

Submission on the Statutory Review of the NSW Strata Schemes Laws

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Strata Schemes Statutory Review

Policy & Strategy, Better Regulation Division

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The NSW Young Lawyers Animal Law Committee (**Committee**) makes the following submission in response to the Statutory Review of the NSW Strata Schemes Laws – Discussion Paper (**Discussion Paper**).

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises a group of over 400 members interested in animal protection laws regulating the treatment of animals. The Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst Committee members is a passion and desire to use their legal skills and the law to improve protections for animals.

The Committee welcomes the opportunity to contribute to the NSW Government's Statutory Review of the NSW Strata Schemes Laws (**Review**).

The Committee's contribution focuses on that part of the Review which overlaps with our own remit; the applicability of NSW strata laws to animals and the keeping of animals. Specifically, this is done through the 'Pets and assistance animal by-laws' section of the November 2020 Discussion Paper accompanying the available Review resources (Discussion Paper) and questions 87-90 thereunder.

Summary of Recommendations

1. The Committee supports strata managers, landlords or agents being able to request only *minimal* detail in evidence of an animal being an assistance animal in strata plans, to, *inter alia*, preserve the privacy of residents.
2. The Government should ensure that where there is a companion animal ban in strata by-laws, that the owners corporation be required to provide the following information in any notice relating to such a by-law:
 - a. identification of the alleged breach;
 - b. the basis on which the companion animal's conduct or the keeping of the companion animal gives rise to the breach;
 - c. an explanation of the reasoning of the owners corporation in forming the view that other occupants' use and/or occupation of their properties and/or the common property is being unreasonably interfered with by virtue of the keeping of the companion animal on the premises;
 - d. that the owners corporation may file in NCAT if they wish to enforce the request to remove the animal and that the request is not enforceable without an NCAT order; and
 - e. the recourses available to the occupant should they wish to oppose the owners corporation's interpretation of events and the by-law and their decision to issue the relevant notice.
3. The Regulations under the 2021 Amendment should not be permitted to allow for further circumstances in which an animal may unreasonably interfere with another occupant's use and enjoyment of the occupant's lot or the common property.

Assistance animals (questions 87-89)

It is the Committee's view that blanket bans, and indeed most other unqualified bans, on the keeping of companion animals in strata schemes ought to be prohibited. If adopted, this position would do away with many of the more nuanced questions regarding assistance animals.

It would also remedy an issue identified in the Discussion Paper, being that perceptions of the concept of an assistance animal can often be confined to limited scenarios such as guide dogs.

Insofar as assistance animals are regulated separately, the Committee supports a strata manager, landlord or agent being able request evidence from a tenant or owner to show that their companion animal is an assistance animal. However, such a request and such evidence ought to be of **minimal detail** so as to preserve the privacy of residents. To this end, such evidence should not need to include a description of the particular affliction with which the assistance animal is helping. Instead, it could simply comprise a basic note from a medical practitioner identifying the resident/patient and the species of animal providing the assistance. This, in the Committee's view, is sufficient to satisfy a strata manager of the veracity of the animal's classification, while still protecting the personal information of affected residents.

Companion animals in strata and by-laws (question 90)

Public opinion and keeping companion animals

The ongoing survey accompanying this Review indicates that, at the time of writing, around 85 per cent of respondents do not consider that strata schemes should be allowed to ban companion animals. Further, a survey cited in the Discussion Paper identifies that up to 60 per cent of Australians have a companion animal. This is consistent with another survey conducted by Animal Medicines Australia in 2019,¹ which also identified that companion animals outnumber citizens.

Therefore, the Committee submits that bans on companion animals in strata schemes may be in contradiction of public opinion and that any regulation should operate to discourage and limit bans on companion animals by strata bodies.

¹ Animal Medicines Australia, *Pet Ownership in Australia 2019 (2020)* <https://animalmedicinesaustralia.org.au/wp-content/uploads/2019/10/ANIM001-Pet-Survey-Report19_v1.7_WEB_high-res.pdf>

Animal welfare outcomes and euthanasia

The Committee submits that restrictions or bans on companion animal ownership have the propensity to produce adverse animal welfare outcomes.

In the past five years, the RSPCA has reported receiving in the order of 40,000 dogs and 50,000 cats surrendered into their care per year.² Of those dogs and cats surrendered, the RSPCA separately observed³ that 15-30 per cent of those were surrendered because their owners could not take the companion animal into a new rental property. This has subsequently resulted in approximately 5,000 dogs and 12,000 cats being euthanised per year. While correlation does not equal causation and some of this is likely a result of landlords' individual preferences, the availability of companion animal-prohibiting by-laws readily facilitates such outcomes.

