



JS MUELLER & CO
LAWYERS



ACCESS FOR DISABLED RESIDENTS – DO YOU NEED TO PROVIDE IT?

Adrian Mueller
Partner | Senior Lawyer
B.Com LLB FACCAL
[Email](#) | [LinkedIn](#)

JS Mueller & Co

02 9562 1266 | enquiries@muellers.com.au | www.muellers.com.au

ACCESS FOR DISABLED RESIDENTS – DO YOU NEED TO PROVIDE IT?

Does an owners corporation need to modify its common property to provide easier access for disabled residents in its strata scheme? And can the owners corporation be forced to do so?

Introduction

There are a variety of residents who live in strata schemes. Some of these residents have special needs. This includes disabled residents, for example, residents who are wheelchair bound. These residents may not be able to pass to and from their lots unless modifications are made to pedestrian access routes on common property. Does an owners corporation have to modify those common property pedestrian access routes, for example, by building an access ramp or installing automatic door openers to provide easier access for disabled residents? And if the owners corporation refuses to modify those pedestrian access routes, can a disabled resident force the owners corporation to do so?

Legal Analysis

Strata Legislation

An owners corporation has the principal responsibility for the management of its strata scheme. This includes the responsibility for the management and control of the use of the common property in its strata scheme for the benefit of the owners of the lots in the scheme: see section 9 of the *Strata Schemes Management Act 2015 (Strata Act)*. The owners corporation also has a duty to maintain and repair the common property in its strata scheme: see section 106 of the Strata Act. However, none of these obligations operate to require an owners corporation to modify common property to allow easier access for disabled or less mobile residents. This is for several reasons.

First, the owners corporation's obligation to manage and control the use of the common property must be exercised for the benefit of owners of its strata scheme as a whole, not individual owners. Therefore, if it is not in the interests of the owners as a whole or a majority of them to make modifications to the common property to manage and control its use, then the owners corporation is not required to do so.

Second, the obligation of the owners corporation to “maintain” the common property centres on preserving or retaining the original fabric of the common property, not upgrading it: see *The Owners – Strata Plan No. 21702 –v- Krimbogiannis* [2014] NSWCA 411.

Third, the duty of the owners corporation to “repair” the common property requires the owners corporation to restore common property to good or sound condition after decay or damage and does

not require the owners corporation to modify common property that is operating as originally intended: see *The Owners – Strata Plan No. 50276 –v- Thoo* [2013] NSWCA 270.

Finally, the duty of the owners corporation to maintain and repair common property does not require the owners corporation to upgrade the common property to comply with contemporary building standards, particularly where that common property is not damaged and is in working order: see *Ridis –v- Strata Plan 10308* [2005] NSWCA 246.

This means that under the strata legislation an owners corporation has the power (but not the obligation) to modify common property to allow easier access for disabled and less mobile residents in its strata scheme, for example, by installing an access ramp on common property. This is able to be done by the owners corporation pursuant to section 108 of the Strata Act which gives the owners corporation power (but not the obligation) to alter, add to or erect a new structure on common property for the purpose of improving or enhancing the common property.

Anti-Discrimination Legislation

The *Anti-Discrimination Act 1977 (Anti-Discrimination Act)* applies to an owners corporation. The Anti-Discrimination Act prohibits an owners corporation directly or indirectly discriminating against (among others) residents in certain circumstances. More specifically, it is unlawful for an owners corporation to discriminate against a person on the ground of disability in the terms on which the owners corporation provides that person with services: see section 49M of the Anti-Discrimination Act. Further, the owners corporation cannot discriminate against, for example, a resident on the ground of disability if the owners corporation requires the resident to comply with a requirement with which the resident is not able to comply, but which a substantially higher proportion of persons who do not have the resident's disability are able to comply, and that requirement is not reasonable in the circumstances: see section 49B of the Anti-Discrimination Act. Therefore an owners corporation can be guilty of indirect discrimination against a disabled resident if it requires the resident to access their lot through common property through which the resident is unable to pass.

Hulena's Case

The seminal case of *Hulena -v- Owners Corporation Strata Plan 13672* [2010] NSWADTAP 27 provides an example of indirect discrimination by an owners corporation against a disabled resident. In that case, Ms Hulena bought an apartment in Potts Point, Sydney. She complained that because she had multiple sclerosis she was unable to access her apartment through any of the three available pedestrian routes on common property. Ms Hulena alleged that by requiring her to access her apartment through those common property pedestrian routes, the owners corporation had indirectly discriminated against her on the ground of her disability in the terms on which it provided services to

her in contravention of sections 49B and M of the Anti-Discrimination Act. The Appeal Panel of the NSW Administrative Decisions Tribunal upheld Ms Hulena's complaint and concluded that the owners corporation had indirectly discriminated against her on the grounds of her disability by failing or refusing to modify the common property to allow easier access to her apartment in breach of the Anti-Discrimination Act.

