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CHILDREN AND BY-LAWS IN STRATA AND COMMUNITY SCHEMES – CAN THEY BE EXCLUDED FROM SHARED FACILITIES?

Daniela Terruso
Lawyer **I** BA LLB
Email I LinkedIn

JS MUELLER & CO LAWYERS

CHILDREN AND BY-LAWS IN STRATA AND COMMUNITY SCHEMES

Can children be excluded from shared facilities in a strata or community scheme?

A recent newspaper article concerning a Sydney residential complex where children have been banned from using a swimming pool within that complex, got us interested in taking a look at the extent to which the by-laws of a strata scheme or community scheme can be used to exclude children from using certain shared facilities in that scheme.

For what matters can a strata by-law be made?

Under the strata legislation, by-laws may be made in relation to the management, administration, control, use or enjoyment of the lots, or the common property and lots. The matters which by-laws can cover is not restricted to a set list. There is some flexibility because the strata legislation recognises that by-laws may apply to a wide variety of strata schemes, not just residential strata schemes.

Model by-laws prescribed under the strata legislation are a good starting point when working out what matters by-laws can cover. They cover various matters such as behaviour, the keeping of pets, parking, floor coverings, garbage disposal, safety and security measures and matters appropriate to the particular type of strata scheme (eg. whether wholly residential or a mixed use scheme or commercial scheme). Commonly, older strata schemes have model by-laws in place, with a few additional changes over the years. Newer and more complex strata buildings, with facilities and services not found in older strata schemes, commonly have tailor made developer by-laws, which cover the matters contained in the model by-laws together with additional matters particular to the strata scheme concerned.

Limitations on the matters for which a strata by-law can be made

The strata legislation does contain some limitations on the types of by-laws that can be made for a strata scheme. These are contained in Part 7 Division 2 of the *Strata Schemes Management Act 2015*. Section 136(2) of that Act states that a by-law has no force or effect to the extent that it is inconsistent with the Act or with any other Act or law. Also, under section 139(1) of the Act, a by-law for a residential strata scheme cannot restrict children (persons under 18 years of age) from occupying a lot, unless the by-law relates to a strata scheme for a retirement village or for housing exclusively for aged persons.

The position is not so clear as regards a by-law concerning the use of services and facilities on common property, as while children cannot be excluded from occupying a lot in a residential strata scheme, can children nonetheless be excluded by a by-law from using certain parts of the common property?

Model by-laws restricting children

Interestingly, there is a model by-law that has been in operation for many years that prohibits owners and occupiers permitting any child in the control of that owner or occupier from playing on common property within a building or, unless accompanied by an adult exercising effective control, to be or remain on common property comprising a laundry, car parking area or other area of possible danger or hazard to children.

The model by-law does prohibit children from playing on common property within a building. As regards use of a laundry, car parking or other areas of danger or hazard to children, children are not restricted from being on these areas of common property per se, rather an appropriate safety and security measure is put in place by requiring adult supervision of children in such areas.

The terms contained in the model by-law suggest that a by-law can restrict children from being on common property for certain purposes, for example, playing within a building. Can this extend to other areas, for example, swimming in a swimming pool that a developer or an owners corporation wishes to set aside as a swimming pool for use by adults only?

The position in NSW, Qld and Vic

There is a provision that was recently introduced in the 2015 NSW strata legislation that provides that a by-law must not be “harsh, unconscionable or oppressive”, and that any by-law of this kind can be invalidated by NCAT.

Queensland strata legislation has had a similar provision requiring this of by-laws for some time 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 “no pets” by laws. But there does not appear to have been any case law in Queensland where children have been restricted by a by-law from being on common property and where that by-law was found to be harsh, unconscionable or oppressive. However, in the Queensland cases on the keeping of pets it was found that where a particular owner or a class of owners was affected by a by-law imposing a blanket ban (such as absolutely no pets) that by-law could be found to be unconscionable. Similarly, a blanket ban on children using certain common property facilities could be found to be unconscionable.

The Victorian strata legislation contains a provision that is more expansive than the NSW provision contained in section 136(2) of the Act. Section 140 of the *Owners Corporations Act 2006* (Vic) states that, in addition to provisions similar to section 136(2) of the NSW Act, a rule (or by-law) of an owners corporation is of no effect if it unfairly discriminates against a lot owner or an occupier of a lot.

Where a by-law is inconsistent with Anti-Discrimination legislation and discriminates against children on the grounds of age – Are these principles applicable to owners corporations?

The recent Victorian disability discrimination case of *Owners Corporation OC1-POSS539033E v Black* [2018] VSC337 found that the owners corporation was providing "services" to a lot owner within the meaning of that term as used in the Victorian anti-discrimination legislation. That case involved a lot owner with restricted mobility who sought to have the owners corporation of her apartment building make alterations to the building to enable her to have access to and use of certain common areas in the strata building. That case cited the earlier disability discrimination cases of *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119 (25 May 2009) (NSW) and *C v A* [2005] QADT 14 (Qld). These cases found that the relevant owners corporations were providing services to the lot owner applicants under the relevant state anti-discrimination legislation, and could not discriminate against them in the provision of those services.

