The bulldog and the by-law

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BY ALLISON BENSON - NOV 15, 2024 9:02 AM AEDT

Strata and community title has a huge social and economic impact, and the keeping of pets in apartments has long been a key area of dispute. So, what does the furore over keeping our animal friends mean for the governance of our strata and community title schemes?

Under the surface we find an all too familiar tale of the law drifting away from changing societal norms and demands. This article looks at the governance implications of this by-law restriction for the scheme, in light of recent animal related disputes. We will also take a wider view and consider some of the unintended consequences. Strata and community title schemes are diffuse and have a significant effect on the daily lives of residents and on the state's economy. It's evidently important to understand the governance requirements. Regulating how these schemes are governed impacts the nature of real property owned by one in five NSW residents.

one fifth of our state live in strata title or community title schemes, strata title has a significant commercial impact. In NSW alone, strata titled property is estimated as being worth $456.4 billion. With this comes the inevitable flow on commercial effect of repair work, maintenance work and specialist services such as building management, strata management and strata searches to provide reports for potential purchasers. In effect, strata title is big business. The report estimates that in 2021 the value of callouts for services such as plumbing, gardening and electrical work was $2,563,126,852. This figure does not include fees for professional services such as those provided by lawyers, accountants and engineers.

How are strata and community title schemes managed?

The administration control and management of our strata and community title schemes is predominantly governed by the *Strata Schemes Management Act* and the *Community Land Management Act* which respectively authorise the scheme's owners corporation or association to undertake these functions. Importantly, strata and community title schemes are also governed by the by-laws and association management statements applicable to the individual schemes. Since the first tranche of the *Strata Schemes Management Act* (*SSMA*) took effect on 30 November 2016, there has been an explosion of cases considering whether by-laws are harsh, unconscionable or oppressive in our strata schemes. One of the key drivers of this explosion has been the issue of whether animals could be kept in the scheme, and if so, on what conditions.

Is there a default right to keep an animal in our strata?

Short answer: it's complicated, as always. The effect of section 139(1) of the *SSMA* was that an application could be made to the NSW Civil and Administrative Tribunal (Tribunal) for an order that a by-law was invalid on the basis that it was harsh, unconscionable or oppressive. Sections 130(1) and 140 of the *CLMA* are in similar terms with respect to association management statements (the terms of which are also referred to as by-laws). Notably, if a by-law is registered and has not been challenged and found invalid by the Tribunal, it remains in effect and must be adhered to.

The peak of the animal related cases was the 2020 NSW Court of Appeal's decision of *Cooper v The Owners – Strata Plan No. 58068* (*Cooper*). *Cooper* set an 'adverse affection' test to determine what is harsh, unconscionable or oppressive. The test, set by his Honour Basten, provides that a by-law which limits the property rights of lot owners is only valid if it protects the use and enjoyment of lots or the common property by other occupants from adverse affection. To paraphrase his Honour Justice Fagan's words, a by-law that prohibits an ordinary incident of the ownership of real property, such as keeping an animal, and which provides no material benefit to other occupiers will be invalid.

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Following the decision in *Cooper*, the NSW Parliament passed the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act* which inserted a new section 137B into the *SSMA* which deals with by-laws about animals. Section 137B commenced on 25 August 2021. Note there is no such provision under the *CLMA*.

Under section 137B(1), a decision by the owners corporation under a by-law that unreasonably refuses the keeping of an animal, or a by-law that unreasonably prohibits the keeping of an animal, will be deemed to have no force or effect. Section 137B(2) further changes the regulatory landscape in that it is now taken to be reasonable to keep an animal in a lot unless it interferes with another occupant's use and enjoyment of their lot or the common property. While the emphasis has shifted as a result of these changes, they do not establish an enshrined right to keep an animal in a scheme.

Unintended consequences and the evolution of by-laws

By-laws under section 137B may still prohibit the keeping of an animal in a scheme provided the restriction is reasonable. This led to a raft of by-laws that sought to impose conditions on the keeping of an animal such as payment of a bond, restrictions on the number and type of animal, and provision for an application process which sometimes included an application fee and requirements for pet references.

The animal related disputes continued with the Tribunal's decisions in *Roden v The Owners – Strata Plan No. 55773* (*Roden*) and *Bruce v The Owners – Strata Plan No. 98803* (*Bruce*) being demonstrative.

