

BY-LAWS: Referee won't blow the Whistle?

A sporting game can become an ugly affair when the referee blows the whistle for every infringement, seems to be blowing it in favour of one team or fails to blow it all. It works the same way with enforcement of strata by-laws. A scheme can quickly become dysfunctional when the strata committee is over or under active or seems to be favouring one group of owners over another.

So what can an owner do if unhappy with the way the strata committee has been administering the by-laws of the scheme? Key considerations:

- It is always best to try to resolve these issues amicably. Talk to strata committee members. Ask them to explain their stance on the by-law. Try to explain your concerns. Remember that strata committee members need to balance conflicting considerations and need to exercise judgement with when and how to exercise their powers.
- By-laws operate as an agreement between the owners corporation and owners and are binding on them. However, this is an agreement imposed by legislation known as a statutory contract and there are some legal differences between this kind of contract and a standard contract, including how they are enforced and what remedies are available. This makes it all the more important to obtain legal advice before commencing court or tribunal proceedings if you are trying to enforce by-laws or trying to make the owners corporation do so.
- The strata management legislation does not impose an express obligation on an owners corporation to enforce its by-laws. In fact, the legislation provides that an owners corporation may issue a notice to comply and even that is conditional. The owners corporation must be satisfied that the relevant owner has contravened the relevant by-law and the owners corporation must have approved by general resolution the issue of the particular notice or at least notices for the particular kind of contravention.
- The position may be different in a community association context, as the community management legislation contains a provision (not mirrored in the strata management legislation) to the effect that a community association must implement its decisions. It is unclear whether NCAT would consider that as extending to enforcement of by-laws.
- Strata committee members have statutory and common law obligations, including to exercise their functions with due diligence in the best interests of the scheme. Accordingly, it may be possible to obtain appropriate orders where strata committee members have been overzealous, underactive or biased in performance of their functions, with detrimental impact on the scheme.
- Decided NCAT cases suggest that NCAT is reluctant to get involved in such issues, particularly if non-compliance of the relevant by-law has not been established and may well leave the

issue to a general meeting. Accordingly, an aggrieved owner may need to frame an application on one of the following bases:

- An application for orders to the effect that the owners corporation be required to enforce a particular by-law, i.e. an application against the owners corporation focused on owners corporation/strata committee member failure to exercise functions in an unbiased manner or at all.
- Application for orders to the effect that a particular owner comply with a particular by-law, i.e. a direct application against the relevant owner focused on the breach by the relevant owner.

The first would provide a more comprehensive solution, but won't always be realistic.

We have considerable experience with these issues and could help you manage difficulties in this area.

**Prepared by Bannermans Lawyers
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T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA