Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners – Strata Plan No 91157 v Yoolee Holdings Pty Ltd Limited; Yoolee Holdings Pty Limited v The Owners – Strata Plan No 91157
Medium Neutral Citation:	[2020] NSWCATAP 6
Hearing Date(s):	18 November 2019
Date of Orders:	16 January 2020
Decision Date:	16 January 2020
Jurisdiction:	Appeal Panel
Before:	Cole DCJ, Deputy President G Curtin SC, Senior Member
Decision:	(1) The appeal is allowed to the following extent: (a) Order 1 made on 26 July 2019 by the Tribunal in the Consumer and Commercial Division is set aside. (b) The application by Yoolee in SC 18/18886 under s 232 of the Strata Schemes Management Act 2015 (NSW) for an order directing the Owners Corporation of Strata Plan 91157 to provide consent to the lodgement of a development application under by-law 37.1 is remitted to the Tribunal in the Consumer and Commercial Division for reconsideration having regard to this decision. (c) Order 2 made on 26 July 2019 by the Tribunal in the Consumer and Commercial Division is set aside. (d) The question of whether by-law 8.3, as amended on 29 March 2018, should be declared to be invalid on the basis that it is harsh, unconscionable or oppressive is remitted to the Tribunal in the Consumer and Commercial Division for reconsideration having regard to this decision. (2) The cross appeal by Yoolee Holdings Pty Ltd, by which it was asserted that, contrary to the determination

	of the Tribunal at first instance, the Tribunal had jurisdiction under s 232(1) and (6) to hear and determine the dispute in relation to the giving or withholding of consent to the development application, is allowed by consent.
Catchwords:	LAND LAW - Strata title - Owners corporation – By-laws
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Corporations Act 2001 (Cth) Environmental Planning and Assessment Act 1979 (NSW) Environmental Planning and Assessment Regulation 2000 Local Government Act 1993 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd & Ors (2003) 214 CLR 51 Bull v Attorney General for New South Wales (1913) CLR 370 Chamwell Pty Ltd v Strathfield Council (2007) 151 LGERA 400 North Sydney Council v Ligon (1996) 185 CLR 470 Ousley v The Queen (1997) 71 ALJR 1548 Parramatta City Council v Brickworks Ltd (1972) 128 CLR 1 The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207 Wayde v NSW Rugby League Ltd (1985) 180 CLR 459 Wehbe v Pittwater Council (2007) 156 LGERA 446
Category:	Principal judgment
Parties:	Proceedings AP 19/36275 The Owners - Strata Plan No 91157 (Appellant) Yoolee Holdings Pty Limited (Respondent) Proceedings AP 19/48413 Yoolee Holdings Pty Limited (Appellant) The Owners - Strata Plan No 91157 (Respondent)
Representation:	Counsel: Proceedings AP 19/36275 M Ashhurst SC and D Meyerowitz-Katz (Appellant) T Lynch SC and D Hand (Respondent)

	Proceedings AP 19/48413 T Lynch SC and D Hand (Appellant) M Ashhurst SC and D Meyerowitz-Katz (Respondent) Solicitors: Proceedings AP 19/36275 Grace Lawyers (Appellant) Harris Friedman Lawyers (Respondent) Proceedings AP 19/48413 Harris Friedman Lawyers (Appellant) Grace Lawyers (Respondent)
File Number(s):	AP 19/36275, AP 19/48413
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal New South Wales
Jurisdiction:	Consumer and Commercial Division
Citation:	[2019] NSWCAT
Date of Decision:	26 July 2019
Before:	G Meadows, Senior Member
File Number(s):	SC 18/18886; SC 18/27917

REASONS FOR DECISION

Introduction

1 The Tribunal at first instance determined two actions between The Owners – Strata Plan No 91147 (the owners corporation) and Yoolee Holdings Pty Limited ("Yoolee") concerning a multi-story building at Milsons Point ("the building") which was developed for residential and retail/commercial purposes. The building contains 129 residential lots, 3 retail lots and 4 commercial lots. Yoolee has purchased all of the retail lots and 3 of the commercial lots. The other commercial lot is used for the purposes of a dental practice.

