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EAT AND BE MERRY - NCAT INVALIDATES NO COOKING BY-LAW

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Introduction

Can a by-law prohibit the cooking of food including toasting bread in a lot? The answer is “no” according to NCAT. However, there is a silver lining in NCAT’s ruling.

Background

There is a large residential strata building located in Newcastle, New South Wales. The building contains 87 residential lots. The building was previously an aged care facility. The building contains a commercial kitchen for shared use by the building’s occupants. Four of the lots have cooking facilities that were installed by the developer. Those lots are substantially larger than the other lots. The other lots each contain a room and bathroom measuring between 21m² and 30m². It would be difficult to install a kitchenette in those other lots.

The By-Law

By-law 25 for the building prohibited the cooking of food in any lot except a lot with kitchen facilities that were installed by the developer. The ban on cooking was so extensive that it even covered toasting bread.

The NCAT Case

A lot owner, Mr Franklin, objected to the by-law. He considered that a ban on cooking went against his right as an owner to do what he wants in his lot and was unreasonable and restrictive. He applied to NCAT for an order to invalidate the by-law on the grounds that the by-law was harsh, unconscionable and oppressive.

The owners corporation argued that the by-law had existed for many years, that there was a large commercial grade kitchen in the building where residents could cook and if residents were allowed to cook in their small lots that may create a fire risk.

NCAT’s Decision



NCAT held that the ability to cook in a lot was an ordinary property right enjoyed by an owner or resident of a lot. NCAT said that a by-law that limits the property rights of owners is only valid if it protects against unreasonable interference with another resident's use and enjoyment of his or her lot

or the common property. NCAT was not satisfied that the by-law imposing a blanket ban on cooking in lots did so.

NCAT held that the evidence did not demonstrate that cooking in a lot including toasting bread would cause a fire risk or offensive odours which could not be managed. NCAT also said that whilst it might be difficult to install a kitchenette in a small lot the by-law prohibited all cooking including use of a toaster which was unreasonable because a toaster could be used in a small space.

Ultimately NCAT concluded that the by-law imposed a blanket ban on cooking without any consideration of whether the cooking would impact on another resident's use and enjoyment of their lot or common property, that cooking in one's home is a right connected with the property and could be done (at least in some cases) without having a detrimental impact on the amenity of other residents and as a result of those matters the by-law was harsh, unconscionable or oppressive and therefore invalid.

A Silver Lining

The final part of the by-law permitted the owners corporation to recover from an owner false fire alarm call out fees charged by Fire & Rescue NSW when a resident cooked in a lot which caused a smoke alarm to be triggered. NCAT saw nothing wrong with that part of the by-law and held that it could remain in place. This lends weight to the argument that "cost recovery" type by-laws are enforceable.

Conclusion

The case is yet another example of NCAT invalidating a by-law that imposes a blanket ban on an activity that is capable of being carried out in a way that does not create an unreasonable interference with the use and enjoyment of lots and common property by other residents. The case demonstrates that an owners corporation must be careful to ensure that any by-law that prohibits altogether a certain activity does not overstep the mark otherwise it will not be enforceable.

Case Name: Franklin v The Owners – Strata Plan No. 87497 [2022] NSWC



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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.

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