

By-law Breach: NCAT Reject the Mixed Bag Approach

Lot Owners who Breach By-laws

An owners corporation is able to take legal action in NCAT against an owner who breaches its by-laws.

There are typically two types of legal action the owners corporation can take against the owner.

First, the owners corporation can apply to NCAT for an order to require the owner to comply with the by-laws or to stop breaching them. Second, the owners corporation can ask NCAT to impose a monetary penalty on the owner if the owner has breached a by-law after being given a notice to comply with the by-law.

However, what happens when an owners corporation seeks both an order to stop an owner breaching a by-law and a penalty in the same legal action? Can NCAT do both at the same time?

A recent decision by NCAT's Appeal Panel sheds light on that issue.

Introduction to By-law Breach Case

Tania Brown lives in a unit in a strata building in NSW. Ms Brown keeps dogs in her unit.

The building is governed by a by-law which requires owners and occupiers of lots to obtain owners corporation approval to keep dogs in their units. The owners corporation alleged that Ms Brown had not obtained any approval to keep her dogs and that her dogs barked and caused a nuisance to other residents.

On 3 December 2021, the owners corporation issued Ms Brown

with two notices to comply with by-laws.

The first notice alleged that Ms Brown had breached the noise by-law by allowing her dogs to constantly bark which disturbed the peaceful enjoyment of other residents.

The second notice alleged that Ms Brown had breached the keeping of animals by-law by having 4 large dogs within her unit without the approval of the owners corporation.

Prior to those notices being issued, Ms Brown had agreed to remove the dogs by 1 December 2021 in a settlement agreement made at a mediation conducted by NSW Fair Trading.

By-law Breach Legal Action

The owners corporation alleged that Ms Brown did not remove the dogs contrary to the settlement agreement and had continued to breach the by-laws after it issued the two notices to comply against her.

Consequently, the owners corporation commenced legal action in NCAT against Ms Brown. In that legal action the owners corporation sought an order for Ms Brown to remove her dogs and a further order that Ms Brown be penalised \$1,100.00 for contravening the by-laws after the notices to comply were issued against her.

In July 2022, the NCAT case was listed for a hearing at which the owners corporation was successful and orders were made, by the consent of Ms Brown and the owners corporation, to require Ms Brown to pay an \$1,100.00 penalty to the owners corporation and remove all but one dog from her unit. The order imposing the penalty would not apply if Ms Brown removed the dogs by 19 July 2022.

The Appeal Against NCAT

Shortly afterwards, Ms Brown filed an appeal against the

orders made by NCAT, even though she agreed to those orders being made. Despite that, Ms Brown's appeal was successful.

The orders made by NCAT were set aside and the case was sent back to NCAT for a further hearing.

A Mixed Bag?

During the course of the appeal, NCAT's Appeal Panel considered whether it was possible for an owners corporation to seek in the same proceedings in NCAT both an order to require an owner to comply with a by-law (in this case by removing dogs from a unit) and a further order for a monetary penalty to be imposed on the owner.

The Appeal Panel concluded that this was not possible essentially for three reasons.

First, different procedural rules apply to a mixed application seeking general orders and the imposition of a penalty because, for example, the rules of evidence do not apply to an application for general orders but, in contrast, the rules of evidence do apply to proceedings for the imposition of a penalty.

The Appeal Panel considered those different rules indicated that the Legislature intended that separate proceedings would need to be brought by an owners corporation to seek general orders and the imposition of a penalty.

Second, the Appeal Panel held that procedural fairness could not be afforded to the parties in mixed proceedings where different rules of evidence applied and a party could claim civil penalty privilege when giving evidence in proceedings for the imposition of a penalty but doing so would disadvantage that party in proceedings seeking general orders for compliance with the by-law.

Third, the Appeal Panel noted that different appeal rights

exist in relation to an application for general orders and an application for the imposition of a penalty. General orders can be challenged by way of an internal appeal to NCAT's Appeal Panel whereas an appeal against a penalty needs to be filed in a Court.

The Appeal Panel concluded that the Legislature did not intend that an owner would be required to lodge two appeals to different bodies to challenge general orders and penalties made against him or her in the same proceedings in NCAT.

It was for these reasons that the Appeal Panel ordered the owners corporation to start again in NCAT and to only seek a general order to require Ms Brown to remove all but one of her dogs, not a penalty.

Conclusion

The decision of the Appeal Panel means that an owners corporation can no longer file one application in NCAT seeking both orders to require an owner or occupier of a lot to comply with a by-law and for a penalty to be imposed on the owner or occupier.

Instead, the owners corporation will either need to decide whether it wants to seek general orders or a penalty and commence one set of proceedings to seek either remedy or alternatively file two separate applications in NCAT, one seeking general orders for compliance with the by-law and the other seeking the imposition of a penalty.

No doubt commencing two separate proceedings would add to the time, cost and complexity of the case and quite possibly render it commercial unviable for an owners corporation to seek both general orders and a penalty against an owner or occupier who breaches its by-laws.

Case Name: *Brown v The Owners – Strata Plan No. 82527* [2022] NSWCATAP 328



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Since 2002 Adrian has specialised almost exclusively in the area of strata law. His knowledge of, and experience in strata law is second to none. He is the youngest person to have been admitted as a Fellow of the ACSL, the peak body for strata lawyers in Australia. [Profile](#) I [Linked](#)

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