

# Owners Corporation – NCAT Enforces By-laws

Does an owners corporation have to enforce its by-laws? If an owners corporation decides to ignore breaches of its by-laws, can NCAT force the owners corporation to take action and enforce its by-laws? A recent NCAT case provides the answer to these questions.

## Introduction

Almost every strata building is governed by a set of by-laws. Those by-laws set out rules that regulate behaviour, noise, the keeping of pets and, among other things, the performance of renovations. The by-laws are binding on the owners corporation and the owners and occupiers of the lots. An owners corporation has the power to enforce the by-laws if they are breached. For example, an owners corporation can issue an owner or occupier of a lot with a notice to comply with a by-law or apply to NCAT for an order to require the owner or occupier to obey a by-law. But what happens when an owners corporation decides to turn a blind eye to a breach of a by-law committed by an owner? Can the owners corporation be forced to enforce the by-law against the culprit? If so, by whom? A recent NCAT case reveals the answers to these questions.

## The Case

Suzanne Lyon owns a lot in a residential strata scheme in Wollstonecraft, Sydney. In August 2020, the owners corporation created a common property rights by-law to give the owner of the lot beneath Ms Lyon's lot, Mr Swanson, the right to build a pergola over his rear courtyard.

Subsequently, Mr Swanson built the pergola, but Ms Lyon claimed that the pergola did not comply with the by-law because it was too high. The by-law had permitted the pergola to be 2.7m above the concrete floor of the courtyard but it was built about 3.21m above that concrete floor. Ms Lyon wanted the pergola to be removed or modified but the owners corporation was not prepared to force Mr Swanson to change the pergola. For that reason, Ms Lyon sued the owners corporation in NCAT and sought orders to require the owners corporation to remove Mr Swanson's pergola or enforce the common property rights by-law by requiring the pergola to comply with it.

## **The Outcome**

Ms Lyon's claim was partially successful. NCAT agreed with Ms Lyon that the pergola was too high and was not built in accordance with the by-law. NCAT then considered whether it had power to make an order to force the owners corporation to enforce the by-law and require Mr Swanson to comply with it by changing the height of the pergola. NCAT concluded that it did have that power because it could make an order, on the request of an owner, to settle a complaint or dispute about the failure of an owners corporation to exercise its functions including its power to enforce a by-law. NCAT held that there would be a sufficient basis to make an order where an owners corporation has a discretion to exercise a function (such as its discretionary power to enforce a by-law) but decides not to do so. NCAT considered that there was little point in the strata legislation creating a mechanism for an owners corporation to pass a common property rights by-law merely to have that by-law flouted and for the owners corporation to fail to act in the face of complaints from other owners and legal advice it had received. Ultimately, NCAT concluded that the owners corporation's failure to manage Mr Swanson's non compliance with the by-law, or to make any attempt to require him to comply with the by-law, meant that an order should be

made requiring the owners corporation to exercise its functions to administer the strata scheme for the benefit of the owners and in accordance with the by-laws.

## The Orders

For those reasons, NCAT ordered the owners corporation to take all necessary steps to require Mr Swanson to comply with the by-law by requiring him to reduce the height of the pergola to 2.7m above the concrete surface of his courtyard. However, NCAT gave the owners corporation 6 months to comply with that order to allow Mr Swanson sufficient time to apply to the owners corporation for approval to amend the by-law to permit the pergola to remain at a height of 3.21m above the courtyard floor and for that amendment to the by-law to be approved by the owners corporation.

## Analysis

This case is one of the first times that NCAT has made an order to compel an owners corporation to enforce its by-laws. The decision does break new ground because it was previously thought that because the *Strata Schemes Management Act 2015* does not explicitly require an owners corporation to enforce its by-laws but rather gives an owners corporation a discretion to do so, it was not possible for NCAT to force an owners corporation to require owners and occupiers to comply with its by-laws. The order made in the case begs the question: What does the owners corporation need to do to take “all necessary steps” to require an owner to comply with a by-law? Does that require the owners corporation to issue a notice to comply with the by-law against the owner? Or does it require the owners corporation to do more and, if necessary, take legal action against the owner to force him or her to comply with the by-law? And what if the owners corporation is successful in that legal action, but the owner

ignores orders that are made to require him or her to comply with the by-law? What is the owners corporation required to do then? It remains to be seen whether those questions will need to be answered by NCAT in the future.

## Conclusion

The case sends a message that owners and occupiers of lots who are affected by breaches of the by-laws committed by other owners and occupiers are not helpless. They can apply to NCAT for orders to force their owners corporation to enforce the by-laws against those in breach of them. It remains to be seen whether the decision in *Lyon v The Owners – Strata Plan No. 11045* [2023] NSWCATCD 31 will be followed in future cases.



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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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