Strata & Community Titles: Would your by-laws pass the 'reasonable' test?

Allison Benson 20.4.2023 – Lookup Strata

KERIN BENSON LAWYERS

KERIN BENSON LAWYERS

AIMS OF PRESENTATION

1. To provide an overview of some of the decisions affecting by-laws in the last 12 – 18 months;
2. More specifically, to review some of the decisions on what is or is not a harsh, unconscionable and oppressive by-law.

KERIN BENSON LAWYERS

WHAT IS STRATA & COMMUNITY TITLE?

- Strata title is a form of property ownership that enables multiple persons to own airspace within a building and to own a share in the common property of that building or buildings. A strata scheme can be residential, commercial, retail, industrial or a mix.
- Community title is slightly different in that lot owners generally own their land and the house any other built on their lot yet they also have a share in the community property that makes up their estate. Examples Liberty Grove, Fern Bay, Raleigh Park.

KERIN BENSON LAWYERS

WHY IS STRATA & COMMUNITY TITLE LAW IMPORTANT?

- Approx. 83,998 strata schemes in NSW (as at 2020) with an est. average of 100 new schemes registered per month
- 709 community schemes, 30 precinct schemes & 1,459 neighbourhood schemes (as at Nov 2014)
- Approx. 15% of people in NSW live in strata but it comprised 19% of all NSW households
- Total est. value of strata property in NSW $404,358,229,265 (this is not a typo)

Details from the Australian Strata Insights 2020 Report published by City Futures Research Centre UNSW

https://cityfutures.be.unsw.edu.au/research/projects/2020australasian-strata-insights

KERIN BENSON LAWYERS

SOME FACTS ABOUT THE CONSTITUTION OF STRATA RESIDENTS

Country of birth

Less than half of all apartment residents are born in Australia

Australia 40% India 5%
China 8% Other 47%

Language spoken

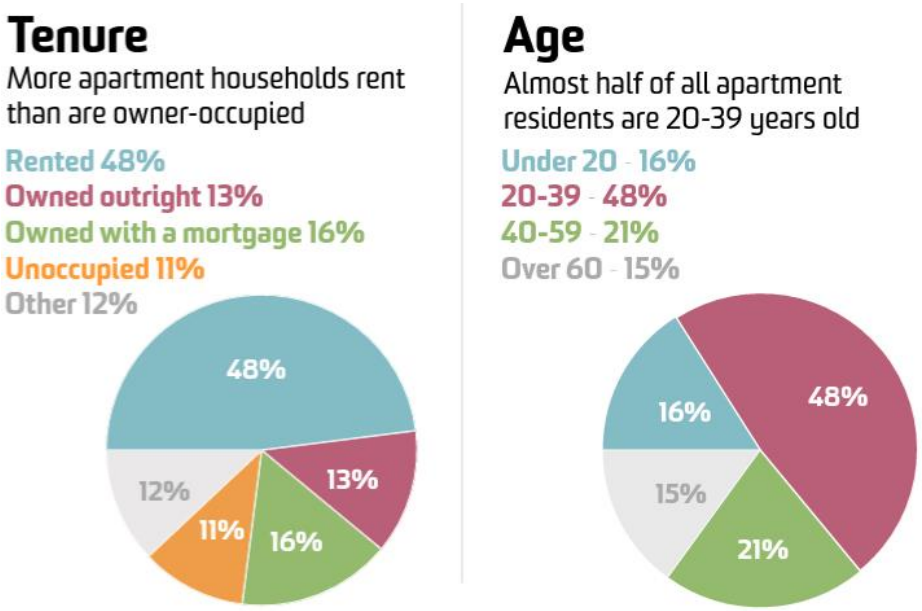
Most apartment residents speak a language other than English at home

English 45% Cantonese 3%
Mandarin 8% Other 44%

- Australian Strata Insights 2020 Report published by City Futures Research Centre UNSW
- https://cityfutures.be.unsw.edu.au/research/projects/2020australasian-strata-insights

KERIN BENSON LAWYERS

SOME FACTS ABOUT THE CONSTITUTION OF STRATA RESIDENTS



- Australian Strata Insights 2020 Report published by City Futures Research Centre UNSW
- https://cityfutures.be.unsw.edu.au/research/projects/2020australasian-strata-insights

KERIN BENSON LAWYERS

THE LEGISLATION

Strata Title	Community Title
*Strata Schemes Management Act 2015 (**SSMA**)*	*Community Lands Management Act 2021 (**CLMA**)*
Strata Schemes Management Regulations 2016	*Community Lands Management Regulation 2021*
*Strata Schemes Development Act 2015 (**SSDA**)*	*Community Lands Development Act 2021 (**CLDA**)*
Strata Schemes Development Regulations 2016	*Community Lands Development Regulation 2021*