The Key Issues

Hulena's case highlights that the following criteria must be satisfied before an owners corporation will be required to modify common property to allow easier access to a lot for a disabled resident in order to comply with the Anti-Discrimination Act:

(a) *Does the owners corporation provide the disabled resident with "services" within the meaning of section 49M of the Anti-Discrimination Act?*

In *Hulena's* case, the Tribunal concluded that the owners corporation provided the service of providing accessible entrances and exits from common property to individual apartments within its complex. The same conclusion would apply to most owners corporations.

(b) *Has the owners corporation, in providing such services, "imposed" a requirement on the disabled resident?*

In *Hulena* the Appeal Panel of the Tribunal concluded that the owners corporation had imposed a requirement on Ms Hulena because:

- the owners corporation provided the service of providing accessible entrances and exits from individual apartments within the complex as a result of which it had also "required" Ms Hulena to access her apartment via those entrances and exits;
- construction of the building that met design specifications at the time of construction did not remove from the owners corporation the ongoing responsibility of maintaining and repairing the common property in accordance with current anti-discrimination legislation;
- therefore, if an owners corporation provides the service of providing accessible entrances and exits from individual apartments within the complex, it must do so in accordance with legislation enforced from time to time which includes compliance with the Anti-Discrimination Act.

Therefore, in *Hulena*, the Appeal Panel concluded that the owners corporation did provide the service of providing accessible entrances and exits from individual apartments within the

complex, had the ability to change those arrangements and therefore imposed the pedestrian access requirement on Ms Hulena. The same conclusion would apply to most owners corporations.

(c) *Is the disabled resident unable to comply with the pedestrian access requirement?*

In *Hulena*, the Tribunal concluded that in a practical sense, Ms Hulena could not comply with the pedestrian access requirement due to the disability she suffered as a result of her multiple sclerosis. The answer to this question in most strata schemes will depend on the nature and extent of any disability suffered by any particular resident.

(d) *Can a substantially higher proportion of people who do not have the resident's disability comply with the pedestrian requirement?*

In *Hulena's* case, the Tribunal concluded that even though there was no specific evidence on this issue, a substantially higher proportion of persons who did not have Ms Hulena's disability could comply with the pedestrian access requirement. The same conclusion would apply to most strata schemes.

(e) *Is the pedestrian access requirement not reasonable having regard to the circumstances?*

In *Hulena*, the Tribunal concluded that the pedestrian access requirement was not reasonable because the owners corporation had a fairly healthy financial position and the cost to modify three door openers along the pedestrian access route to provide easier access for Ms Hulena to her apartment would not impose an inappropriate financial burden on the owners corporation. The same conclusion would likely apply to many owners corporations.

(f) *Would the provision by the owners corporation of the modifications to common property requested by the resident impose unjustifiable hardship on the owners corporation?*

In *Hulena*, the Tribunal concluded that altering the pedestrian access routes in the manner requested by Ms Hulena to make it accessible for her would not impose on the owners corporation unjustifiable hardship because those alterations would substantially benefit Ms Hulena and not impose an unjustifiable burden on the financial position of the owners corporation. The same conclusion would probably apply to most owners corporations if minor and inexpensive modifications could be made to common property pedestrian access routes to provide easier access for disabled residents.

The Washup

Therefore, the question of whether or not an owners corporation falls under a duty pursuant to the Anti-Discrimination Act to modify common property to facilitate easier access for residents generally depends on the answers to the following key questions:

- (a) Are there disabled residents in the strata scheme?
- (b) If so, is the requirement for those disabled residents to travel through the presently available pedestrian routes on common property to get to and from their lots not reasonable having regard to the circumstances?
- (c) Would the modifications to the common property pedestrian routes requested by disabled residents impose unjustifiable hardship on the owners corporation?

Conclusion

The answer to these questions will depend on the specific circumstances of any particular strata scheme. However, if there are disabled residents in a strata scheme who cannot, because of their disability, access their lots through common property pedestrian routes, and simple and inexpensive modifications can be made to those pedestrian routes by the owners corporation to facilitate easier access for those disabled residents, then there is a very good chance that the owners corporation could be forced to make those modifications under the Anti-Discrimination Act.

About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.



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