration for owners corporations and their strata managing agents. Such costs and charges can span a wide range, including:

- Wilful or negligent damage to common property.
- Failure to comply with owner repair obligations, e.g. after installing or removing locks.
- Improper use of emergency numbers, e.g. unnecessary contractor callouts.
- Unnecessarily calling strata managers after hours.

Understandably, they would like a way to pass on such costs and charges to the people who caused them and a by-law doing so can be tempting. However, there are limits to what can be done, given relevant provisions of the Strata Schemes Management Act 2015 (“SSMA”) and other laws and owners corporation need to be careful not to make by-laws which are invalid or unenforceable. In particular:

- By-laws can regulate conduct by owners and occupiers, but subject to some constraints. The main constraints are that they must relate “to the management, administration, control, use or enjoyment of the lots or the common property”, not be “harsh, unconscionable or oppressive” and not be inconsistent with the SSMA or other laws, there being some types of by-law which are prohibited, e.g. restrictions on keeping assistance animals.
- By-laws probably cannot impose unilaterally fees and charges, in the absence of express authority to do so under the SSMA, as it would arguably be inconsistent with the provisions of the SSMA relating to common property maintenance and maintenance of scheme funds.
- By-laws probably cannot impose a penalty for breach of by-laws (e.g. repair obligations) or SSMA requirements (e.g. lot access), even if a genuine pre-estimate of loss. While the by-laws are given statutory force by the SSMA, it is not entirely clear that they operate as a statutory contract, as is the case with constitutions of companies incorporated under the Corporations Act 2001. In any event, the case law relating to Corporations Act companies suggests that contract law remedies are not available for breach of a company’s constitution and we are not aware of any case law suggesting that the position is any different for strata owners corporations incorporated under the SSMA.

That said, there may be some scope for by-laws to regulate unnecessary costs and charges. For example:

- The SSMA provides that a common property rights by-law can be conditional, including on payment of moneys, so a by-law conferring a right of exclusive use rights or special privileges in relation to common property could impose charges and/or compensation requirements.
- The SSMA also provides that an owners corporation can enter into an agreement with an owner or occupier to provide amenities or services to the lot. These would need to be amenities or services which the owners corporation is not already obliged to provide. If so, the owners corporation could enter into an agreement with owners and occupiers, either directly or via a by-law providing that specified services if requested will be provided on specified terms. For example, this could potentially:
 - establish a framework for contractor callouts and make owners or occupiers liable for the cost of contractor callouts in relation to lot specific issues.
 - establish a communications protocol, i.e. set of rules for communications within the scheme (subject to statutory requirements) and impose charges for services supplied in excess of those provided for in the protocol, e.g. charged strata manager after hours time.
- An owners corporation can, within the constraints referred to above, make by-laws regulating lot owner conduct and enforce those with the enforcement mechanism under the SSMA, i.e. notices to comply and Tribunal penalty applications.

We have considerable experience with these issues and can assist if you are having difficulties with them. In particular, we have prepared draft by-laws, service agreements and guidance materials which would be of considerable assistance to you should you wish to transition to an administrative model involving:

- Implementation of a communications protocol aimed at procuring efficient and cost-effective communications between persons involved in the scheme.
- Restriction of services to be provided to owners and occupiers by the owners corporation or its strata managing agent on its behalf to those which the owners corporation is required by law to provide, with additional services to be the subject of negotiation between owners and occupiers and the strata managing agent or alternate supplier, an owner/occupier cost.

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Updated 11 December 2023