KERIN BENSON LAWYERS

RECENT LEGISLATIVE CHANGES

1 July 2021 - *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021*

- Introduced sustainability infrastructure & a new definition of 'special resolution, requirements for information on these motions eg funding etc. – s132B, new keeping of animals regime – s137B, new enforcement mechanism – s247B

1 December 2021 – the CLMA & the CLDA commenced

- Introduced s130(1) a restriction on by-laws of 'harsh, unconscionable or oppressive' into the CLMA which is the equivalent of s139(1) in the SSMA

KERIN BENSON LAWYERS

THE FUN PART: HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

S139(1) in SSMA & S130(1) CLMA

139 Restrictions on by-laws

"(1) By-law cannot be unjust A by-law must not be harsh, unconscionable or oppressive.

- Note : Any such by-law may be invalidated by the Tribunal (see section 150).

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

- No reported cases under the CLMA – yet
- Look to cases under the SSMA keeping in mind s128(2) pf the CLMA which enables by-laws relating to the control or preservation of the essence of theme of the development.

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Cooper v The Owners – Strata Plan No. 58068 **[2020] NSWCA 250 (21 October 2020)**

- By-law prohibited the keeping of animals.
- Found to be harsh, unconscionable and oppressive.
- Why? In essence:
  - The prohibition restricted a fundamental property right – the right to use your property
  - AND
  - The act being prohibited (the keeping of animals) did not adversely affect any other owner or occupant.
  - AND
  - By-law was not for a proper purpose

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Cooper v The Owners – Strata Plan No. 58068 **[2020] NSWCA 250**

- The Court of Appeal held that a by-law "that limits the property rights of Lot owners is only valid if it protects from adverse affection the use and enjoyment by other occupants of their own Lots, or the common property".

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Cooper v The Owners – Strata Plan No. 58068 **[2020] NSWCA 250**

- Basten J stated at [63]
- *"[a] by-law that restricts the rights of all owners as to the use and enjoyment of their lots in circumstances where the prohibited use would not interfere with the use and enjoyment of any other lot, is not a by-law which has regard to the interests of all lot holders; nor is it for the benefit of all the lot owners", within the terms of s 9(2)'*

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Franklin v The Owners—Strata Plan No. 87497 [2022] NSWCATCD 210 (20 December 2022)

- By-law regulated cooking in lots. 87 residential lots and 13 utility lots. The scheme had previously been an aged care facility.
- The by-law stated:
- *25 Cooking within any lot*
- *(1) Cooking of any nature including toasting bread will not be permitted in any lot unless the lot has cooking facilities installed by the original Owners of the strata.*
- *(2) The use of a kettle will be permitted.*
- *(3) Should any lot owner or occupant engage in cooking within the lot, which then causes a smoke alarm to be triggered resulting in the Fire Brigade attending at the building, then the lot owner will be responsible for reimbursement to the Owners Corporation for any charge levied against the Owners Corporation by New South Wales Fire Brigade.*

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Franklin v The Owners—Strata Plan No. 87497 [2022] NSWCATCD 210

By-law was found to be harsh, unconscionable and oppressive.

Why?

Due to its effect on the use of an owner's lot:

Cooking in your home is a feature or a right of property ownership & occupation. Lot owners may not have wanted to use the common area cooking facilities and the by-law prohibited even the use of toasters;

The blanket ban could only be valid if it protected against unreasonable interference with another occupant's use and enjoyment of their lot or the common property; &

There was no evidence cooking in a lot would cause a fire risk or smell that could not be managed.

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

***The Owners – SP No 91684 v Liu; The Owners – SP No 90189 v Liu* [2022] NSWCATAP 1 (5 January 2022)**

- By-law regulated short term rental accommodation arrangements.
- It provided the OC with the ability to:
- (a) restrict access to the lot by deactivating access keys upon breach of the by-law and
- (b) to recover the OC's costs as if they were a levy debt and
- (c) contained an indemnity by the lot owner to the costs.
- Found to be harsh, unconscionable and oppressive.
- Why? In essence:
  - The prohibition restricted a fundamental property right – the right to access your property.
  - There was no power under the SSMA to enable an OC to treat debts as if they were levy contributions.