Can these principles be extended to challenge the validity of a by-law on the grounds of discrimination against children who are denied the right to access a common property swimming pool in a strata scheme? One might argue that it would be unlawful for an owners corporation which provides services to discriminate on the ground of age, either by refusing to provide those services to children, or in the terms on which the those services are provided: see section 49ZYN *Anti-Discrimination Act 1977* (NSW). The definition of "services" in section 4 of the *Anti-Discrimination Act 1977* (NSW) is an inclusive definition and includes "*services relating to entertainment, recreation or refreshment*", as well as "*services consisting of access to, and the use of any facilities in, any place or vehicle that the public or a section of the public is entitled or allowed to enter or use…"*

Therefore, it is arguable that any by-law that purports to create a restriction preventing children from accessing or using any service relating to recreation (such as a swimming pool) would be inconsistent with another law, namely the relevant provision of the NSW Anti-Discrimination Act, and therefore not be a valid by-law.

However, this position is not beyond doubt. Further what if a strata scheme provides a playground or child friendly facilities, including a children's swimming pool? A case of reverse discrimination? It is difficult to come up with a satisfactory answer without looking at how a specific strata scheme operates as a whole.

An alternative?

It might be arguable that if a class of owners or occupiers of lots in a strata scheme are to be excluded from using certain services and facilities, that this should be secured by way of a common property rights by-law granting exclusive use or special privileges to certain lot owners to the exclusion of other lot owners. Such common property rights by-laws often impose the obligation to maintain and repair the relevant areas of common property on the owner or owners entitled to use them.

Harsh?

It might also be arguable that a by-law that restricts a group of owners or their children from using a shared facility such as a swimming pool, is unfair or harsh, because those owners would still be responsible through payment of levies for the costs of the upkeep and maintenance of a facility that they (or their children) are unable to use as an amenity in the same way as other owners and occupiers of a lot.

Community scheme by-laws – A different position?

The by-laws for a community titles scheme are contained in a management statement that complies with Schedule 3 of the *Community Land Development Act 1989* for community schemes and precinct schemes, or with Schedule 4 for neighbourhood schemes which is required to be registered by a developer with the plan for the scheme.

Schedules 3 and 4 set out:

- mandatory matters which must be included in a management statement - for example, by-laws relating to the location, management, use and maintenance of scheme property, fencing, garbage collection, maintenance of utility services, insurance, meetings and functions of the executive committee and functions of the office bearers of the committee, voting on certain motions and the keeping of executive committee records and proceedings; and

- optional matters which may be included in a management statement – many of these optional matters are similar to matters that are usually covered in the model by-laws applicable to a strata scheme (eg. behaviour, keeping of pets), but there are a number of additional matters with a focus on community title.

Similar to the regime for strata by-laws, the mandatory and optional matters set out in the legislation are not intended to limit what by-laws may be included in a management statement. This is because of the nature, size and scale of community schemes and the various uses to which they can be put, which often include mixed residential and commercial uses, which can also be used for tourist and recreational schemes and the like.

However, clause 5 of Schedules 3 and 4 to the *Community Land Development Act 1989* specifically state that certain matters cannot be prohibited or restricted by the by-laws of an association scheme, such as the keeping or use of assistance animals, by-laws based on race or creed (religion) or on ethnic or socio-economic grouping, or by-laws that purport to exclude public housing from a scheme.

Interestingly, unlike the strata legislation, there are no provisions in the community titles legislation that provide that an association scheme by-law in a management statement that is inconsistent with the provisions of any other Act have no force or effect. There are also no provisions in the community titles legislation stating that a by-law for an association scheme cannot restrict children, or cannot affect the leasing or transfer of a lot. There is no specific provision in the community titles legislation that makes a by-law ineffective or subject to challenge if that by-law is harsh, unconscionable or oppressive.

In fact, certain specific provisions in the community titles legislation appear to state the contrary position. Section 17(1)(a) of the *Community Land Management Act 1989* provides that the by-laws for a scheme may relate to the control or preservation of the essence or theme of the development under the scheme by "limiting occupancy under the scheme to persons of a particular description." This might have been intended, for example, to permit discrimination based on age because the particular scheme is a retirement village. Indeed state planning laws permit certain developments exclusively for people over a certain age to ensure appropriate types of housing are provided to that sector. But it is possible that such a provision can be extended beyond that with inconsistent results.

It is also worth noting that many strata schemes are situated within community schemes, so if there is a by-law in a community management statement or precinct management statement that is inconsistent with a strata scheme by-law, that management statement prevails over the strata by-laws to the extent of the inconsistency: see Section 139(7) of *the Strata Schemes Management Act 2015*.

Unless Commonwealth anti-discrimination legislation can be said to be applicable to a community scheme and override the state based community title laws in question (and Commonwealth age discrimination legislation tends to be limited to discrimination on the basis of age in the circumstances of employment and in areas of public life), it is likely that the situation in the community titles context is different to the strata schemes context.

It may well be the case, given the differences between strata legislation and community titles legislation, that a different result might apply if the common facilities in question are on strata scheme property or on community or other association property. This is potentially problematic in terms of ensuring that owners and occupiers are not discriminated against in their use of common facilities and services on the grounds of age.

Conclusion

There is no clear answer to the question of whether a by-law can restrict children using shared facilities in a strata or community scheme. The way the law currently stands, it appears that there is much greater scope for a community scheme by-law to restrict children using a communal facility such as a pool than a strata by-law. This could lead to interesting outcomes particularly in some of the larger community schemes which contain strata schemes.

Daniela Terruso
Lawyer **I** BA LLB
danielaterruso@muellers.com.au

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02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au

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