2 One of the actions related directly to a development application Yoolee wishes to pursue in relation to units it owns within the building ("the DA proceedings") involving building works and a change of use to a college. The other action related to the by-laws of Strata Plan No 91147 ("the by-laws proceedings").

3 The owners corporation has appealed to this Appeal Panel against the decision of the Tribunal at first instance with respect to both the DA proceedings and the by-laws proceedings.

4 The appeal with respect to the DA proceedings relates to the question of whether the owners corporation is bound by Strata Plan No 91147 by-law 37.1 to give consent to the lodgement of the development application Yoolee wishes to lodge with the North Sydney Council under the *Environmental Planning and Assessment Act 1979*.

5 The appeal with respect to the by-law proceedings relates to the validity of amendments to one of the by-laws by the owners corporation.

6 The evidence before the Appeal Panel comprised, principally, an agreed bundle of documents contained in a three volume appeal book which became Exhibit A 10. We understand that all of the documents in Exhibit A10 were before the Tribunal at first instance.

Facts

The DA proceedings (SC 18/18886)

7 The Tribunal at first instance (*Yoolee Holdings Pty Ltd v The Owners – Strata Plan No 91157* [2019] unpublished) summarised the facts relevant to the DA proceedings at [1]–[11] in the following way:

> 1 I do not understand the following summary to be a matter of dispute (although it is incomplete).
>
> 2. Strata Plan 91157 is a mixed residential and commercial strata building at Milson's Point in Sydney. The Strata Plan was registered on 13 August 2015.
>
> 3 The applicant, Yoolee Holdings Pty Ltd, owns 6 commercial and retail lots in the building. The applicant wishes to develop those lots for use as a private college.
>
> 4 On or about 16 December 2016 the applicant provided an earlier version of its proposed development application to the respondent.
>
> 5 It appears that the parties engaged in negotiations and that although the respondent did not formally refuse consent, the applicant elected to abandon

that earlier proposal and on 13 December 2017, by letter addressed to the owners, provided a fresh and different proposed development application to the respondent. The latter proposed development application is the subject of this application to the Tribunal.

6 The proposal is to use part of the basement, ground floor and first floor levels as a college providing education courses at certificate to advanced diploma levels. The applicant asserts that the affected "land" is zoned "B4 Mixed Use" under the relevant local environmental plan (LEP) and that the proposed use is a permissible use but requires development consent from North Sydney Local Council.

7 When approving the original mixed use development for the building which became Strata Plan 91157, the Council imposed Condition I8 which required:

> "… A separate development application for the fitout and use of the non-residential tenancies must be submitted and approved by Council prior to that fitout or use commencing", the reason being "To ensure development consent is obtained prior to uses commencing."

8 The by-laws in force in the scheme include by-law 37.1 "Approval by a Government Agency" as follows:

> "An Owner or Occupier of a Retail Lot or a Commercial Lot may only use the Retail or Commercial Lot for any purpose, and during the hours, approved by a Government Agency. The Owners Corporation must without delay give its consent to the lodgement of an application to a Government Agency (as owner for the purpose of the Planning Act) for a particular use, or for specified hours, if requested by an Owner or Occupier of the Retail Lot or a Commercial Lot."

[Neither party has submitted, so far as I can see in the evidence or submissions, that by-law 37.1 was included specifically in response to Condition 18.]

9 The proposed development application provided to the owners corporation included, on the cover sheet of the Council's pro-forma development application form, the following requirement:

> "If the property is a unit under strata title or a lot in the community title, then in addition to the owners signature, the common seal of the body corporate must be stamped on this form over the signature of the owner and signed by the chairman or secretary of the Body Corporate or the appointed managing agent."

The place shown on the form for the signature and placement of the common seal of the body corporate is immediately under the following paragraph:

> "As owner of the land to which this application relates, I assent to this application. I also consent for authorised Council officers to enter the land to carry out inspections relating to this application. I accept that all communication regarding this application will be through the nominated applicant."

