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OWNERS CORPORATIONS AND DISCRIMINATION LEGISLATION

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OWNERS CORPORATIONS AND DISCRIMINATION LEGISLATION

Is your owners corporation likely to be subject to claims that it is discriminating against disabled persons?

A recent decision of the Administrative and Equal Opportunity Division of the Civil and Administrative Tribunal of New South Wales (**NCAT**) has determined that an owners corporation “provides services” to owners and occupiers within a strata scheme. As a result, owners corporations are potentially subject to the provisions of the *Anti Discrimination Act 1977*, in relation to the way that owners corporations manage and control common property and the finances of the strata scheme.

This raises the prospect that owners corporations may face increasing burdens to manage common property with the needs of disabled persons in mind.

The Recent NCAT Decision – January 2021

In this decision (*Araya v Owners Corporation SP65717* [2021] NSWCATAD 5) NCAT was asked to consider whether an owners corporation discriminated against a disabled resident and her husband. It was alleged that owners corporation discriminated against them by enforcing a by-law prohibiting parking by residents in a visitor parking space specifically set aside for disabled visitors. The disabled resident consistently parked in one of the parking spaces set aside for disabled visitors, in breach of the owners corporation's by-laws.

NCAT dismissed the application by the residents on the basis that the actions of the owners corporation to enforce the relevant by-law against them were not due to the resident's disability. The Tribunal also found that the requirement not to park in visitor car spaces did not amount to discrimination against the disabled resident.

However, beyond the specific facts of this decision, the finding by NCAT that an owners corporation “provides services” means that all actions by an owners corporation in dealing with and managing common property potentially open the owners corporation to claims under the *Anti Discrimination Act 1977*.

Background

The strata scheme in this case was the subject of a development consent which required the building to contain a number of visitor car parking spaces. The applicant in this case, a disabled resident, regularly parked in one of the disabled visitor car parking spaces, in breach of the owners corporation's by-laws. The owners corporation sought to enforce that by-law against the disabled resident.

NCAT noted that the requirements of the *Anti Discrimination Act 1977* meant that the disabled resident, in order to succeed in their claim, needed to demonstrate two initial matters, namely:



- that the resident had a disability; and
- that the owners corporation “provided services” to that resident.

There was no argument that the resident had a disability, however the issue of whether the owners corporation “provides services” (a preliminary requirement pursuant to section 49M of the *Anti Discrimination Act 1977*) was argued.

In an earlier Tribunal decision (*Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119) the Tribunal had found that an owners corporation provided a number of specific services, which included providing accessible entrances and exits from the common property to individual apartments within the strata complex.

However, in this 2021 decision of the Tribunal, it was found that the owners corporation’s management and control of the use of common property pursuant to s9(2)(a) of the *Strata Schemes Management Act 2015* constituted the provision of a service. NCAT also found that the management of finances for the strata scheme pursuant to s9(3)(a) of the Act also was a service.

Ultimately in this case, NCAT dismissed the application by the disabled resident because it was not satisfied that the resident’s disability was a factor in the manner in which the owners corporation acted. However, the decision has wider implications.

Potential Implications for Strata Schemes

Potentially, this decision widens the possibility that claims under the *Anti Discrimination Act* can be brought against owners corporations. This is because the decision has broadened the understanding of whether an owners corporation provides “services” as that term is understood under the *Anti Discrimination Act*.

Previously there had only been a very narrow understanding of whether an owners corporation “provides services”, and therefore becomes subject to the provisions of the *Anti Discrimination Act 1977*. The decision of NCAT in this case, that the management and control of common property and the management of finances constitute “services”, if upheld and followed, means that many aspects of the operation of a strata scheme may be open to challenge under the anti discrimination legislation.

Provision of appropriate access for disabled persons, provision of alternatives to stairs, installation of lifts and other lifting mechanisms, broadening of doorways to enable wheelchair access, the provision of non-slip devices, installation of access ramps, are all matters which potentially are “on the table” for owners corporations, and will need to be considered by them.



Issues such as the accessibility of parking spaces, the accessibility of garbage facilities, and the accessibility of pool facilities and other recreational facilities, are all matters which potentially may be subject to anti discrimination legislation because they fall under the owners corporation's responsibility for the management and control of common property.

Owners corporations would be well advised to take great care, and even to seek advice, when issues of discrimination are raised by lot owners and residents.

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JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collections.

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