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# BY-LAW REVIEWS – HOW TO AVOID THE PITFALLS & CORRECT THE MISTAKES

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## BY-LAW REVIEWS - SOME OBSERVATIONS, MISTAKES AND HOW TO AVOID THEM

The *Strata Schemes Management Act 2015* (*2015 Act*) has been in force for some time now since commencing on 30 November 2016. Under the new strata legislation every owners corporation in New South Wales was required to review their by-laws.

Most strata schemes have now completed their by-law reviews. Not a bad effort considering there are over 90,000 strata schemes in New South Wales.

So what have we learned from undertaking by-law reviews on behalf of our clients and what insights can be gleaned from having undertaken the process?

What mistakes have been made during the process by some owners corporations in amending their by-laws following a review?

What other matters should an owners corporation consider when making by-laws into the future, including matters they might not have had to consider before?

### What are strata by-laws?

Owners and occupiers of lots in a strata scheme have a right to use and occupy their lots and rights to use and enjoy the common property, in common with other owners and occupiers.

The by-laws of a strata scheme serve essentially three functions:

- to regulate the way in which lots and common property are occupied, used and enjoyed: these are commonly referred to as behaviour or conduct by-laws;
- the means by which the owners corporation can confer special rights or privileges on owners of lots to the exclusion of other owners, previously called exclusive use or special privileges by-laws: these are now called common property rights by-laws; and
- to grant and extend the powers of an owners corporation: these are commonly referred to as empowering by-laws.

By-laws can be made in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme. (s.139(1) 2015 Act). However, a by-law has no force or effect to the extent that it is inconsistent with the Act or any other Act or law (s.139(2)).

Most of the strata by-laws we have asked to review, particularly for residential strata schemes, are the model by-laws applying to their strata scheme, with additional by-laws registered over time, for example, by-laws for exclusive use rights granted to various lot owners to park vehicles, store goods or use gardens in common property areas, or rights to use common property to undertake various works in conjunction with a lot.

For strata schemes in existence before the *Strata Schemes Management Act 1996* (*1996 Act*), the vast majority of these schemes were, and continue to be governed by by-laws that are essentially in the form contained in Schedule 2 to the *Strata Schemes Management Regulation 2016 (Regulation)*. These are 19 model by-laws dealing with various topics.

Most strata schemes also had registered additional by-laws, usually granting exclusive use rights to various owners of lots in the strata scheme.

For post-1996 Act to pre-2015 Act strata schemes, many of these schemes adopted model By-Laws under the 1996 Act as contained in Schedule 1 to the *Strata Schemes Management Regulation 1997* (and then in 2005 and 2010). That schedule contained several sets of model by-laws for various schemes including for residential, retirement village, industrial, hotels/resorts, commercial/retail and mixed use. These provisions are very similar to some Schedule 3 model by-laws that now apply to new strata schemes, and to some Schedule 2 model by-laws, and are a bit of a hybrid version of old and new.

However there has been in the past 20 years an increase in tailor made by-laws drafted specifically by or on behalf of developers, particularly due to the increased complexity of building structures and buildings containing mixed use strata schemes or part building strata schemes, and the increase in the number of community schemes. These changes have been facilitated by the part building strata legislation and the community titles legislation respectively, and for developments that fall into these categories you typically see more complex and comprehensive by-laws.

There are a wide variety of by-laws out there. It is notable however, that many strata schemes, particularly residential strata schemes, have been well served by the model by-laws over the years.

The strata by-law review has been a useful opportunity by owners corporations to consider what by-laws are valid and continue to apply, whether any by-laws need to be changed. There have however, been a number of mistakes undertaken by owners corporations when reviewing their by-laws and making changes as a result.

The following are some of the main mistakes we have seen when undertaking strata reviews, particularly ones we have seen after the by-laws have already been changed under the new strata legislation by an owners corporation.

**Mistake 1: Out with the old and in with the new: blanket adoption of new model by-laws**

The new model by-laws contained in Schedule 3 to the Regulation are a set of 18 model by-laws that apply to new strata schemes created on or after 30 November 2016, or to owners corporations of strata schemes created before that date that choose to adopt them.

Many pre-existing schemes have chosen to adopt the new model by-laws. They have done so thinking that the new model by-laws reflect best practice in this area. But is that the case?

There are a number of important differences between the model by-laws that apply to most pre-existing schemes and the new model by-laws. There are also a number of subtle differences in the wording used in some new model by-laws that result in changes which are not always picked up by owners corporations when they decide to replace their existing model by-laws with the new ones: So what are the big mistakes that are being made by owners corporations that are repealing their existing model by-laws and adopting the new ones?