Immediately after the place shown on the form for the signature the following "small print" is placed:

> "Without the owner's consent **we will not accept the application**. This is a very strict requirement for all applications."

[Emphasis in original]

10 In contrast to the first proposed development application, the respondent owners corporation has formally refused to consent to the lodgement of the current proposed development application and has indicated an apparent intention to vigorously resist and object to the proposal. On 29 March 2018 an extraordinary general meeting (EGM) was held at which [it] was resolved "to oppose the proposed development application". Furthermore, at the same EGM, the owners resolved to defend any NCAT proceedings brought by the applicant, to appeal to the Land and Environment Court in the event that Council approved the proposed development application and to raise a special levy to provide funds for those legal proceedings.

11 Application SC 18/18886 was lodged on 18 April 2018. The order sought is:

> "An order under Section 232 of the Strata Schemes Management Act, 2015 that the Owners Corporation Strata Plan 91157 provide consent to lodgement of a development application in accordance with by-law 37.1."

8 The Tribunal at first instance granted an order with the effect of the order sought by Yoolee.

9 The Environmental Planning and Assessment Regulation 2000 (NSW) provides, in reg 49(1):

> 49 **Persons who can make development applications**
>
> (cf clause 46 of EP&A Regulation 1994)
>
> (1) A development application may be made—
>
> (a) by the owner of the land to which the development application relates, or
>
> (b) by any other person, with the consent in writing of the owner of that land.

10 The *Environmental Planning and Assessment Act 1979* defines the term "owner" in the same way as the *Local Government Act 1993.* In the dictionary to the *Local Government Act 1993,* "owner" is defined, relevantly, to mean and include:

> (b) in relation to land other than Crown land, includes—
>
> (i) every person who jointly or severally, whether at law or in equity, is entitled to the land for any estate of freehold in possession, and
>
> (ii) every such person who is entitled to receive, or is in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession, or otherwise, and
>
> (iii) in the case of land that is the subject of a strata scheme under the *Strata Schemes Development Act 2015*, the owners corporation for that scheme constituted under the *Strata Schemes Management Act 2015*, and

(iv) in the case of land that is a community, precinct or neighbourhood parcel within the meaning of the *Community Land Development Act 1989*, the association for the parcel, and

(v) every person who by this Act is taken to be the owner,

11 Yoolee's originating application to the Tribunal is predicated on the assumption that Yoolee's proposed development application requires the consent of the owners corporation under reg 49(1) of the Environmental Planning and Assessment Regulation 2000.

12 Section 232 of the *Strata Schemes Management Act 2015* (NSW) is in Division 4 of Part 12 of the Act, which is entitled 'Orders that may be made by the Tribunal'. Section 232(1), (2) and (6) provide:

232 Orders to settle disputes or rectify complaints

(1) **Orders relating to complaints and disputes** The Tribunal may, on application by an interested person, original owner or building manager, make an order to settle a complaint or dispute about any of the following—

(a) the operation, administration or management of a strata scheme under this Act,

(b) an agreement authorised or required to be entered into under this Act,

(c) an agreement appointing a strata managing agent or a building manager,

(d) an agreement between the owners corporation and an owner, mortgagee or covenant chargee of a lot in a strata scheme that relates to the scheme or a matter arising under the scheme,

(e) an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws of a strata scheme,

(f) an exercise of, or failure to exercise, a function conferred or imposed on an owners corporation under any other Act.

(2) **Failure to exercise a function** For the purposes of this section, an owners corporation, strata committee or building management committee is taken not to have exercised a function if—

(a) it decides not to exercise the function, or

(b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.

…

(6) **Disputes relating to consent to development applications** The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a

development application under the *Environmental Planning and Assessment Act 1979* relating to common property of the scheme.

