Beware of by-laws that seek to prohibit changing wet areas

The recent Appeal Panel ("Appeal Panel") decision from the New South Wales Civil & Administrative Tribunal (the "Tribunal") of *Shah v The Owners – Strata Plan No. 7655* [2025] NSWCATAP 215 considered the circumstances in which the Tribunal may exercise its discretion to make an order pursuant to section 150 of the *Strata Schemes Management Act 2015* (NSW) ("SSMA").

This matter specifically involved an appeal in which an order sought to invalidate a by-law which was harsh, unconscionable or oppressive was dismissed. The decision was overturned by the Appeal Panel, who made an order invalidating the by-law on the basis that it was harsh, unconscionable or oppressive.

Background

Bianca Shah (the "Appellant") is a lot owner within strata scheme 7655 (the "Scheme"), which is comprised of 26 lots and located in Kirribilli NSW.

The Appellant requested approval from The Owners – Strata Plan No. 7655 (the "Owners Corporation") to complete renovations to convert her three bedroom and one bathroom unit, into a two bedroom and two bathroom unit. The proposed renovations would involve positioning the proposed additional bathroom directly above an existing bedroom of the lot below.

The Scheme resolved to approve and register a by-law (Special By-Law 19) that was adopted at a general meeting of the Owners Corporation in March 2024. Special By-Law 19 strictly prohibited the installation of a bathroom, toilet or laundry above any part of a bedroom, living room or lounge room of a lot below.

The Appellant lodged an application in the Tribunal seeking an order under section 149 of the SSMA for the unreasonable refusal to consent to a by-law and under section 150 of the SSMA to invalidate Special By-Law 19. The Appellant's application was dismissed by the Tribunal in March 2025.

Appeal Panel Proceedings

The Appellant filed an appeal with the Appeal Panel against the first instance decision of the Tribunal, but only in so far as it related to the dismissal of the section 150 order sought. The Appellant did not appeal the dismissal of the section 149 application.

The Appeal Panel was required to consider whether the absolute blanket prohibition imposed by Special By-Law 19 rendered it hard, unconscionable or oppressive within the meaning of section 150 of the SSMA.

Section 136(1) of the SSMA provides that by-laws may be made in relation to the management, administration, control, use or enjoyment of the lots or the common property. Section 139(1) of the SSMA affirms that a by-law must not be harsh, unconscionable or oppressive.

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The approach taken by the Appeal Panel in this case involved an analysis of the judgment of the NSW Supreme Court (Court of Appeal) decision in *Cooper v The Owners – Strata Plan No. 58068* [2020] NSWCA 250 ("Cooper"). In Cooper, the Court of Appeal found that the imposition of an absolute prohibition was a factor to take into consideration in assessing whether a by-law is harsh, unconscionable or oppressive. However, the critical question was whether the by-law impermissibly interfered with the ordinary rights of the lot owners, not just the lot owner seeking its invalidation.

The Appeal Panel held that there was no error in the way in which the Tribunal below had dealt with this issue. The parties accepted during the hearing that this depended on, and was subsidiary to, the wording of the by-law and the question whether an absolute prohibition was harsh, unconscionable or oppressive.

In this case, the Tribunal held that Special By-Law 19 was invalid because there was no element of consideration for individual circumstances. Importantly, it was a blanket prohibition without, for instance, a lot owner being able to apply for renovation works that contradicted Special By-Law 19.

The wording of Special By-Law 19 acknowledged that noise impacts were only typical, but it gave lot owners no opportunity to attempt to demonstrate that their proposal was atypical and would not adversely affect other lot owners.

Decision

The Appeal Panel decision handed down by Senior Member Bell SC and Senior Member Goldstein on 2 September 2025 was in favour of the Appellant. The orders were as follows:

(1) Appeal allowed and set aside order 2 made by the Tribunal in March 2025.

(2) Pursuant to section 150 of the SSMA, declare that Special By-Law 19 regarding bathroom construction is harsh, unconscionable or oppressive.

(3) Direct that if any party seeks a costs order, that party must lodge supporting written submissions with the Registry by close of business on 16 September 2025.

Key Takeaways

1. Absolute prohibitions are not automatically invalid. However, they may be invalidated if they fail to account for circumstances where the prohibited conduct causes no adverse impact on others.

2. By-laws should allow consideration of individual circumstances instead of being a blanket prohibition imposed on all lot owners within a scheme.

3. An owners corporation may regulate to protect amenity, as is its statutory right under section 136 of the SSMA. However, restrictions imposed by way of by-laws must not unnecessarily interfere with ordinary property rights of lot owners.

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