

User Pays By-Laws – An Alternative to Levies?

Problems can arise in strata schemes when an owner is perceived to be obtaining a disproportionate benefit from use of common property or services provided by the owners corporation or carrying out activities which puts the owners corporation to increased costs. How far can the owners corporation go in shifting costs to this owner, instead of recouping these costs by levy contributions imposed on owners generally?

An owners corporation in these circumstances should consider the following:

- There are few scenarios in which an owners corporation can directly impose differential levies, i.e. levies not proportionate to unit entitlements, the principal cases being:
 - Under Section 82 of the Strata Schemes Management Act 2015 ("Act"), where the owner's use of its lot increases the owners corporation's insurance costs. In that case, the owners corporation can increase the levies payable by that owner, with that owner's consent or with an order from the Tribunal that the owner has unreasonably withheld consent.
 - Under Sections 90 & 104 of the SSMA, where an owners corporation is raising a special levy to fund court or tribunal proceedings involving owners. In those cases, the owners corporation may be prevented by legislation or court or tribunal orders from requiring the relevant owner to contribute to the levy.
- There are scenarios in which an owners corporation can achieve the same result by shifting liability to an owner, negating the owners corporation's liability to a third party and in turn the need to fund that liability by levy contributions. In particular:
 - An owners corporation making a common property rights by law granting an owner special rights in relation to part of the common property can allocate responsibility for maintenance of that part of the common property to the owner, in which case the Strata Schemes Management Act 2015 ("Act") negates the owners corporation's obligation to maintain that part of the common property. It is important to note that this applies only to maintenance obligations and does not extend further, e.g. to the cost of a third party providing a utility to the area.
 - Where the issue concerns a third-party supply for the benefit of an owner as end user, the owners corporation need not contract directly with the supplier and on supply to the end user and can instead require the end-user to contract directly with

the supplier. There are of course some practical considerations, such as whether separate metering would be required and is practical.

- An owners corporation can defray costs, i.e. introduce what amounts practically to a user pays system. In particular:
 - An owners corporation granting an owner rights under a common property rights by law can charge a fee or impose conditions, including that the relevant owner take responsibility for liabilities to third parties, e.g. electricity charges for the relevant area. We suggest that:
 - The better way to do this, where practical, would be to have the relevant owner contract directly with the supplier, taking this off the owners corporation's books and simplifying matters for all concerned.
 - Where that is not practical, it would be preferable to frame the by-law such that the relevant owner will reimburse a proportionate part of other owners' levy contributions (instead of reimbursing the owners corporation's liability to the third-party), in practical terms making a payment directly to the owners corporation, to be received on behalf of other owners and credited to the levy contributions which they would otherwise have been required to make.
 - An owners corporation can enter into an agreement with an owner for the provision of amenities and services to the lot owned by that owner and can charge for doing so. Again, this could extend to making the relevant owner take responsibility for liabilities to third parties, e.g. third party charges for utilities provided for the benefit of that owner. We suggest that this be effected by a by-law. Again, we suggest that:
 - The better way to do this, where practical, would be to have the relevant owner contract directly with the supplier, taking the supply off the owners corporation's books and simplifying matters for all concerned.
 - Where that is not practical, it would be preferable to frame the by-law such that the relevant owner will reimburse a proportionate part of other owners' levy contributions (instead of reimbursing the owners corporation's liability to the third party), in practical terms making a payment directly to the owners corporation, to be received on behalf of other owners and credited to the levy contributions which they would otherwise have been required to make.
 - In either case, it is important to note that this does not and cannot negate the owners corporation's liability to third party suppliers. Consequently, some issues arise:
 - If and when the payment is made by the relevant owner, can the owners corporation omit the relevant liability from its estimated expenditure and hence from levies imposed on owners generally? In our view, this turns on whether the payment is framed as a payment to the owners corporation to reimburse the owners corporation's liability to third party suppliers or a payment to other owners (paid through the owners corporation), to be credited against their levy contributions. In the former case, the amount would represent owners corporation funds and would need to be deposited to

the administrative fund. In the latter case, the amount would represent funds held on behalf of the relevant owners and could be credited to the relevant owners.

- What if the owner required to make the payment does not do so, e.g. because of liquidation or bankruptcy? In this case, the distinction referred to in the previous bullet point is probably moot. In the former case, the owners corporation will clearly need to collect the amount from owners generally, as it cannot have an unfunded liability. In the latter case, it will also have to do so, because it would have received no amount to credit against other owners' levy contributions.