Decision of the Tribunal at first instance with respect to the DA proceedings

13 The Tribunal at first instance characterised the requirement by reg 49(1)(a) of the Environmental Planning and Assessment Regulation 2000 for the consent to the making of a development application by the owner of the land to which the development application relates as conferring upon the owners corporation in circumstances such as those in the present matter a power to "veto" the making of the development application (at [70-85], citing *Mulyan Pty Ltd v Cowra Shire Council & Anor [1999] NSWLEC 212 per Lloyd J at [26] and [32], Becton Corporation Pty Ltd v Minister for Infrastructure, Planning and Natural Resources & Anor [2005] NSWLEC 197 per Lloyd J at [7], Hurstville City Council v Minister for Planning and Infrastructure [2012] NSWLEC 134 per Payne J at [70]* and *North Sydney Council v Ligon 302 Pty Ltd (1996) 185 CLR 470 at [7], [12], [13] and [16]).*

14 The Tribunal at first instance determined that, in the absence of by law 37.1, the Tribunal would not have had power to require the owners corporation to give its consent to a development application where that consent was required under reg 49(1)(a) of the Environmental Planning and Assessment Regulation 2000, and where the owners corporation did not wish to give its consent [89].

15 However, the Tribunal found, by-law 37.1 changed that position.

16 The Tribunal noted that the development consent for the adaptive re-use of the building which resulted in the creation of the 129 residential lots, 3 retail lots and 4 commercial lots included Condition I8 (ie the letter capital I and the number 8) (see Tab 22, Exhibit A 10), which provided as follows:

> First Use of Premise – Further consent required
>
> I8 A separate development application for the fitout and use of the non-residential tenancies must be submitted to and approved by Council prior to that fitout or use commencing.
>
> (Reason: To ensure development consent is obtained prior to uses commencing)

17 It appears from the documents before us that condition I8 was imposed as part of a modification of the original consent for the adaptive reuse of the building.

18 The Tribunal said:

> 95 In "Part 3 – Retail and commercial by-laws" by-law 37.1 is as follows:
>
> > "37.1 Approval by a Government Agency
> >
> > An Owner or Occupier of a Retail Lot or a Commercial Lot may only use their Retail Lot or Commercial Lot for any purpose, and during the hours, approved by a Government Agency. The Owners Corporation must without delay give its consent to the lodgement of an application to a Government Agency (as owner for the purpose of the Planning Act" for a particular use, or for specified hours, if requested by an Owner or Occupier of a Retail Lot or a Commercial Lot."
>
> 96 The parties argued in their evidence, at the hearing and in their post-hearing submissions as to the significance of any pre-purchase discussions there may have been in relation to the intentions of the applicant and whether it specifically relied on by-law 37.1. In my opinion it is not necessary to make any factual findings in that regard. That is because, as I discussed below, I find the applicant is entitled to rely on and require the owners corporation's compliance with its own by-law.
>
> 97 I am satisfied, and I understand it is not disputed, that by-law 37.1 was an "original by-law" being included in the by-laws registered at the time the strata plan itself was registered.
>
> 98 I am also satisfied, as a necessary inference from the additional Condition I8 amendment to the development approval, that by-law 37.1 was intended to make it clear that the owners corporation would not stand in the way of any application for development consent arising from that Condition I8. I note that the trigger for the owners corporation providing its consent to a development application was simply that a request is made to it by an owner or occupier.
>
> 99 I do not consider it is necessary to make a determination whether the applicant "took comfort" in by-law 37.1 although if I am wrong in that regard I accept the evidence of Mr Yoo. I also note that the strata manager, Mr Abbott, agreed under cross-examination that he specifically discussed by-law 37.1 with another employee of the strata manager, Mr Howitt who stated to Mr Abbott that this was discussed with Mr Lee of Bridgehill Projects Pty Ltd on or about 29 August 2016. I also note the email of the same date from Mr Lee to Mr Yoo (pages 264-267 of the tender bundle). I find there is simply no doubt that the applicant made it clear when considering purchase of its lots in the scheme that it was intended to use those lots as an educational college. Nevertheless, in my opinion that finding is not necessary or relevant in determining this application.
>
> 100. The reason is that I consider by-law 37.1 was registered in order to advise the world, or at least any interested party, of what the owners corporation intended to do: that is, in relation to retail and commercial lots in the strata plan, the owners corporation advised that it would **not** apply its veto power. That power inheres in the owners corporation by virtue of Regulation 49 and the construing of that provision in the decisions discussed above. The owners corporation can use its veto power but equally it can decide not to use its veto power.
>
> 101 The respondent (commencing at (34) of its written submissions) provides a detailed argument as to whether by-law 37.1 displaces the principle that, as owner of the common property, the owners corporation's consent is required.