The owners' corporation claimed the administration fee covered the cost of processing applications. The Tribunal accepted the fee was a modest charge and was necessary, as each application had to be considered on its merits having regard to the conditions in the by-law. The Tribunal found the administration fee was not unreasonable, nor was it harsh, unconscionable or oppressive. It was also found not to restrict lot owners in the enjoyment or exercise of the rights that come with ownership.

Following *Roden* it was clear that application fees, provided they were not unreasonable, were not in breach of section 139(1) of the *SSMA*. The pendulum swung towards making it more difficult to keep an animal, and the imposition of application fees and bonds in by-laws increased.

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The circumstances surrounding *Bruce* are reasonably typical. The Bruces lodged a pet application with respect to their French Bulldog, Peach. The strata committee refused the application. The committee interpreted the words "an owner or occupier may keep an animal on the lot" as meaning one animal, and the Bruces already had a French Bulldog, Zodiac, living at the lot (as well as a caged bird, however birds and fish are exempted under the model by-law). Peach was relocated for a period but returned to the lot in August 2021. The strata committee called an Extraordinary General Meeting (EGM) for the owners corporation to vote on whether the pet application should be accepted. The strata committee also circulated a document prior to the EGM noting it had rejected the pet application "on the grounds of it not being in compliance with the Strata by-laws (see by-law 5(1))" and stating:

"*This by-law stipulates an owner/occupier of a lot may keep 'an animal' on the lot with the written approval of the Owners Corporation. This Strata Committee interpret this as meaning one animal per lot. ... To date no owner or occupier has been refused permission to keep an animal on their lot. It is our opinion that if a second animal (irrespective of the size or breed of the animal) were to be allowed onto a lot, then it would be difficult to refuse future requests by other owner[s] to increase the number of animals on their lots. With 24 lots in the strata this situation could in the future create unsatisfactory outcomes.*"

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The motion was defeated at the EGM without giving reasons and the Bruces sought orders under section 157 of the *SSMA* to permit them to keep Peach on their lot. Penumbra aside, it does beg several questions: how many pets is too many? Will it take an incident of bodily harm or property damage to make a pet unreasonable? Do we want strata management to be that reactive? And what if the damage is not done by a specific pet but by their sheer volume? Think smells and pet hair triggering allergies.

interpretation was correct. Taking into consideration the Minister's speech to Parliament, the *Interpretation Act*, construction of the Model By-laws and the decision in *Cooper*, the Tribunal found it was not correct the by-law permitted the keeping of only one animal. Therefore, to the extent the owners corporation's decision to refuse the pet application was based on that view, it was in error and the refusal was unreasonable. The Tribunal made an order allowing Peach to live on the lot subject to the by-law conditions and those agreed to in the pet application.

Reform required to combat unintended consequences

The evolution of restrictions on the keeping of by-laws led to more legislative reform with the *Strata Legislation Amendment Act* inserting, on 11 December 2023, sections 105A and 139A into the *SSMA* and equivalent provisions, sections 108A and 130A, into the *CLMA*.

Section 105A overturns the Tribunal decision in *Roden* which had enabled application fees. Now, conditions imposing bonds or fees, or requiring insurance for animals cannot be imposed on an owner or occupier of a lot.

Section 139A(1) corrects another mischief that had crept into the application of by-laws which had the effect of imposing unreasonable restrictions on the keeping of assistance animals. For example, requiring them to be carried across the common property or kept in a secure cage when on the common property. Such requirements would negate the effectiveness of, for example, a guide dog for assisting a visually impaired person. By-laws that impose unreasonable burdens on the keeping or use of an assistance animal now have "no force or effect". Section 139A(2) also limits the evidence that can be required of a person keeping an assistance animal. The only evidence that can be required is evidence of accreditation under the *Disability Discrimination Act* or a statutory declaration verifying the animal has received the prescribed training. Strata and community title regulations may, but do not currently, prescribe further acceptable evidence.

What are reasonable restrictions?