The following three are by-laws covered in the old model by-laws but are not covered in the new model by-laws:

By-Law 13 – Moving in and Out

The model by-laws for pre-existing strata schemes contain a by-law dealing with moving in and out by residents and the transportation of furniture and large objects through common property (By-law 13, Schedule 2 to the Regulation). This by-law requires residents to notify the strata committee before transporting any furniture or large objects through or on common property to give the strata committee sufficient time to arrange for its nominee to be present at the time of the move in or out.

There are no provisions dealing with this topic in the new model by-laws. This means that those owners corporations who have replaced their existing by-laws with the new ones no longer have a by-law dealing with moving in and out by residents or the transportation of furniture and large objects through common property.

Not covering this topic might have practical consequences, for example the owners corporation might be able to determine whether or not any damage has been caused to the common property as a result of an occupier transporting of furniture or large objects during a move, because they were not notified of the impending move.

By-Law 14 – Floor Coverings

The model by-laws for pre-existing strata schemes contain a by-law dealing with floor coverings (By-law 14 Schedule 2 to the Regulation). This by-law requires owners to ensure that the floor coverings in their lots are covered or otherwise treated to an extent sufficient to prevent the transmission of noise likely to disturb the peaceful enjoyment of other residents.

The new model by-laws do not contain any by-law dealing with floor coverings. This is presumably because the new model by-laws are intended to be used by more modern buildings that have better sound insulation between different areas of the building. But this means that many owners corporations of older strata buildings which have chosen to adopt the new model by-laws no longer have a by-law dealing with noisy floor coverings. This may end up proving to be a big mistake for many owners corporations particularly in older buildings which are plagued by noise transmission problems from floor coverings.

Owners corporations should consider including a floor coverings by-law and adopt appropriate acoustic standard (such as a 5 star or 6 star rating under the guidelines published by the Association of Australian Acoustical Consultants) that is achievable to the strata scheme given the age and construction of the particular building.

By-Law 18 – Noticeboard

The model by-laws for existing schemes have a by-law that requires a noticeboard to be maintained on the common property (By-law 18 Schedule 2 to the Regulation). The new model by-laws do not contain any noticeboard by-law. A noticeboard by-law can prove helpful. Not only does a noticeboard provide a source of information for residents but it can be used to serve tenants with notice of tenants' meetings that must be held for the purpose of appointing a tenant representative. Further, a noticeboard by-law allows an owners corporation to display notices it receives from NCAT on the noticeboard including any orders that are made by NCAT instead of having to serve a copy of any orders it receives from NCAT on all of the owners. Additionally, notice of an adjourned meeting of a strata committee is able to be given by displaying a notice on the notice board rather than by serving the notice on every owner. Therefore, a noticeboard by-law is still useful and should not be dispensed with by every owners corporation.

**Mistake 2: Do nothing – If it ain't broke don't fix it**

Some strata schemes have undergone their by-law review without considering the benefits of adopting some provisions from the new model by-laws or considering how the changes introduced by the new strata legislation might have an impact on existing strata by-laws.

The new model by-laws actually contain many useful by-laws which are not included in the model by-laws for pre-existing schemes. Indeed some new model by-laws are improved versions of pre-existing model by-laws: Here are some new model by-laws an owners corporation might consider incorporating into their pre-existing by-laws:

By-Laws 9 & 10 – Smoke Penetration & Fire Safety

There are new model by-laws dealing with smoke penetration (By-Law 9) and fire safety (By-Law 10), which are topics that have not been previously covered in the by-laws. These are very useful by-laws that should be adopted by most owners corporations. With regard to smoke penetration, the new strata legislation admits in a note to the section dealing with nuisance that smoke penetration can be a nuisance or hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot. That of itself should encourage an owners corporation to adopt the new model by-law.

By-Laws 17 & 18 – Change in Use or Occupation to be Notified & Compliance with Planning and other Requirements

New model by-law 17 dealing with change in use or occupation to be notified is an expanded version of its predecessor model by-law. The prior version of this by-law only had an obligation of the person to notify the owners corporation of the change in the existing use of a lot if that change might affect insurance premiums for a strata scheme. The new model by-law expands this more generally and includes an obligation on an occupier to give at least 21 days prior notice to the owners corporation if there is a change to the use of the lot generally, including whether the change might affect insurance premiums, or if the lot is being used for short term or holiday letting.

New model by-law 18 dealing with compliance with planning and other requirements makes clear that the owner or occupier of a lot must not use the lot for any purpose prohibited by law and must ensure the lot is not occupied by more persons than are legally allowed.

By-Law 5 – Keeping of Animals

With regard to the keeping of animals, as apartment living becomes more common, there are changes in expectations as to what living in an apartment should be like.

The two options contained in the by-law dealing with the keeping of animals (By-Law 5) are a shift away from the blanket refusal to keep pets in a building, or to keep pets but only with the consent of an owners corporation that has absolute discretion.