The owners corporation arrives at its concluding submission on this issue that "By-Law 37.1 does not assist the applicant in obtaining consent from the Owners' Corporation to lodge its DA" by the following path.

102 The respondent refers to *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 in which McColl JA (with whom Mason P agreed in this regard) sets out a number of propositions in relation to the interpretation of by-laws. I extract the relevant passages:

> Conclusion
>
> 71 The following propositions emerge from the foregoing discussion:
>
> 1. By-laws are the "series of enactments" by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: Bailey;
>
> 2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cf, Parkin, Lion Nathan;
>
> 3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: NRMA; Lion Nathan.
>
> 4. By-laws may be characterised as either delegated legislation or statutory contacts: Dainford; Re Taylor; Bailey; North Wind; Sons of Gwalia;
>
> 5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: Lion Nathan;
>
> 6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors inter se: Parkin; Lion Nathan.
>
> 7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy: cf NRMA (at [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as Antaios Cia. Naviera S.A., but due regard must be paid to the statutory context in so doing;
>
> 8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law: Re Taylor;
>
> 9. Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances: Lion Nathan.

103. The owners corporation submits that propositions 1 and 9 are relevant and that "it would be wrong to go beyond the language of the present By-Law, number 37.1". The owners corporation submits that any interpretation of by-law 37.1 that it

> "must consent to any development application lodged by an owner of a commercial or retail Lot without the Owners' Corporation having any ability to protect its own interests (which includes its management of the strata scheme – see s. 9 SSM Act) … cannot be correct and would be contrary to the underlying intention of cl 49(1) of the *Environmental Planning and Assessment Regulation* 2000".

104 In support of that submission the owners corporation next considers *Mulyan* (*supra*) and specifically to the passage extracted at paragraph 72 above.

105 As is clear from the previous discussion and findings, I essentially agree with the proposition in that passage that "an owner can withhold consent". As I am now discussing however, I do not consider that this owner can withhold consent either in compliance with or despite by-law 37.1.

106 Presumably, as is usual, by-law 37.1 was included in the by-laws by the original developer and it may be that the owners corporation, once it came into being, did not actually pass a resolution in a general meeting to the effect that it would not rely on its veto power. If that is the case, in my view that does not change the circumstances — it appears that the owners corporation has not otherwise taken any steps to amend or repeal by-law 37.1.

107 Still, the fact is that by-law 37.1 is "only" a by-law which can be changed pursuant to the provisions of the SSM Act 2015. The owners corporation can simply change its mind.

108 If the owners corporation did seek to repeal or amend that by-law, of course an aggrieved owner or occupier could seek to have that decision set aside by applying to this Tribunal. At that stage, in my opinion the Tribunal would be considering the powers of the owners corporation in relation to its by-laws rather than deciding whether to remove the owners corporation's veto power to prevent development.

109 In *Casuarina Rec Club Pty Ltd v The Owners — Strata Plan 77971*, Young JA (with whom Macfarlan JA and Handley AJA agreed) stated:

> "[50] … In the case of an original by-law, people have vested rights which are not likely to be diminished by an amendment at the behest of the majority.
>
> [51] As White J said in *White* at first instance … the original by-laws accompany the strata plan and people who buy a lot in the strata scheme buy with notice of the by-law, so that it can hardly ever be said that the by-law creates an injustice.
>
> [52] It must be observed to that for that very reason it is rare that an original by-law (or, in the case of limited companies, an original article) will be held to be invalid. … "

110 Now it is clear that the particular issue in that case differs from the situation before the Tribunal in these proceedings. There is no dispute in these proceedings as to whether by-law 37.1 is invalid or "creates an injustice", at least as I understand the evidence and submissions of the parties.

