Platinum Strata Management

KEEPING OF AN ANIMAL ON A LOT - UPDATE

In recent years there has been significant activity in the NSW Civil and Administrative Tribunal (NCAT) in relation to the keeping of animals on a lot in a strata scheme.

On 24 February 2021, the NSW parliament passed the Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021. This takes effect from 25 August 2021

Section 137B is now included in the Strata Schemes Management Act (SSMA) This section means that a by-law that unreasonably prohibits the keeping of an animal on a lot has no force or effect. In other words, it cannot be enforced by the owners corporation. The new section does not stop owners corporations from making a pet's by-law that places conditions on the keeping of animals as long as the conditions reasonably prohibit the keeping of an animal.

In short, this means that those schemes that have a by-law imposing a blanket ban on keeping pets in a lot, are operating with an unenforceable by-law.

Background to Amendment

The Horizon, a large strata complex in Darlinghurst had a no pet by-law. Notwithstanding the no pet by-law, a number of lot occupants maintained animals in their lots.

In the 2015 a new owner (Mrs Cooper) purchased a lot in the complex and brought her 14 year old miniature schnauzer with her.

The strata committee issued Mrs Cooper with a number of notices to comply with the no pet bylaw. Mrs Cooper lodged a motion with the owners corporation to have the by-law removed. The motion was not passed. The owners corporation subsequently commenced action in NCAT against Mrs Cooper. In response she lodged an application to have the by-law ruled invalid as it was harsh, unconscionable and oppressive.

NCAT ruled in favour of Mrs Cooper. The Owners Corporation consequently appealed the decision. The NCAT Appeal Panel made orders for the removal of Mrs Cooper's dog. Dissatisfied with the ruling Mrs Cooper appealed to the NSW Court of Appeal. The NSW Court of Appeal ruled in favour of Mrs Cooper; meaning Mr Coopers original application to have the by-law ruled invalid as harsh, unconscionable and oppressive was correct.

Note: Refer to Cooper v The Owners SP 58068 (2020) NSWCA 250 [Cooper Case] for more detail.

Keeping of Animal By-law

It is not an option for an owners corporations to ignore the changes to legislation and maintain their current blanket ban bylaw on the keeping of animals. This will prove to be time consuming, costly (to the OC) and undermine the function of the strata committee. No matter your personal view, legal precedence has been established and the law changed to permit the keeping of animals in strata schemes.

For those owners corporations ignoring the legislative changes and maintain the current blanket ban animal by-law, may want to consider the following.

> *Any owner, existing or new, decides they wish to keep a dog on their lot, and does so. The OC pet by-law prohibits the keeping of animals. The strata committee issues a notice to comply. The lot owner ignores or responds in the negative. The SC decides to issue a breach of by-law notice (not as straight forward as most think it is). The lot owner ignores all approaches or refuses to comply with any directions. The only option open to the SC/OC is to lodge an application with NCAT for the owner to comply with the by-law.*

The probable outcome is that NCAT will rule the blanket by-law harsh, unconscionable and oppressive; that the by-law is invalid and potentially award costs against the owners corporation

Pet Applications

Notwithstanding the new law, it is not unreasonable for an owners corporation to have in place a keeping of animal bylaw that requires an application. This process needs to be balanced and applying the principles of the Cooper Case.

However, it must be noted that the new section states that an owners corporation is taken to have given permission for the keeping of an animal on a lot if it made a decision about the keeping of the animal in contravention of subsection (1) (b), or a decision of the owners corporation is required before the animal may be kept on the lot and the owners corporation failed to make a decision within a reasonable time.

In other words, apply the principles of the new requirements and do not try and delay the consideration of an application by not conducting a strata committee or general meeting in a reasonable time frame.

Unreasonable Interference

As part of the amendments clause 36A has been included in the regulations. The purpose of this clause is to set out the circumstances in which the keeping of an animal unreasonably interferes with the peaceful enjoyment of a lot occupant.

In short, this new regulation says that an animal will cause an “unreasonable interference” if:

(a) the animal makes a noise that persistently occurs to the degree that the noise unreasonably interferes with the peace, comfort or convenience of another occupant, or

(b) the animal repeatedly runs at or chases another occupant, a visitor of another occupant or an animal kept by another occupant, or

(c) the animal attacks or otherwise menaces another occupant, a visitor of another occupant or an animal kept by another occupant, or

(d) the animal repeatedly causes damage to the common property or another lot, or

(e) the animal endangers the health of another occupant through infection or infestation, or

(f) the animal causes a persistent offensive odour that penetrates another lot or the common property, or

(g) for a cat kept on a lot—the owner of the animal fails to comply with an order that is in force under the Companion Animals Act 1998, section 31, or

(h) for a dog kept on a lot—

(i) the owner of the animal fails to comply with an order that is in force under the Companion Animals Act 1998, section 32A, or

(ii) the animal is declared to be a menacing dog or a dangerous dog under the Companion Animals Act 1998, section 34, or

(iii) the animal is a restricted dog within the meaning of the Companion Animals Act 1998, section 55(1).

Dogs referred to as a “restricted” dog and a “menacing or dangerous” dog in *Companion Animals Act 1998* can be prohibited by a by-law.

If an owners corporation is going to rely on this regulation it will need to have conclusive documented proof of the facts.

Cooper Case Implications

The implications of the Court of Appeal in the Cooper Case goes beyond the issue of keeping of animals in any owners corporation.

Initially, the new section 137B means that any by-law or decision about the keeping of animals which are considered “unreasonable” will have no effect and cannot be enforced.

Before considering any breach of by-law notice an owners corporation needs to consider whether the by-law they are seeking to enforce is actually enforceable.

The deeper implication of the Cooper Case flows onto all by-laws, not just those related to the keeping of animals. All by-law will have to meet the threshold established in the Cooper Case.

Proposed Actions

Any owners corporation that has a no pet’s by-law has an unenforceable bylaw. The effect of this, if challenge in NCAT is that the owners corporation are unlikely to have a successful outcome.

It is now imperative that owners corporations review their current pet’s bylaw by applying the principles established by the Cooper Case.

If an owners corporation which has a no pet’s by-law and wishes to regulate the keeping of animals, they should repeal the by-law and replace it with an updated by-law that provides for reasonably conditions for the the keeping of animals.

It is strongly recommended that a strata solicitor be engaged to review and, if necessary, prepare the new by-law.

Additionally all other by-laws should be reviewed by applying the principles of the Cooper Case.

The Unknown

What does “*unreasonably interferes with another occupant’s enjoyment of their lot or the common property*” mean?

The interpretation of “*unreasonably interferes with*” will vary from person to person and how they wish to interpret the circumstances. A strata committee’s function is to work on behalf of the owners corporation and committee members own personal agendas and views should not be imposed.

For this reason owners corporation should engage a practicing strata solicitor to assist them in reviewing their bylaws and interpreting the unreasonably interferes. Strata solicitors are continually monitoring NCAT decisions and interpretation of the tribunal. It will take some time for decisions to be handed down on applications on section 137B and clause 36 A