By-Law Review: How strong will your by-laws stand in front of the current legislative framework?

Strata schemes must regularly review their by-laws to ensure they remain valid and appropriate under the current legislative framework in NSW.

Following our previous article on this topic, our suggestion remains that a scheme should regularly be reviewing their by-laws and considering if their by-laws are still appropriate and valid in accordance with the current legislative framework. Despite the question of enforceability, it is pertinent to have the review completed regularly to ensure that they meet the needs of the scheme, which could change from time to time.

Since the operation of Strata Schemes Management Act 2015 (SSMA) on 30 November 2016, there have been continuous changes to the legislative framework which dictate how an owners corporation can manage the strata scheme and the rules that it could adopt for the management, administration, control and use of common property within a strata scheme.

Here is an overview of some of the key changes introduced over the years following the commencement of the SSMA:

Keeping of pets	Prior to the landmark decision in *Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA*, it was common to see many schemes adopting by-laws that placed a blanket prohibition on keeping of pets. On 25 August 2021, section 137B of the SSMA and clause 36A of the Strata Schemes management Regulation 2016 came into operation which essentially states that it is taken to be reasonable to keep an animal on a lot unless the keeping of the animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property. Further a recent decision in Bruce v The Owners – Strata Plan No. 98803 [2022] NSWCATCD 83 also provides judicial interpretation of sections 137B and 157 of the

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	SSMA and declared that the tenant was permitted to keep more than one animal within their lot.
Short term letting arrangement	The new planning framework that came into operation on 1 November 2021, to control the status of short term letting arrangement under the planning law and to ensure that fire safety outcomes are achieved and maintained. The introduction of section 137A of the SSMA makes it clear that an owners corporation can adopt a by-law to prohibit a lot being used for the purposes of a short term rental accommodation arrangement only if the lot is not the principal place of residence of the owner.
By-laws that authorise owners corporation to recover costs from lot owners for breach of by-laws	While it is common to see common property rights by-laws that contain provisions allowing an owners corporation to recover costs from lot owners for enforcing the by-laws, the SSMA sets out how by-laws are enforced and in what circumstances costs can be awarded. A by-law that seeks to recover these costs is contrary to the legislation and would not be valid.
By-laws that allows an owners corporation to deactivate access devices	In a recent case The Owners – SP No 91684 v Liu [2022] NSWCATAP 1, the Tribunal invalidated a short term letting by-law which conferred the owners corporation the additional functions, powers, authorities and duties to deactivate access devices and recover cost and expenses for breach of by-law.
Prohibition of smoking	We often receive enquiries from individuals and owners corporation wanting a by-law that places complete ban on smoking within the entire scheme. In a recent Tribunal case of *Pittman v Newport [2022]* NSWCATCD, it foreshadowed that a complete restriction on smoking within a building could be challenged and invalidated. Further, a complete ban on smoking by-law arguably contravenes the provisions set out in section 139 of the *SSMA.*

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Hard surface flooring	The decision in *Gurram v Owners Corporation SP36589 [2017] NSWCAT* confirms that a by-law prohibiting flooring other than carpet was deemed harsh, unconscionable and/or oppressive, because it failed to include a mechanism for considering minor renovations, which under section 110 of the SSMA, an owner may conduct with approval of the owners corporation.

Section 139(1) of the SSMA provides that a by-law must not be "harsh, unconscionable or oppressive" and section 150 gives the NSW Civil & Administrative Tribunal power to make orders invalidating such a by-law on application by "a person entitled to vote on a motion making a by-law".

Generally, any by-law regulating activity within a strata scheme may be vulnerable to challenge if it:

- Imposes a complete prohibition on some activity and provides no means by which the special circumstances of particular lot owners might be considered; and/or
- Unreasonably and unnecessarily precludes some incident of domestic life consistent with contemporary community standards associated with the rights of owners and occupiers of lots in strata schemes.

Community Scheme

Following the commencement of the Community Land Management Act 2021 and Community Land Development Act 2021, as well as their associated regulations on 1 December 2021, it introduced many significant changes to the rules that an association may adopt in its management statement.

A non-exhaustive list of the more notable changes for each of these groups can be found in our article Important changes to be aware of following commencement of the Community Legislation.

Just because the by-laws were validly made and/or enforceable at the time, it does not simply mean they remain enforceable forever. It could be a costly and time consuming exercise for an owners corporation or association if it does not have a good understanding of where its current by-laws stand in the current legislative framework. A by-law review can act as a precautionary mechanism to a scheme when dispute arises. Get in contact with us to get started on a by-law review process or if you have any concerns relating to the enforceability of certain by-laws within your scheme.

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Key takeaways

- Regular reviews of strata by-laws are essential to ensure compliance with current legislation.
- The SSMA has introduced significant changes affecting pet ownership, short-term letting, and smoking regulations.
- By-laws that contradict the SSMA may be deemed invalid by the Tribunal.
- Recent legal decisions have clarified the enforceability of various by-law provisions.
- Owners corporations must be cautious when drafting by-laws to avoid potential legal challenges.

****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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26 April 2023

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