Strata Reform: Will it Break Your By-Laws?

The Strata Schemes Management Act 2015 ("**SSMA 2015**") contains significant implications for certain by-laws, and may invalidate some of your current by-laws, or limit their application. If you do not act now, owners and occupiers may be able to act in manners currently banned or restricted and the owners corporation may have no enforceable by-laws to stop them doing so.

Some of the significant changes to legislation in this regard include:

1. **By-laws must not be *harsh, unconscionable or oppressive.* If they are, they may be ignored**

   Section 139(1) provides:

   A by-law must not be harsh, unconscionable or oppressive.

   This is a new requirement. If a by-law is *harsh, unconscionable or oppressive*, then owners and occupiers may (depending upon its terms) be entitled to simply ignore it entirely, or at least ignore those parts that are *harsh, unconscionable or oppressive*.

   What by-laws may be affected by this restriction?

   This may affect numerous by-laws, but some common ones we have identified are:

   (a) **Prohibitions or restrictions on smoking**

   By-laws prohibiting or restricting smoking may (depending upon their terms) be *harsh, unconscionable or oppressive*. If you have one that is *harsh, unconscionable or oppressive*, then it may have no force or effect from 30 November 2016.

   Conversely, your smoking prohibitions may not be as strict as they may be able to be and you may want to tighten your restictions.

   Minor amendments to the by-law may address the issues, or you may require a replacement one.

   (b) **Overcrowding or occupancy limits**

   Section 137 of the SSMA 2015 allows by-laws to impose occupancy limits, albeit with some exceptions set out in the regulations.

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However, if you have by-laws to address overcrowding that are inconsistent (particularly more restrictive) with the restrictions in section 137 of the Act, then they may have no force or effect. In that case, you should amend or replace your current applicable by-laws so that you continue to have appropriate and enforceable controls.

(c) **Absolute prohibition on pets**

A by-law prohibiting pets absolutely may be considered *harsh, unconscionable or oppressive*. For example:

- If a lot is a townhouse with its own garden or courtyard, it may be *harsh, unconscionable or oppressive*, to prohibit that lot having a pet; and

- It may be *harsh, unconscionable or oppressive* to prohibit a pet of any species if for example the specific breed proposed by a lot owner is known for being small, quiet and innactive, or possessing traits which mean that it is unlikely to impact on other owners or occupiers.

All schemes with a by-law prohibiting pets should reconsider whether that is appropriate, or should be replaced with a more accomodating by-law with appropriate restrictions and guidelines for approval of a particular pet. Your scheme may have better control with a by-law that contains reasonable restrictions and guidelines than by having a blanket prohibition that can be ignored.

2. **Changes to restrictions on pets - Do you know if that pet is an assistance animal?**

Under the SSMA 1996, by-laws restricting or regulating the keeping of pets are of no force or effect to the extent they prohibit or restrict the keeping on a lot of a dog used as *a* ***guide or hearing dog*** by an owner or occupier of the lot or the use of a dog as a ***guide or hearing dog*** on a lot or common property.

Under section 139(5) of the SSMA 2015, ***guide or hearing dog*** has been expanded to an ***assistance animal*** (as referred to in section 9 of the Disability Discrimination Act 1992 (Cth)). This is a much wider category of animals and you may not know if a pet in your scheme is an assistance animal. Whilst section 9 of the Disability Discrimination Act 1992 (Cth) contemplates some manners where an assistance animal can be certified, it can extend to (s. 9(2)(c)):

a dog or other animal trained:

- *to assist a person with a disability to alleviate the effect of the disability; and*

- *to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.*

In this regard, there are currently no requirements for certification, or limiting who the training must be performed by, or even that the trainer be a professional trainer.

How can you know if someone's pet is an assistance animal? Section 139(6) of the SSMA 2015 allows these by-laws to require the owner or occupier to provide evidence to the owners corporation that the animal is an assistance animal. Without this obligation being included in your by-law, you may not know if a pet is permitted (because it is an assistance animal), or if it is not an assistance animal and is not permitted.

We consider that **all** pet by-laws should be amended, unless they have been prepared recently in light of the SSMA 2015.

3. **Changes impacting on by-law 5**

Most strata schemes have a by-law similar to model by-law 5, which provides:

(1) An owner or occupier of a lot must not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property without the approval in writing of the owners corporation; and

(2) An approval given by the owners corporation under subclause (1) cannot authorise any additions to the common property.

However, this by-law is inconsistent with provisions of the Strata Schemes Management Act 2015, such as sections 109 (Cosmetic works) and section 110 (Minor renovations by owners).

This by-law has also been carried over for pre 1996 schemes and set out in the Strata Schemes Management Regulation 2016, which includes notes that this by-law is subject to sections 109 and 10, but for strata schemes that have different sets of model by-laws, or tailored by-laws there are no such notes.

We recommend that **all** schemes consider revising their by-law 5 (or equivalent) so that you don't have to be a lawyer to work out what works an owner can carry out without approval, and for those that require approval, what approval is required.

4. **What is the effect of the transitional provisions?**

Transitional provisions provide at clause 4(2) of Schedule 3 of the SSMA 2015:

> *"(2) Despite any other provision of this Act, a by-law continued in force by this Act is taken to be a valid by-law if it was a valid by-law immediately before the commencement of this clause."*

Does this mean that:

- A by-law that was previously valid despite being *harsh, unconscionable or oppressive* is still valid despite section 139(1)?; or

- A by-law restricting overcrowding which was previously valid, continues to be valid despite being contrary to section 137?

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These could be complex questions that may be difficult for a lot owner to determine. An owners corporation may consider it prudent to review all of its by-laws and update and amended ones which are likely to cause confusion, debate or dispute. Reviewing by-laws and amending them can be a cheaper exercise than costly legal disputes fighting whether they are valid or have any force or effect.

These are just some of the key by-law amendments that the owners corporation should be considering, and depending upon what by-laws you have there may be others. Upon commencement of the SSMA 2015, all strata schemes are required to review their by-laws within 12 months, and we recommend that this exercise be treated seriously to ensure that issues such as above are addressed.

There are other potential issues with by-laws arising from the commencement of the SSMA 2015, and we recommend you also read our article 'By-Law Review – Are You Ready' (3. By-Laws and Works to Common Property > Fact Sheets).

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