Option A in the new model by-law dealing with pets automatically permits an occupier of lot to keep a pet on the giving of a notice in writing.

Option B in the new model by-law, permits an occupier of a lot to keep a pet with the approval of the owners corporation, who must not unreasonably withhold approval and must give written reasons for any refusal to grant approval.

Many older strata schemes have absolute no pets by-laws. However, regard must now be had to section 139(5) of the *Strata Schemes Management Act 2015* which states that a by-law is of no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of an assistance animal (as defined in section 9 of the *Disability Discrimination Act 1992* (Cth).

Indeed it is useful if you do have a strictly no animals or pets by-law that you amend it by making that by-law subject to the provisions of section 139(5), and adopt provisions in your by-law permitted by Section 139(6) that enables an owners corporation to require a person to produce evidence that the animal is indeed an assistance animal under the relevant disability discrimination legislation.

You might also want to consider whether a strictly no animal or pets by-law might not be subject to challenge on the grounds it is a harsh, unconscionable or oppressive by-law, particularly if that by-law is made on or after the date of commencement of the 2015 Act. I will talk about this in more detail a little later.

**Mistake 3: Renovations By-Laws: Keep in or take out?**

**Repealing Renovations By-laws already in place for a strata scheme**

Many owners corporations, particularly of older strata buildings, have, over time, made multiple by-laws authorising individual owners to carry out renovations in a number of lots in the scheme. This results in the common property title becoming cluttered with numerous, lengthy renovations by-laws. During the by-law review process, some owners corporations have expressed a desire to remove those renovations by-laws to declutter the common property title and have therefore repealed them.

This has resulted in bringing to an end by-laws that regulate past or existing renovations, with the consequence that there are no longer any by-laws which regulate those past or existing renovations. So, for instance, where the past or existing renovations by-laws are repealed, the provisions in those by-laws which make the owners responsible for the renovations liable for ongoing maintenance and repair of those renovations (and relevant common property affected by those renovations) are no longer effective. This means that the owners corporation will often become responsible for the maintenance and repair of those older past or existing renovations which is often not what the owners corporation intended.

**Adding New Renovations By-laws**

The 2015 Act identifies three categories of work owners are able to carry out to the common property in connection with their lots. These are: cosmetic work, minor renovations and major renovations. Many strata buildings already have a by-law that regulates renovations undertaken by owners. These are often called “blanket” or “generic” renovations by-laws.

During the by-law review process, many owners corporations have made new by-laws dealing with cosmetic work or minor and major renovations. There is nothing wrong with doing so. Indeed it is a sensible practice.

However, the problem arises when an owners corporation makes a new by-law dealing with minor and major renovations but does not repeal or amend its existing renovations by-law. This results in the scheme being governed by two (often inconsistent) by-laws governing renovations. In those circumstances, it is often not clear which by-law prevails and will apply to a particular renovation.

For example, you might have two different sets of by-laws with two different sets of times an owner can undertake works, or with different ongoing obligations for repair and maintenance.

**What to do when repealing existing or adding new renovations by-laws**

Ongoing obligations under any pre-existing renovations by-laws should be carefully considered and preserved where possible.

The difficulty with removing any pre-existing renovations by-laws is that they are often exclusive use or special privileges by-laws (now known as common property rights by-laws), and consequently the consent of the owner of the lot affected by the common property rights by-law is required to repeal that by-law or make any changes to it.

It might be worth considering keeping all old renovations by-laws and retain all ongoing obligations under those old renovations by-laws for past or existing works, and making the new renovations by-law valid from the date the by-law is passed or registered and to say that the new by-law applies to all new works undertaken on or after that particular date.

**Difficulties encountered in effecting changes of by-laws following a review**

Many strata schemes see a review of by-laws as a chance to start afresh and want to remove many by-laws or redress situations. Often we find this to be the case, particularly with mixed use strata schemes where a number of issues have arisen as between the residential and commercial components of a building and strata committees are eager to use this exercise as a means of making things right.

Unfortunately this can be difficult to achieve in practice, particularly where there are common property rights by-laws as any change to such a by-law requires the consent of a particular lot owner or group of lot owners.

In a practical sense it is difficult to pass the special resolutions required with the consent of the owner/s of the lots affected by the particular common property rights by-law so as to impose on that owner any additional or different obligations.

So this exercise has limits as to what can be achieved.

**Other matters to consider when changing existing or adopting new by-laws**

Harsh Unconscionable or Oppressive By-Laws – More to do on No Pets By-Laws Perhaps?

As and from 30 November 2016, by-laws passed under the new strata legislation must not be harsh, unconscionable or oppressive under section 139(1) of the 2015 Act. The previous 1996 Act contained no such restraint on what a by-law could cover provided the by-laws were for the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme, and provided the by-law was not inconsistent with the strata legislation or any other law.

