

Are cost recovery by-laws valid?

A common, but risky by-law owners corporation sometimes seek to adopt are costs recovery by-laws which seek to allow an owners corporation to recover its costs it incurs for a breach of by-laws from owners or occupiers.

Most commonly for:

- Call out fees for false fire alarms;
- Costs for a contractor to re-conduct a fire safety inspection where the initial request to access a lot was denied or ignored;
- Insurance excess; and
- Legal costs and other expenses associated with enforcing by-laws.

Owners corporations are empowered by the Strata Schemes Management Act 2015 (SSMA) to make by-laws “*in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme*”, subject to certain restrictions on the by-law making power.

Pursuant to section 150 of the SSMA, the Tribunal may invalidate a by-law 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*.

In determining whether to make an order under section 150, the Tribunal in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250 found that section 150 is a two-limb test:

1. Whether the by-law is made beyond power; and
2. Whether the by-law is not in accordance with the requirement of section 139(1).

Series of cases in the Tribunal suggest that a cost recovery by-law may be *harsh, unconscionable or oppressive* if the by-law:

- Is inconsistent with the regime in the SSMA in which lot owners are levied;
 - *Is harsh, unconscionable or oppressive* because they do not require the costs recoverable by the owners corporation to be reasonable;
 - Does not provide for a mechanism for owners to challenge the costs claimed by the owners corporation;
- or

- Does not provide that the amount the owners corporation is seeking to recover is subject to review by a court or tribunal of competent jurisdiction.

The absence of a requirement that costs be reasonably incurred and the lack of opportunity for review or independent assessment suggest that the purported right to recovery costs under the by-law is likely arbitrary and wholly within the control of one party.

Furthermore, a by-law framing liability as a "debt due" or "payable on demand", rather than requiring proceedings in a court or tribunal of competent jurisdiction, resulting in the owner being "unfinancial" and negating voting rights is also likely to be invalidated by the Tribunal.

Bannermans Lawyers have crafted costs recovery by-laws in relation to fire safety and insurance issues, based on the legislative requirements and decisions by the Tribunal.

If you require assistance in prepare a by-law or handling a situation of a lot owner or occupant breaching the by-laws of your strata scheme, please contact Bannermans Lawyers on 02 9929 0226 or on enquiries@bannermans.com.au for advice on how to proceed.

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