> 111 However, a similar principle can be derived in relation to Yoolee Holdings' application and that is that the applicant was entitled to rely on the original by-laws when making its business decisions to purchase lots in this strata scheme. The Tribunal, on the basis of *Casuarina*, will not itself likely disregard the original by-laws.
>
> 112 The respondent submitted that there is an issue as to whether by-law 37.1 is "limited to an obligation regarding a development application for use".
>
> 113 On its terms, by-law 37.1 relates not only to the development application for a particular use but also for specified hours. The respondent suggests that it does not extend to the carrying out of physical works. I reject that submission: the proposed physical works arise wholly from the proposed use. The applicant proposes a development to "use" its lots in the scheme and if necessary part of the common property as a college. That is what the owners corporation has been requested to consent to. The Council (and of course the other owners and the owners corporation) will require full details of any physical works proposed to enable that "use".
>
> 114 I find that the respondent's submission in regard to the carrying out of physical works is a conflation of its function to consent or not to a development application with the following planning and approval process.
>
> 115 The Tribunal has no information in relation to any other refusal of consent despite by-law 37.1. On the information before me in these proceedings, the owners corporation's refusal to consent to making the application is unreasonable because the by-law does not provide for any exceptions. That is, there is no hint that the owners corporation will not consent to a particular development application provided the specific requirements of by-law 37.1 are present: the development application is for a proposed use or for specified hours and a request has been made by the owner proposing the development.
>
> 116 For those reasons I find that the applicant is entitled to an order that the owners corporation consents to lodging the development application the subject of these proceedings.

The proposed development, Yoolee's lots and the common property

19 The proposed development the subject of the development application includes a change of use of the building from residential and retail/commercial use to residential use, commercial use and use as an education and training facility (see the Statement of Environmental Effects, tab 13 p 428, Exhibit A 10). The education and training facility is proposed to be established in parts of the basement, the ground floor and the first floor of the building (affidavit of Geoffrey Mark Goodyer 5 September 2018, tab 14 Exhibit A10).

20 The proposed development also includes building works involving both Yoolee's lots and the common property. In the report of their joint conference, town planners Geoffrey Goodyer and Gary Shiels agreed the following:

> 50. The proposal involves works to the common property, which include:
>
> a. Penetrations to slabs for plumbing works associated with the installation of a kitchen/catering room and bathrooms/WCs;
>
> b Building up the concrete slab with screed on Basement 1 level, across Lots 127 and 128;
>
> c The installation of partition walls to separate classrooms, bathrooms, the catering room, meeting rooms and the like may involve works to common property depending on the method of construction (eg: affixing the partition to the floor or walls);and
>
> d The rotation of entry doors to Lots 127 and 128, which now open over the common entrance to the street.

21 It is apparent from the plans that the proposed development also includes the removal of several common property walls on the first floor and a further common property wall in the basement. A new staircase is proposed between the ground floor and the first floor, the installation of which would require alteration to common property flooring.

22 It is clear from the Statement of Environmental Effects prepared for Yoolee in relation to the development application that use of the common property will occur by the students and the staff of the training facility. Attachment A to the Statement of Environmental Effects shows that students will use the common property stairs to gain access from the basement to the ground floor. Students and staff will use the common property hallway adjacent to residential apartments on the ground floor. Students and staff will also use the common property lifts. On the first floor, staff will use the common property hallway next to residential apartments to move from one of Yoolee's lots to another.

23 The Statement of Environmental Effects notes that there are 12 existing bicycle storage bays on basement levels 3 and 1, and that there is a shower on basement level 1. The inference is that these will be used by the staff and students of the proposed training facility. They are on common property.

24 The Statement of Environmental Effects indicates that the training facility will use the garbage room on basement level 4. It asserts 'exclusive' use of the garbage room, but, from later correspondence, it is apparent that all of the commercial lots in the building have the use of that garbage room, and that it is

a central transfer point on garbage day (see Grace Lawyers letter 31 March 2017 at p 392 Exhibit A 10). The garbage room is on common property.

