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ANOTHER “NAIL IN THE COFFIN” FOR SMOKING IN STRATA

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ANOTHER “NAIL IN THE COFFIN” FOR SMOKING IN STRATA

A recent decision of the NSW Civil and Administrative Tribunal has recognised that even though a lot owner smokes inside their lot, they still may be in breach of the by-laws of the owners corporation and leave themselves open to a penalty being imposed by the NSW Civil and Administrative Tribunal. This is because if the smoke leaves their apartment it will almost inevitably penetrate Common Property in one way or another.

Together with other measures which can be implemented by owners corporations through their by-laws, the evolving approach of the Tribunal seems sympathetic to an increasing restriction on the ability of occupants of strata schemes to be able to smoke in their schemes at all.

The Nature of the NCAT Case

In this case, decided in February 2022, occupants of a multi-storey strata building had been disturbed by smoke emanating from an adjoining apartment.

The owners corporation had a by-law which addressed the issue of smoking. The by-law prohibited owners and occupants from “**smoking on common property or allowing smoke to enter common property**”.

The owners of the apartment experiencing the smoking from their adjoining occupants, complained to the owners corporation which issued a Notice to Comply to the occupants who were smokers. The smokers did not comply with the Notice to Comply and kept smoking.

When proceedings were commenced in the NSW Civil and Administrative Tribunal by the owners corporation seeking a penalty against the offending occupants, the smokers argued that the Tribunal could not make an order because, among other matters, the complaining owners had experienced smoke in their apartment, and the by-law only prohibited smoke from entering common property.

Therefore, the smokers argued that by experiencing the smoke within their apartment the complaining occupants did not provide evidence to meet the criteria of the by-law and that the Tribunal could not impose a penalty for the breach of the Notice to Comply.

What is “Common Property”

The owners corporation argued before the Tribunal that common property included the air space immediately outside the smokers’ apartment. For the smoke to reach the apartment of the owners affected

the smoke, it had to travel through common property air space outside the building, through the air space of a balcony and through a common property window to make its way into the apartment.

This argument was accepted by the Tribunal. Ultimately, the Tribunal imposed a penalty on the smokers for continuing to breach the smoking by-law after they were given the Notice to Comply.

Consequences for Smoking in Strata Schemes

The risk for owners corporations seeking penalties against occupants is always that their by-laws may be technically deficient because of the wording of those by-laws. In this case, the owners corporation had a little “wobble room” because the Tribunal (quite correctly) recognised that common property within a strata scheme consists of more than just a common stairway or laundry area – it consists of the entirety of the parcel making up the strata scheme which is not lot property.

However, because of the way in which the by-law was drafted, by reference to the common property, the owners corporation needed to rely on this technical definition of common property.

For most strata schemes, this case illustrates that it is extraordinarily difficult for smokers to avoid breaching by-laws – as we have previously observed in these newsletters, the days of smoking within a strata scheme are almost certainly “numbered”.

Nonetheless, it is important to have a well-drafted by-law if the owners corporation wishes to comprehensively deal with the issue, including a by-law which deals with:

- the use of all tobacco types, including cigarettes, pipes and cigars;
- vaping, and the debris created by these practices;
- the issue of “smoke-drift”

We would be happy to work with your owners corporation to develop an effective and comprehensive smoking by-law. It is definitely time to review your smoking by-law, or to implement one if you do not have one.

Note: JS Mueller & Co Lawyers acted for the successful owners corporation in the Tribunal case.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across Sydney 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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