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

The Owners – Strata Plan No. 46433 v Coscuez International Pty Ltd v The Owners – Strata Plan No. 46433 **[2022] NSWCATCD (16 November 2022)**

- By-laws that authorised the owners corporation to recover costs (legal or otherwise) from lot owners were found to be:
- (a) beyond power and
- (b) harsh unconscionable and oppressive and invalid as they removed the ability to challenge costs by pre-determining that the lot owner was responsible for those costs.

There were other issues in that the occupancy by-law overstepped by restricting rights provided under s137A of the SSMA.

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Neri v The Owners – Strata Plan No. 91204 [2021] NSWCATCD 164 (29 April 2021)

- By-law provided for a car park management system whereby the owners corporation had the power to issue & place notifications on the vehicle & then recover a fees for doing so and to recover it as if it were a debt.
- By-law found to be harsh, unconscionable and oppressive.
- Why?
  - There was no power under the SSMA for a by-law to enable the OC to impose penalties.
  - The by-law attempted to thwart s147 of the SSMA (civil penalty provision) and s38(3)(a)(ii) of the Civil & Administrative Tribunal Act 2013 (civil penalty provision).
  - There were amended by-laws but they were not considered as they had not been passed in accordance with s141 of the SSMA (no evidence of special resolution or that the by-laws had been registered)
- Stated that the power / purpose test and the harsh, unconscionable and oppressive test are alternatives. Only one need be met.

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

John Maait Properties Pty Ltd v The Owners - Strata Plan No 50396 **[2019] NSWCATAP 26 (23 January 2019)**

- By-law regulated access keys. It provided for a certain no. of keys per lot and only allowed access to areas containing the lot.
- By-law found NOT to be harsh, unconscionable or oppressive as:
  - There was a "legitimate need to ensure the security of the building which is to be balanced against a particular Lot owner's need to access their Lot and relevant common property areas"
  - relevant that the restriction on access was not an "absolute embargo" . The by-law conditions provided capacity for a lot owner to apply for different levels of access.

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

Davis v Owners Corporation Strata Plan 63429 **[2018] NSWCATCD 27 (21 June 2018)**

- By-law purported to authorise the OC to collect increase in insurance premiums where lot owners has conducted work over $50,000 to their lot.
- Found to be harsh, unconscionable & oppressive

KERIN BENSON LAWYERS

HARSH, UNCONSCIONABLE & OPPRESSIVE RESTRICTION ON BY-LAWS

***Davis v Owners Corporation Strata Plan 63429* [2018] NSWCATCD 27**

Why?

- The Tribunal found that:
  - no evidence of a change in use of the applicant's lot enlivening OC's ability to recoup the premium increase related to the change of use under s82 SSMA,
  - the by-law did not provide for exclusive use rights, which under s143(2) of the SSMA would have enabled the OC to require a payment; and
  - while *Italian Forum Limited v Owners Strata Plan 60919* [2012] NSWSC 895 upheld a by-law allowing a promotional levy on certain lots, that this was due to s 43 of the SSMA 1996 enabling by-laws to be regarding "matters appropriate to the type of strata scheme concerned" which had no equivalent under the SSMA.
  - as such, as per s83(2) the OC could only levy contributions from lot owners in accordance with their unit entitlements and had no power to make the by-law.

KERIN BENSON LAWYERS

QUESTIONS

1. **Animals by-laws – restricting to 1 animal or type of animal or to not taking animal over common property.**
2. **Animals by-laws – no pet policy in over 55s scheme.**
3. **Time to challenge meeting minutes by-law – limit of 30 days to challenge.**
4. **Exclusive use by-laws – where only some specify a fee for the use.**
5. **Does NCAT have the power to order owners corporation to update its by-laws?**

Key considerations:

- Is the restriction negatively affecting someone's property right without good reason?
- Is the by-law within the power of the owners corporation to make?

KERIN BENSON LAWYERS

WHO TO CONTACT?

www.kerinbensonlawyers.com.au

Allison Benson

allison@kerinbensonlawyers.com.au

Christopher Kerin

Christopher@kerinbensonlawyers.com.au

MORE INFORMATION

Allison's Blog: Thoughts From A Strata Lawyer

www.allisonbensonau.com

HOW TO CONTACT US

- Sydney
  - P: (02) 8706 7060
  - Suite 9.01, 46 Market St Sydney NSW 2000
- Newcastle
  - P: (02) 4032 7990
  - 591 Glebe Rd Adamstown NSW 2289
- Canberra
  - P: (02) 6140 3270
  - Level 5, 15 Moore St Canberra ACT 2600
- Fax (02) 8706 7061