Queensland strata legislation has had a similar provision requiring this of by-laws for some time now, with the added proviso (not found in the NSW legislation) that regard must be had to the interests of all lot owners and occupiers and the use of the common property. Section 180(7) of the *Body Corporate and Community Management Act 1997* (Qld) is the corresponding section which has been in place since 2008. Interestingly this provision has been applied in several situations in Queensland to strike out "strictly no pets" by laws.

In the *Isle of Palms Resort* decision [2010] QBCCMCmr 200 (30 April 2010), a lot owner applied to the Adjudicator for orders seeking that the current by-law restricting pets was void, and that his Maltese Terrier be allowed to be kept in the strata scheme. The Body Corporate had voted to change the by-law for pets from a "not without body corporate approval" to a "strictly no pets" by-law. The Adjudicator considered that the new by-law was unreasonable and oppressive on the basis that the by-law unduly restricted the use of the lot by preventing an owner from even keeping a goldfish in their home. The Adjudicator also considered the strata scheme in question, which was a scheme consisting of low-rise villas covering a large area of land rather than an apartment building. See also the *River City Apartments decision* [2011] QBCCMCmr 184 (3 May 2011) which decision arrived at the same conclusion for that strata scheme even where the strata scheme had little common property. See also *Tutton v Body Corporate for Pivotal Point Residential CTS 33550;* and *Seachange Retirement Village* [2011] QBCCMCmr 94.

Similarly the corresponding provision in the NSW strata legislation might be relied upon by lot owners to overturn no pets and other by-laws considered to be harsh, unconscionable or oppressive in future and consideration needs to be given as to whether a particular by-law might be considered to such a by-law. NCAT can make an order to invalidate a by-law on the grounds that it is a harsh, unconscionable or oppressive by-law see sections 148, 150 of the 2015 Act.

Care should now be taken in making by-laws with blanket bans, or by-laws targeting the behaviour of a particular owner of a lot, or a class of owners of lots in a strata scheme. For example, rather than passing a by-law that targets the behaviour of a particular lot owner, say in how that lot owner maintains the landscaping within their lot, the better position might be to consider what kind of by-law can be passed in more general terms that applies to all lot owners to achieve the same effect.

I have yet to find cases on this provision in NSW but watch this space it is only a matter of time before the limits of this provision is tested.

Strata Management Statements, Precinct Management Statements and Community Management Statements

Another matter to consider is whether the changes you have made to your by-laws will be effective, as in many cases there are other umbrella documents that impact on the behaviour of owners in a strata scheme, and the types of works that can be carried out to a lot or to the common property of a strata scheme.

In a part building strata situation, the Strata Management Statement might contain overriding provisions dealing with the management of garbage and other services in the building, or the type of work that can be done to the building overall (including the common property of the strata scheme that is a component of the building).

Community Management Statements and Precinct Management Statements also contain considerable provisions dealing with the appearance of landscaping or buildings in the community or precinct scheme and also contain provisions dealing with the behaviour of strata lot owners and occupiers. These statements will contain mandatory matters such as the management of garbage and insurance, and may also contain optional matters such as for example, the keeping of animals, security measures, noise controls and trading activities.

The provisions contained in these Statements prevail over the strata by-laws, so regard should be had to how these impact on any changes you are thinking about adopting after undertaking a review of the strata by-laws for your strata scheme, and whether your changes will achieve the desired effect.

**Conclusion**

The by-law review process has been a very useful exercise. Indeed many problems with by-laws have been identified and corrected due to the fact that strata schemes have been required to undertake this process. I would say that there has been considerable and practicable benefit to every owners corporation in reviewing its by-laws.

However it is a task that should be undertaken carefully having regard to the benefits of the old by-law terms and the new ones, realising in some cases the need to preserve the existing by-laws and to incorporate any new by-law terms in a way that ensures there is no conflict or uncertainty, and to carefully consider the recent changes in the strata legislation in order to avoid unintended and undesirable consequences.

Unfortunately, some owners corporations have made mistakes when reviewing their by-laws which will have a detrimental impact on the management of their strata schemes. However, the good news is that, normally, any mistakes that have been made can be fixed through further amendments being made to the by-laws. The important thing is for an owners corporation to realise that it has made a mistake when reviewing its by-laws and to correct that mistake.

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Daniela is a lawyer of 15 years practicing in the areas of strata law and property law. Daniela has significant experience in providing legal services to owners corporations and developers in a wide variety of areas. Her background includes working on the acquisition of development sites and preparation of off the plan contracts, by-laws and management statements for vacant land, housing and strata and community title developments. Daniela also specialises in drafting complex by-laws.

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