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NCAT GIVES THE GREEN LIGHT TO “USER PAYS” BY-LAWS

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NCAT GIVES THE GREEN LIGHT TO “USER PAYS” BY-LAWS

In a recent decision, the Appeal Panel of NCAT has approved of a by-law which introduced a “user pays” system for the cost of electricity used to keep hot water supplied to some but not all lots in a mixed-use strata scheme. This decision confirms that an owners corporation is able to make a by-law that introduces a “user pays” system for utilities costs such as water, electricity and gas expenses.

The Case

East on Byron is a resort in Byron Bay, NSW. The resort contains 30 lots and common property. All but three of the lots are residential lots.

Lots 1-22 are residential lots that are supplied with hot water from three common property hot water tanks which are connected to the common electricity supply of the strata scheme. Since 2006, all of the costs for the electricity used to heat the water in the three hot water tanks was paid by the owners corporation. This meant that all owners had to contribute towards that cost through levies they paid the owners corporation.

Some of the owners thought that regime was unfair because their lots were not supplied by hot water from those tanks. Those owners did not want to pay for the cost of electricity that was used to heat the water in those tanks.

The By-Law

In October 2019, the owners corporation made a special by-law. The by-law made the owners of lots 1-22 responsible for all electricity meter charges for the hot water system located on the common property and servicing those lots. The by-law also required those owners to indemnify the owners of lots 23-31 for any of those electricity charges and required the owners corporation to, where necessary, give the owners of lots 23-31 a credit for any proportion of levies paid by them that were attributable to those electricity charges.

The Decision

The Appeal Panel of NCAT considered the by-law in the context of a claim that some of the commercial owners had made for orders to require the owners corporation to reimburse them for the proportion of levies they had paid which related to the electricity charges. The claim of the commercial owners was ultimately unsuccessful.



However, within the course of its decision the Appeal Panel considered the by-law. The Panel concluded that the by-law was not inconsistent with the provisions of the strata legislation concerning the raising of levies by the owners corporation to meet its expenditure. The Appeal Panel said that because the by-law made the owners of lots 1-22 responsible for the electricity costs, those costs were no longer expenses that needed to be included in the owners corporation's budget or the levies that were raised by the owners corporation to its administrative fund. Indeed, the Appeal Panel considered that the by-law dealt appropriately to rectify the situation which impacted adversely on the owners of the lots which were not supplied with hot water from the hot water tanks. In other words, the Appeal Panel could see nothing wrong with the regime which had been introduced by the by-law

Conclusion

The East on Byron case is an important step in confirming that an owners corporation is able to introduce a "user pays" by-law for the cost of utilities that are supplied to some but not all lots. These types of by-laws are not uncommon and our firm has drafted many of them over the years particularly in relation to the cost of utilities that are supplied to some but not all lots, or are separately metered, such as electricity, gas and water. This decision confirms that these types of by-laws are valid and enforceable: see *The Owners – Strata Plan No. 76830 -v- Byron Moon Pty Ltd* [2020] NSWCATAP 186.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collection.

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