A recent NCAT Appeal Panel decision, *The Owners –Strata Plan No. 76830 -v-Byron Moon Pty Ltd [2020] NSWCATAP 186*, is seen by some as extending an owners corporation's ability to make "user pays" by-laws. Although we agree that there is some scope for an owners corporation to make "user pays" by-laws, we are concerned that some are reading more into this case than is warranted, at the risk of aggravating existing confusion in relation to this issue. Our take on the case is as follows:

- The case essentially involved a mixed-use scheme in relation to which the electricity cost of heating water had for years been borne by owners generally, in circumstances where only the residential owners obtained the benefit of the hot water. The commercial owners were understandably concerned and this ultimately led to a by-law providing for the residential owners to be responsible for such electricity charges, for the residential owners to "indemnify" the commercial owners in respect of such charges and for the owners corporation "to credit" the commercial owners "any costs incurred by those lots for such electricity charges arising pursuant to section 83 of the act from 1 May 2019".
- Faced with a claim by the commercial owners for an order that the owners corporation repay to them the amount which they claimed they had overpaid, the Tribunal needed to deal with two main issues:
 - Firstly, was the by-law valid? The Tribunal decided that it was and that it was not invalid for inconsistency with the Act. However, the Tribunal's reasoning is premised on a particular factual situation and a particular construction of the by-law, which we will consider below.
 - Secondly, did the Tribunal have jurisdiction to make the orders sought? The Tribunal decided that it did not, but this is beyond the scope of this article and will not be considered here, but will be considered in a separate article.
- As to the validity of the by-law, we consider the following factors critical:
 - After allocating liability for electricity charges to the residential owners, the by-law expressly provides for this to operate by way of an indemnity in favour of the commercial owners and for a credit to be made against levies payable by commercial owners.
 - The payments required to be made by residential owners effecting such indemnity had been made sometime before.

- Accordingly, our interpretation of the decision is that where an owner pays an amount to the owners corporation on behalf of another owner, for the purpose of credit to the other owner's levy account, the owners corporation can do so, as specified by the by-law.
- The decision does not need to be construed and should not be construed to the effect that a by-law can provide for an owner to reimburse the owners corporation for a liability owed by the owners corporation to a third party and for the owners corporation to abrogate its responsibility to pay the supplier and recoup the amount paid from owners generally through levy contributions.
- Were the construction referred to in the preceding bullet point intended by the Tribunal (and again we consider this unwarranted), we would regard that construction as incorrect and vulnerable to being overturned by the courts, as occurred recently when the Court of Appeal corrected the significant errors made by the Appeal Panel in relation to pets by-laws ***Cooper v The Owners – Strata Plan No 58068 [2020] NSWCA 250*** and the Tribunal's powers to award damages *Vickery v The Owners - Strata Plan No 80412 [2020] NSWCA 284*.
- Until the position is clarified by the courts, owners corporations need to tread carefully to avoid potential traps. For example, a scenario could arise in which an owners corporation found itself unable to recover an amount from a party to whom liability had been allocated under a by-law, e.g. because of invalidity of the by-law or insolvency of the party liable and the owners corporation found itself unable to recover the liability by other means, e.g. because it was precluded by the by-law or legislation, e.g. where incorrect information had been provided in strata information certificates.

Compared with levies, such methods of funding owners corporation costs present some advantages, particularly potential for more fairly allocating costs between owners. However, there are some practical implications which need to be considered, as they could diminish or even outweigh those advantages:

- If the payment obligation is framed as an amount payable to the owners corporation under an agreement with the owners corporation, e.g. charges under an agreement to provide amenities or services to a lot, the owners corporation will need to recover any unpaid amount as a debt, i.e. the owners corporation may be put to the delay and expense of recovery proceedings.
- If the payment obligation is framed as an obligation under a by-law, e.g. a condition on a grant of rights under a common property rights by-law, the owners corporation will need to enforce its rights as a by-law breach, i.e. by issuing a notice to comply with by-law and following this up with tribunal proceedings if required.
- Either way, the rights available to an owners corporation in relation to unpaid levies, including a subsequent owner being liable for the unpaid amount, would generally not be available to the owners corporation.

The takeaway point is that there are solutions available to an owners corporation in these circumstances, but that the owners corporation needs to take extreme care not to mishandle what is an extremely complex issue and potentially preclude recovery of what could be substantial amounts.

We have considerable experience in this area and could assist you should you be having problems with these issues.

**Prepared by Bannermans Lawyers
18 February 2021**



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA