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# NCAT TIGHTENS THE SCREWS ON BY-LAWS

**Warwick van Ede**

Lawyer

BEd LLM Acc Spec (Property)

[Email](#) | [LinkedIn](#)

## NCAT TIGHTENS THE SCREWS ON BY-LAWS

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### Introduction

A recent decision of the Appeal Panel of the NSW Civil & Administrative Tribunal has highlighted the potential risks for owners corporations seeking to impose penalties and other sanctions on lot owners in connection with non-compliance with by-laws.

### Background to the Case

SP 91684 and 90189 had buildings in which access to the building and lots was governed by electronic security devices – these are often used in strata schemes and may consist of security cards or “fobs” which are coded and enable an authorised owner or occupier to access the building, carpark, lift etc.

An owners corporation passed a by-law dealing with the issue of short term rental accommodation. The by-law sought reliance on section 137A of the *Strata Schemes Management 2015* (the **Act**) which commenced on 10 April 2020. Section 137A empowered an owners corporation to make a by-law by special resolution prohibiting a lot being used for the purposes of short term rental accommodation with some limitations.

### The Original NCAT decision

The original decision of the Tribunal found that by-law to be invalid in two respects:

- it purported to give the owners corporation power to deactivate access devices to the lot of any owner or occupier found to be in breach of the by-law; and
- it purported to empower the owners corporation to recover the cost and expenses of various legal and administrative expenses incurred by the owners corporation as a result of the by-law.

In the original decision of the Tribunal it was found that the purported power to deactivate access devices had the potential to impact severely on the fundamental rights of owners and occupiers (access to the lot being an inherent property right) and that this impact outweighed the benefit which was sought to be achieved. Therefore, it was held by the Tribunal that this aspect of the by-law was “harsh, unconscionable or oppressive”, and therefore that this aspect of the by-law was invalid pursuant to section 150(1) of the Act.

In relation to the cost recovery aspect of the by-law, the Tribunal had originally decided that purporting to enable the owners corporation to recover such costs as a “levy debt” was invalid, being beyond the power of the owners corporation. That is, the Tribunal found that the owners corporation only had limited powers under the Act to recover amounts as if they were levies, being where those amounts were raised in accordance with the Act.

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The Appeal Panel of the NSW Civil & Administrative Tribunal found that the approach by the Tribunal in the first instance in relation to both of these issues should not be overturned. In light of this decision and the decision of the Supreme Court of NSW in *Cooper v The Owners Strata Plan 58068* [2020] NSWCA 250, it is critical that the powers of an owners corporation to impose penalties or other sanctions on owners and occupiers be very carefully considered before being included in a by-law.

Further, the approach of the Appeal Panel of the NSW Civil & Administrative Tribunal now clearly seems to be against by-laws which seek to enable an owners corporation to recover amounts which are not levies, as a levy amount.

### **Could the offending parts of the by-law be severed?**

The owners corporation argued before the Tribunal that even if the relevant parts of the by-law were to be considered invalid, that the Tribunal should make orders enabling the by-law to continue simply without the offending clauses. The Tribunal in the first instance declined to do so, arguing that if the Tribunal exercises such a power, the owners corporation would be left with a by-law which it had not voted for. Therefore, once the Tribunal found the two provisions to be invalid, the entire by-law was declared invalid.

The Appeal Panel endorsed the approach of the Tribunal in the first instance.

### **Considerations for owners corporations arising from this decision**

Owners corporations should avoid the temptation to include their own sanctions and “punishments” for lot owners in by-laws unless those provisions are very carefully considered and drafted. Provisions which, if challenged, are considered invalid, will certainly almost certainly mean that the entire by-law is declared invalid.

For the same reason, careful attention will need to be paid by owners corporations to “cost recovery” aspects of their by-laws to ensure that an otherwise well constructed by-law is not rendered completely invalid.

Owners corporations which have by-laws incorporating either of these provisions should give consideration to having those by-laws reviewed.

### **Warwick van Ede**

Lawyer | BEc LLM Acc Spec (Property)  
[warwickvanede@muellers.com.au](mailto:warwickvanede@muellers.com.au)



### 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 collections.

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



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