Those outcomes also place greater strain on local government and volunteer-run animal shelters, a strain that reduces resources and limits the ability of those shelters to duly care for all the animals in their charge.

Domestic and family violence (DFV)⁴

Domestic Violence NSW (**DVNSW**) has analysed the intersection between DFV and the role animals can play in DFV situations, with that analysis revealing that 70 per cent of DFV situations have an animal present.

An earlier survey by Volant et al. identified in 2008 that 33 per cent of women in crisis accommodation had delayed leaving their violent partner because of concerns for the welfare of their companion animal, and around half of DFV victim-survivors reported threats having been made to animals.⁵ This issue appears to have worsened since then, with 81 per cent of victim-survivors now reporting such threats. Further, 42 per cent of survey respondents in 2020 delayed leaving a perpetrator for more than a year due to barriers to

² RSPCA, *RSPCA Australia National Statistics 2019-2020* (2020)

<<https://www.rspca.org.au/sites/default/files/RSPCA%20Australia%20Annual%20Statistics%202019-2020.pdf>>

³ RSCPA, *Can I have a pet while renting or living in a strata property?* (17 August 2020)

<<https://kb.rspca.org.au/knowledge-base/can-i-have-a-pet-while-renting-or-living-in-a-strata-property/>>

⁴ References to: Domestic Violence NSW, *Animals and people experiencing domestic and family violence: How their safety and wellbeing are interconnected* (report, November 2020) <<https://www.dvnsw.org.au/wp-content/uploads/2020/11/Nov-DVNSW-Report-on-Animals-and-People-Experiencing-Domestic-and-Family-Violence.pdf>>

⁵ Cited by DVNSW at 43.

obtaining support for their animals, with 38 per cent delaying it for 6 to 12 months. Only 13 per cent did not delay leaving at all.⁶

Amongst those respondents who delayed leaving a DFV situation, the lack of availability of animal-friendly rental accommodation was cited as a problem by 93 per cent. Improvements in the management of companion animals in tenancy and strata regulation could help to mitigate and prevent a large number of DFV situations.

Bans on companion animals in strata by-laws could serve as another barrier to DFV victim-survivors leaving their violent partner.

Reasoning of the Court of Appeal

The Court of Appeal in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250 held that companion animal bans in strata complexes do not satisfy the relevant tests and criteria in the *Strata Schemes Management Act 2015 (SMA)*. The Committee supports this position and considers that it outlines the most fundamental shortcomings of companion animal bans.

First, companion animal bans contravene s 139 of the SMA. At [88] this point is articulated by Fagan J who describes the relevant by-law in that case as oppressive, because “it prohibits the keeping of animals across the board, without qualification or exception for animals that would create no hazard, nuisance or material annoyance to others”, and is “unjustified” in doing so. The Committee agrees, rejecting any suggestion that the burden on other lot owners in a strata scheme of having certain residents keep companion animals is, *prima facie*, commensurate with the burden on individual lot owners who are forbidden from engaging in companion animal ownership in their own homes.

While there are, of course, reasonable justifications for society restricting one’s use of their own private land for the sake of the interests of others – planning regulation and land use zoning being one such example – that justification is predicated upon the impact of certain practices on other landowners being unreasonable. This bar simply is not met by the mere keeping of companion animals.

⁶ DVSW at 44.

Secondly, other by-laws are readily available to mitigate the impact of one strata occupier's use of their unit on another's. By-laws restricting unreasonable levels of noise, damage to common property and other adverse impacts on co-residents are all available and regularly adopted in strata plans.

These restrictions and remedies remain available as they relate to animals, too. For example, regular damage or mess created in common areas by one resident's dog could contravene one of the by-laws identified above. The Committee therefore does not generally see the utility of an additional and (in the Committee's submission) arbitrary ban on companion animals. Fagan J, again at [88], touched on this:

"...it prohibits an aspect of the use of lots in the strata plan that is an ordinary incident of the ownership of real property, namely, keeping a pet animal, and the prohibition provides no material benefit to other occupiers of the building in their use or enjoyment of their own lots or of the common property. In an apartment building such as that to which Strata Plan 58068 applies, an animal could be kept within a lot without creating the least interference with other lot owners."

Thirdly, the Committee does not consider the desire of some to live in an entire complex without any animals present to be a reasonable basis on which to deprive other occupants of ordinarily-incidental aspects of their rights of occupation, including having a companion animal.

In respect of the fears identified in the Discussion Paper, the Committee refers to the responsibilities of companion animal owners enshrined in the *Companion Animals Act* 1998, as well as the classification of dangerous or menacing animals in that Act and its 2018 Regulation.

