JS MUELLER & CO
LAWYERS

SINCE 1979

# PET BY-LAWS
# PETS, PETS AND MORE PETS: GOODBYE TO "NO PETS" BUILDINGS

**Adrian Mueller**
Partner **I** Senior Lawyer
B.Com LLB FACCAL
Email I LinkedIn

# PETS, PETS AND MORE PETS: GOODBYE "NO PETS" BUILDINGS

In at least two recent cases, NCAT has decided that "no pets" by-laws are invalid. Where does this leave "no pets" buildings?

## Introduction

In February 2018, NCAT handed down its decision in *Yardy v Owners Corporation SP 57237* [2018] NSWCATCD 19. In the *Yardy* case, NCAT held that a by-law banning pets was invalid because it was harsh, unconscionable and oppressive in breach of section 139(1) of the *Strata Schemes Management Act 2015.* Since the decision in *Yardy,* NCAT has overturned other "no pets" by-laws for the same reason including in a case involving The Elan building in Kings Cross. So where does this leave "no pets" buildings? And are by-laws banning pets no longer worth the paper they are written on?

## The Yardy Case

The *Yardy* case concerned a residential apartment building in Sydney. Up until 2009, the building was governed by the standard model by-law concerning the keeping of animals. This by-law allowed owners and occupiers to keep animals with the consent of the owners corporation which could not be unreasonably withheld. In 2009, the owners corporation changed the by-law to prohibit the keeping of animals. This decision was made in response to problems that had been created by the keeping of one or more pets in the building. In 2015, Mr and Mrs Yardy adopted a Maltese Terrier rescue dog called Baxter. In early 2017, the Yardys were interested in buying an apartment in the building and keeping Baxter in the apartment. They inspected the building and observed that the model keeping of animals by-law (which had been changed in 2009) was displayed on the noticeboard. The Yardys also obtained a pre purchase strata report which mistakenly indicated that the model keeping of animals by-law applied to the building.

## A Dispute Erupts

In February 2017, the Yardys bought their apartment and thought they would be able to keep Baxter in the apartment with them. In mid-2017, the Yardys were told about the change that had been made to the model keeping of animals by-law in 2009 and that they would not be able to keep Baxter with them. The Yardys applied to the owners corporation for permission to keep Baxter and that request was rejected. The Yardys then requested that the owners corporation change the keeping of animals by-law to allow them to keep Baxter and that request was also rejected. The Yardys then applied to

NCAT to invalidate the "no pets" by-law claiming the by-law was harsh, unconscionable and oppressive.

## NCAT's Decision

NCAT held that the "no pets" by-law was unjust and was therefore invalid. NCAT reached this conclusion for several reasons. NCAT said that an owner's basic habitation rights now include the right to keep a pet in their apartment in the light of contemporary community standards. NCAT also observed that the "no pets" by-law imposed a complete prohibition on the keeping of pets with no exceptions and no ability for the owners corporation to consider the special circumstances of a particular owner or occupier which may make it appropriate to allow that person to keep a pet. NCAT also considered that the by-law was unbalanced and did not permit a consideration of the interests of all owners rather than just the interests of owners who do not want pets in the building. For those reasons, NCAT declared that the "no pets" by-law was invalid because it was harsh, unconscionable and oppressive in breach of section 139(1) of the *Strata Schemes Management Act 2015.* NCAT therefore revoked the "no pets" by-law and revived the model keeping of animals by-law that had been in place up until 2009. Further, NCAT granted the Yardys permission to keep Baxter in their apartment.

## The Elan Case

More recently, the media reported on anther decision by NCAT overturning a "no pets" by-law. That decision was made on 20 September 2019 and related to The Elan building in Kings Cross. NCAT concluded that the "no pets" by-law which was made in 2013 and continued the "no pets" policy that had existed since the inception of The Elan as a strata building was invalid because it was harsh, unconscionable and oppressive. NCAT followed the reasoning in the *Yardy* case. You can ready more about the Elan case here https://www.domain.com.au/news/pet-owners-in-kings-cross-apartment-building-overjoyed-as-ban-on-animals-overturned-887928/

## What Now for "No pets" Buildings?

Where do the *Yardy* and *The Elan* cases leave "no pets" buildings? Are by-laws prohibiting the keeping of animals no longer worth the paper they are written on? There are doubts that the *Yardy* and *The Elan* cases were correctly decided particularly in relation to a "no pets" by-law that was introduced by a developer or an owners corporation before the commencement of the *Strata Schemes Management Act 2015* on 30 November 2016. This is because prior to 30 November 2016, the model by-laws that could be adopted by a developer or an owners corporation included a "no

pets" by-law. If at the time a developer or an owners corporation introduced a "no pets" by-law, the model "no pets" by-law existed, then it is difficult to see how the "no pets" by-law could be invalid. The position is less clear in relation to "no pets" by-laws that have been introduced since the commencement

of the *Strata Schemes Management Act 2015.* That is because by-laws that are made under that Act cannot be harsh, unconscionable or oppressive and there is some merit in an argument that a by-law which prohibits altogether the keeping of pets is harsh because it does not give any owner or occupier an opportunity to apply for permission to keep an animal in the light of their particular circumstances. Further, can it really be said that an owner's basic habitation right now includes the right to keep a pet in their apartment in the light of contemporary community standards? What about the basic habitation rights of owners who want to live in a pet free building?

## Conclusion

The jury is still out on whether or not "no pets" by-laws are valid. An appeal has been lodged in *The Elan* case meaning NCAT, through its Appeal Panel, will be called on to decide the issue again. So we have not heard the last of this issue given its importance to many strata buildings across the State. We expect to see more cases in which this issue is debated until the uncertainty in this area is resolved by either the Appeal Panel of NCAT or the Supreme Court.

**Adrian Mueller**
Partner **I** B.Com LLB FACCAL
adrianmueller@muellers.com.au

**About JS Mueller & Co Lawyers**

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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