Massage Not So Relaxing for Strata Schemes

Owners corporations and their managing agents are often frustrated by unwanted sex industry businesses operating within their buildings and the lack of effective solutions to this problem. The New South Wales government recently conducted reviews of the sex industry legislation and the strata legislation, but no effective legislative solution has yet been presented.

Since 1995, when the Restricted Premises Act 1943, the Summary Offences Act 1988 and the Crimes Act 1900 were amended, this issue has essentially been a planning matter, rather than a policing matter. The police now have very limited powers in this area, as the use of premises for prostitution is no longer an offence and as police powers to obtain declarations and temporary closure orders in relation to premises under the Restricted Premises Act 1943 require more than the premises being used for prostitution, e.g. the premises being used for the unlawful supply of drugs or alcohol or being frequented by reputed criminals. In theory, under the Summary Offences Act 1988, it remains an offence to advertise premises used for prostitution or use for prostitution premises masquerading as a massage parlour, sauna, gym or photographic studio, but there appears to be little or no enforcement of this. For these reasons, the police can generally do little to assist.

The local council may be able to assist, if the use of the premises for prostitution is unlawful, i.e. prohibited or requiring a development consent which has not been obtained. However, council requirements and enthusiasm for enforcing them vary wildly. Some local environmental plans do not require development consent for prostitution in certain zones or for prostitution involving one or two sex workers working from their own premises. Councils have discretion in relation to enforcement action and many councils are unenthusiastic about enforcement action. Enforcement action is often ineffective, with operators ignoring closure orders and playing cat and mouse games with council and continue to operate for years before eventually relocating.

The owners corporation may be able to take private action, without Council's involvement, if the use is unlawful, as section 123 of the Environmental Planning and Assessment Act 1979 permits any person to apply for orders restraining the breach of planning laws. However, this may not be practical, as it would involve expensive Land and Environment Court proceedings.

The lot owner may be able to assist, if the operator leases the premises. A lot owner may be willing to co-operate and remove the tenant, if the lease term has expired or if the operator is in breach of the lease, e.g. if the premises are not being used for a purpose permitted by the lease. However, the owners corporation may be unable to compel the lot owner to act, as Section 49 of the Strata Schemes Management Act 1996 prohibits a by-law restricting the lease of a lot.

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A by-law made by the owners corporation may assist, as section 43 of the Strata Schemes Management Act 1996 permits a by-law in relation to "matters appropriate to the type of strata scheme concerned". Our view is that this permits a by-law prohibiting the inappropriate use of a lot, e.g. operation of a sex industry business in a residential scheme. However, there may be significant problems with this approach. If the operator has obtained development consent, where Council has adopted section 28 of the Environmental Planning and Assessment Act 1979, this could operate to suspend such a by-law.

The main problem is that the penalties for breach of by-laws are generally not sufficient to deter operators, given the money made by many operators. The penalty for breach of a by-law itself is up to $550 plus costs, but if the owners corporation applies for and obtains an order of the Consumer Trader and Tenancy Tribunal that the operator comply with the by-law, the penalty for breach is up to $5,500 plus costs. A single penalty may not be a significant deterrent, but repeated penalties for ongoing breaches may be effective.

However, in most instances of this nature the penalty would be payable to the government.

Our experience has been that the most effective means of curtailing an unwanted sex industry business within a strata scheme is to adopt the following approach:

- Communicate with lot owners to ensure that they understand and support the owners corporation's concerns and approach in relation to the unwanted business
- Consider making and vigorously enforcing a by-law prohibiting the unwanted activity
- If the premises are leased, explore the possibility of the lot owner terminating the lease
- If the use is unlawful, persuade Council to take enforcement action. We have found that reluctant Councils often find motivation when advised that the owners corporation intends to pursue private enforcement action in the Land and Environment Court and to name the Council as an additional respondent in those proceedings, where it has grounds to do so

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