Effect of the Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021

The *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021 (2021 Amendment)* addresses a number of the matters raised in this submission. In considering the 2021 Amendment, the Committee makes the following submissions to discourage bans of companion animals by strata bodies.

The Committee submits that the language of the 2021 Amendment could give rise to circumstances where a by-law banning companion animals based on reasonableness may lead to inequitable outcomes where disproportionate weight is given to the alleged unreasonable act (for example, where a party levelling an accusation of unreasonableness mischaracterises or exaggerates the extent to which the keeping of a

companion animal is having an unreasonable impact). The Committee submits that the onus of proof should be on the owners corporation.

The Committee submits that in the event that a owners corporation relies on a by-law banning companion animals based on reasonableness, that the owners corporation is compelled to take certain steps. If for example, the owners corporation requires that the occupant of a strata plan vacate or remove a companion animal, the occupant who keeps the companion animal should be required to be given a clear written notice. Furthermore, the notice given to the occupant ought to include:

- identification of the alleged breach;
- the basis on which the companion animal's conduct or the keeping of the companion animal gives rise to the breach;
- an explanation of the reasoning of the owners corporation in forming the view that other occupants' use and/or occupation of their properties and/or the common property is being unreasonably interfered with by virtue of the keeping of the companion animal on the premises; and
- that the owners corporation may file in NCAT if they wish to enforce the request to remove the animal and that the request is not enforceable without an NCAT order.
- the recourses available to the occupant should they wish to oppose the owners corporation's interpretation of events and the by-law and their decision to issue the relevant notice.

This would remove some of the uncertainty over whether an animal "unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property" and clarify the rights and responsibilities of all parties.

The Committee notes the scope for the addition via the Regulations⁷ of further circumstances in which an animal may unreasonably interfere with another occupant's use and enjoyment of the occupant's lot or the common property. The Committee submits that this leaves open the possibility of a future constriction of owner and occupier rights to keeping animals and therefore this power to regulate should be limited.

⁷ 2021 Amendment s 137B.

Responding to the Discussion Paper's comments on suitability of animals

On page 46, the Discussion Paper raises “the suitability of the strata building for keeping animals ”as an issue which might give rise to support for by-law bans on companion animals. In the Committee’s submission, this concern is a vague one.

In the event that an inappropriate animal is proposed to be brought into a strata building, its inappropriateness should only become the subject of a by-law to ban the animal in narrow circumstances, for instance if there is a nuisance, common property damage, or some other significant issue. The Committee therefore does not foresee a scenario where a species-specific companion animal ban purportedly based on reasonableness would improve the position of a strata plan in this regard.

The Committee also notes that other legislative regimes provide further protection, including in relation to permits for dangerous animals under the *Companion Animals Act 1998*, licences for native animals under the *Biodiversity Conservation Act 2016*, and restrictions on the keeping of livestock in the *Local Government (General) Regulation 2005*.

The Committee also does not agree with the suggestion at page 46 of the Discussion Paper that arguments in opposition to companion animal bans in by-laws are “motivated by strong emotional bonds”. They are rooted in the rights of landowners and occupiers to have a companion animal.

Consideration of Discussion Paper options

The Committee's position with respect to the four options set out on pages 47-49 is likely evidenced from the above submissions. For completeness, the Committee's general submissions in this regard are set out below:

- **Option 1** – Status quo:
 - This option leaves too much uncertainty and, in any event, has now been superseded by the enactment of the 2021 Amendment.
- **Option 3** – Blanket companion animal bans are permitted:
 - As identified above, this position appears to be contrary to the public opinion shown in the survey accompanying this Review and that conducted by Animal Medicines Australia in 2019, contrary to the findings of the Court of Appeal and unreasonable.
 - This would now also be inconsistent with the 2021 Amendment.
- **Options 2 and 4:**
 - These, in part, reflect the changes proposed in new s 137B in the 2021 Amendment.
 - These are proposals of a kind that the Committee generally supports, noting that this submission considers that any by-law banning companion animals as qualified by words such as “unreasonable” ought to require that certain information be included in any notice relating to such a by-law.
 - The risks identified in the Discussion Paper in relation to these options are:
 - in the case of concerns about the increased costs of common property management due to the presence of companion animals, the Committee considers that it is reasonable for residents to have companion animals in strata buildings; and
 - in the case of concerns about residents “who bought the place in one condition but then have the matter changed”, this is capable of producing absurd outcomes – followed consistently, this concern would prevent any change in by-law on the basis that one or more residents acquired their property with the by-laws in one form and that ought not be altered after purchase, which is not how strata plans operate.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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