The legislative response to evolving by-laws which have pushed the boundaries of permissible restrictions means it is now easier for strata and community title residents to keep an animal, although by-laws may still impose reasonable restrictions. This begs several more questions: what are reasonable restrictions? What if proliferating and overlapping restrictions begin to impact the enjoyment of lots and common property? This could manifest if, for example, pets were only allowed access to certain areas and thereby created a new crowding or maintenance issue. Does the ambiguous concept of reasonability mean that pet politics will become a fixture of strata governance? By now you'll be thinking how on earth did this get so deep and complicated. But, as every lawyer knows, this is an all too familiar tale where a seemingly innocuous thing lays bare the complex socio-legal lattice that keeps our society balanced. A snail in a bottle is this tale's most iconic iteration but presently we have a bulldog named Peach.

But back to that first fundamental question: what are reasonable restrictions? Restrictions that require animals to be vaccinated, registered where applicable and to have required permits or registrations under the *Companion Animals Act* or other applicable legislation should not be contentious. The first restriction, requiring vaccination, is a health and welfare issue. The second and third examples simply require compliance with existing legislation. For instance, cats and dogs must be registered after the age of six

the common property that they can access. To some extent, the type of dog or cat kept may be less contentious than first thought, as the *Companion Animals Act* has provisions for declaring a dog (or cat) to be a nuisance, dangerous, menacing or restricted, and provides restrictions on how these animals may be kept. While common property and association property are private property, many of the provisions relating to dangerous dogs apply whilst the dog is on the scheme. For instance, the requirement to wear a distinctive collar, to be under the control of a person over the age of 18 years, to be desexed and to be kept in a prescribed form of enclosure with signage, will still apply. Echoing these requirements in a by-law would not be an unreasonable restriction. However, an absolute ban on keeping a dangerous dog without considering whether they could be safely kept on a scheme would be an unreasonable restriction. For instance, a lot in a community association scheme with a three-bedroom house and a large, enclosed backyard would be more suitable for a dangerous dog than a high-rise studio lot with no balcony where the dog would need to regularly use a lift.

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The evolving law

This is no overcomplex storm in a teacup. Arguably, the only rival to animal ownership being the most disputed topic in strata and community titles is the issue of lot owners' inability to claim for damages from owners corporations' breach of their duty to repair and maintain the common property. As animal ownership proliferates it is permeating private legal disputes and becoming an evolving doctrine of law. What then can we learn from the case law and subsequent legislative responses?

Unfortunately, not all people affected under a by-law have the time, energy or financial resources to challenge it, which leads to potentially inequitable outcomes. For instance, prior to sections 105A and 108A being inserted into the *SSMA* and *CLMA*, an owners corporation or association could have enforced a by-law requiring a large bond as a condition of keeping an animal and bonds of $5,000 were not unheard of.

Interestingly, in the May 2024 case of *Barnes & Ors v The Owners Strata Plan No 61934*, Senior Member Gracie appears to have widened the limitation of s 139(1) of the *SSMA* by considering whether application of the by-law had become harsh, unconscionable or oppressive. In that case, a by-law imposed a service fee on a group of lot owners in certain circumstances for the use of part of the common property, and for services such as cleaning the pool and mowing lawns. Effectively, the lot owners who had to pay under this by-law would be double charged as they also contributed to the upkeep of these areas through their levy contributions. The treasurer of the scheme, who was the representative of the lot owner that directly benefited from imposition of the fee, without authority and in what was found to have "all the hallmarks of a punitive action", directed the strata manager to issue invoices under the services fee by-law.

The imposition of the services fee was held to be for an ulterior and improper purpose, and was an unconscionable application of the by-law, which was enough to have the by-law declared invalid under s 150 of the *SSMA*. Although only a single member decision, this is an intriguing avenue to increase the ambit of s 139(1) in requiring that application of a by-law must not be harsh, unconscionable or oppressive. This was not considered in *Cooper* with his Honour Justice Fagan at para 101 noting the "Tribunal was required to evaluate the inherent qualities of the by-law as a rule of general application to all lot Owners" rather than in the *Cooper* specific circumstances.

Indicatively, strata and community law is both every-day law, dealing with the vagaries of living in a home, and complex law, that has many moving parts and is capable of evolving quickly. It governs the friction of our independent living situations that are progressively lived in tighter and tighter spaces. What it lacks in glamour is made up by its tendency to reflect our standards, or expectations, of living. It is understandably banal but active and unpredictable. Unfortunately, that unpredictability impacts a fifth of NSW residents' daily life. Consequently, regular reviews of strata and community title legislation are required to curb unintended excessive powers and to reduce potential inequality.

The by-law making power of the owners corporation under section 136(1) of the *SSMA* has been held to be wide ranging: it must be for the "management, administration, control, use or enjoyment of the lots or the common property". The only restrictions are those within the *SSMA* and, in particular, the new restriction that a by-law must not be harsh, unconscionable or oppressive. Examples of upheld by-laws include ones restricting use of a lot to that of a medical practice of pathology (*Sydney Diagnostic Services Pty Ltd (1991) v Hamlena Pty Ltd*), providing one lot owner with rights to store a boat on a second lot owner's lot (*White v Betalli* (2007)) and providing the owners corporation with the power to enter into facilities agreements providing residents with access to another property (*Casuarina Rec Club Pty Limited v The Owners – Strata Plan 77971* (2011)). Unlike with other forms of real property, by-laws can impose positive obligations on lot owners. One example is the obligation to replace carpets and repaint interior common areas every seven years, a common by-law registered by a NSW developer. Another less beneficial example would be the requirement to plant and keep only approved plants on balconies or courtyards of a lot.

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With one in five NSW residents living in strata and community title, it is important to recognise this form of property's unfortunate distinction from other forms of real property: it impacts the way a fifth of us go about our daily lives. Considering that even with the current restrictions, by-law making powers remain broad, perhaps even domineering, we need to draw attention to the governance flaws of the current system; a system in which positive obligations imposed on everyday people can be excessive and lead to inequitable outcomes. It should not be contentious to expect the strata and community title management scheme should reflect current community standards. For example, consider a hypothetical by-law requiring that only specified plants be kept in common areas. Post *Cooper*, it is not clear a tribunal or court would weigh the amenity in aesthetics against the amenity of a new community standard, like being able to grow one's own vegetables for financial and environmental benefits.

Title as private property

In *Cooper*, the Court of Appeal considered strata and community title in the context of principles of real property. It focused on the proprietary rights of lot owners and occupiers not being unduly restricted while affirming that these types of developments are private property rather than a form of quasi-public property and part of the public sphere. This has ramifications as both by-laws and the governance functions of the *SSMA* and *CLMA* enable and, in many instances, *require* the majority to make decisions for all lot owners. Take determining whether to levy contributions, for example. The growing number of larger developments means this power is exercised over larger groups of people. While strata and community title are private property, due to the number of people affected by each decision, there are public policy concerns that need to be considered.

According to Cathy Sherry in "Does Discrimination Law Apply to Residential Strata Schemes", legislation that typically governs public behaviour, such as discrimination or health and safety legislation, arguably does not apply to strata and community title schemes unless explicitly provided for. As discussed by Sherry, there have been mixed results applying discrimination laws in strata schemes. Case law has been inconsistent and explicit legislation is required to apply discrimination law in a considered manner to our strata and community title schemes.

This issue is growing more pressing with UNSW City Futures Research Centre's *2022 Australasian Strata Insights Report* showing that in 2021, 15 per cent of strata residents were over the age of 60 and only 47 per cent of residents spoke English in the home. There needs to be consideration of, and possibly restrictions to prevent, the ability of lot owners to discriminate against other lot owners or make them unsafe through their strata management decisions. Strata management practice, a virtual black hole of commonplace social protections, is self-evidently out of touch with contemporary community standards. It should reflect the dual nature of strata and community title; as private property that has a far more unpredictable effect on the owners' life and agency than traditional private property.

complex form of property. It is private property that has an undeniable public dimension due to its new commonality and the uniquely invasive way its governance can affect people, often inequitably. As demonstrated by the number and nature of disputes about by-laws regulating the keeping of animals, legislative reforms and case law may have unintended consequences and fall out of touch with community standards. Witless to the changing winds, law-makers and judges are aiming at a floating target in a gale.

In 1928, it was a snail in a bottle that set in motion the writing of an incalculable number of laws, and judgments on standards and duties of care across the common law world. More importantly it triggered a societal discourse on consumer protections in an industrialised economy. In doing so, the snail in a bottle came to reflect a milestone adaptation of the law to reflect the new world and its new ways of living. Now, will it be Peach the bulldog who will spark an earnest process of recodifying, and perhaps even re-conceptualising, our ever-changing ways of living?

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