Relevant provisions of the Environmental Planning and Assessment Act 1979

25 The *Environmental Planning and Assessment Act 1979* provides, in s 1.5 (and provided at all relevant times):

> 1.5 **Meaning of "development"** (cf previous s 4)
>
> (1) For the purposes of this Act, ***development*** is any of the following—
>
> (a) the use of land,
>
> (b) the subdivision of land,
>
> (c) the erection of a building,
>
> (d) the carrying out of a work,
>
> (e) the demolition of a building or work,
>
> (f) any other act, matter or thing that may be controlled by an environmental planning instrument.
>
> (2) However, development does not include any act, matter or thing excluded by the regulations (either generally for the purposes of this Act or only for the purposes of specified provisions of this Act).
>
> (3) For the purposes of this Act, the ***carrying out of development*** is the doing of the acts, matters or things referred to in subsection (1).

Discussion of grounds of appeal in relation to the DA proceedings

26 Ultimately, it was agreed between the parties that, contrary to the determination of the Tribunal at first instance at [89], the Tribunal has jurisdiction, under s 232(1) and (6) of the *Strata Schemes Management Act 2015*, to hear and determine the application by Yoolee with respect to the decision by the owners corporation to decline to consent to the lodgement of the development application under the *Environmental Planning and Assessment Act 1979*. The cross appeal by Yoolee was, to this extent, conceded by the owners corporation.

27 The owners corporation's amended grounds of appeal, which were provided to the Tribunal on 20 August 2019, plead, in grounds 1, 2 and 3 with respect to the DA proceedings that the Tribunal erred in its interpretation of by-law 37.1 in paragraphs [98], [100] and [113] of its decision.

28 The grounds of appeal further plead, in ground 4, that the Tribunal erred in paragraph [115] of its decision in determining that, if a development application

was for a proposed use or for specified hours, and a request was made to the owners corporation by the owner proposing to lodge a development application, then the owners corporation was obliged by by-law 37.1 to consent to the owners development application. It was asserted that such a by-law, with such an effect, would be inconsistent with the obligations of the owners corporation under the *Strata Schemes Management Act 2015* and would, to that extent, have no force and effect under s 136(2) of the *Strata Schemes Management Act 2015*.

29 Ground 5 of the owners corporation's appeal was that the Tribunal erred by failing to take into account the considerations mandated by s 232(6) of the *Strata Schemes Management Act 2015*.

Grounds of appeal 1, 2, 3 and 4

30 The principles set out in *The Owners of Strata Plan No 3397 v Tate,* and reproduced in the decision at first instance at paragraph 102, which is quoted at [18] above, are expressed in the context of an exclusive use by-law, but have application to all kinds of by-laws.

31 It is clear from those principles that the starting point for the interpretation of a by-law is the language of the by-law, interpreted in the knowledge of its statutory context.

32 It is convenient to set out by-law 37.1 once again:

> **Approval by a Government Agency**
>
> An Owner or Occupier of a Retail Lot or a Commercial Lot may only use the Retail or Commercial Lot for any purpose, and during the hours, approved by a Government Agency. The Owners Corporation must without delay give its consent to the lodgement of an application to a Government Agency (as owner for the purpose of the Planning Act) for a particular use, or for specified hours, if requested by an Owner or Occupier of the Retail Lot or a Commercial Lot.

33 Various terms used in the by-l*aws* are defined for the purposes of the by-laws in by-law 45.1, including the following:

> **Government Agency** means a governmental or semi-governmental administrative, fiscal or judicial department or entity.
>
> **Planning Act** means the *Environmental Planning and Assessment Act 1979.*

34 The North Sydney Council is a Government Agency under the by-laws.

35 By-law 45.2(e) provides that, unless the contrary intention appears, a reference in the by-laws to:

> e. a law, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of them;

36 The reference to 'the Planning Act' in by-law 37.1 is therefore a reference to the *Environmental Planning and Assessment Act 1979,* together with the regulations and other instruments under that Act.

37 By-law 37.1 is concerned with the processes provided for under the *Environmental Planning and Assessment Act 1979.* It is reasonable, therefore, to interpret by-law 37.1 on the basis that it was drafted with an understanding of the processes provided for under the *Environmental Planning and Assessment Act 1979* and with knowledge of the meaning of words used in that Act.

38 The requirement imposed upon the Owners Corporation by by-law 37.1 is imposed in the context of the requirement under reg 49(1)(b) of the Environmental Planning and Assessment Regulation 2000 that a development application be accompanied by 'the consent in writing of the owner of that land', in the knowledge that 'owner', in that context, includes the Owners Corporation (see [10] and [11] above).

39 We refer to the meaning of 'development' under the *Environmental Planning and Assessment Act 1979,* which we set out at [25] above.

40 By-law 37.1, in its terms, refers only to an approval for and an application for the use of a Retail Lot or a Commercial Lot and the hours of that use. The hours of a land use may be provided for by way of a condition to a consent to a development application. By-law 37.1 does not expressly refer to an approval for, or an application for, any other kind of development in relation to a Retail Lot or a Commercial Lot, such as the carrying out of works. By-law 37.1 does not expressly refer to an approval for, or an application for, any kind of development at all with respect to common property. By-law 37.1 is not confined to the first use of the lots, but will apply to any change of use from time to time.

41 The Tribunal at first instance said that reg 49(1)(b) of the Environmental Planning and Assessment Regulation 2000 gives an owners corporation the ability to 'veto' a potential development application (see *North Sydney Council v Ligon* (1996) 185 CLR 470). This is because the written consent of the owner is a precondition to the ability to lodge the development application with the relevant authority.

42 The Tribunal went on to say, in [98] and [100], which, for convenience, we will repeat here:

> 98 I am also satisfied, as a necessary inference from the additional Condition I8 amendment to the development approval, that by-law 37.1 was intended to make it clear that the owners corporation would not stand in the way of any application for development consent arising from that Condition I8. I note that the trigger for the owners corporation providing its consent to a development application was simply that a request is made to it by an owner or occupier.
>
> …
>
> 100. The reason is that I consider by-law 37.1 was registered in order to advise the world, or at least any interested party, of what the owners corporation intended to do: that is, in relation to retail and commercial lots in the strata plan, the owners corporation advised that it would **not** apply its veto power. That power inheres in the owners corporation by virtue of Regulation 49 and the construing of that provision in the decisions discussed above. The owners corporation can use its veto power but equally it can decide not to use its veto power.

43 Condition I8 simply says:

> **First use of Premise – Further consent required**
>
> I8 A separate development application for the fitout and use of the non-residential tenancies must be submitted to and approved by Council prior to that fitout or use commencing.
>
> (Reason: To ensure development consent is obtained prior to uses commencing)

44 Condition I8 was imposed, by the North Sydney Council, on the development consent for the redevelopment of the building, in the context of the planning scheme provided for by the *Environmental Planning and Assessment Act 1979.* Condition I8 is an express acknowledgement that the consent given to the redevelopment of the building did not include consent for any particular use of the non-residential tenancies within the building, and that the Council would require a development application for the fitout and use of such tenancies.

45 There is no warrant, and no evidentiary basis, for the inference drawn by the Tribunal at first instance in paragraph [98] of its decision. It is certainly not a 'necessary' inference. Yoolee argued that the inference arises from the 'reason' set out after condition I8, in that it was 'logical' to assume that the first use of a lot could not commence without a fitout. However, we reject the idea that inferences which might be drawn from condition I8 about the obligations that the Council intended to impose upon the individual non-residential lot owners necessarily influences the interpretation of by-law 37.1.

46 Likewise, with respect to paragraph [100] of the decision of the Tribunal at first instance, there is no reason to interpret by-law 37.1 as if it were 'advice to the world' that the owners corporation would not 'apply its veto power' in relation to retail and commercial lots.

47 In paragraph [113] of its decision, the Tribunal at first instance rejected the submission by the owners corporation that by-law 37.1 relates only to the use of Retail and Commercial Lots and the hours of that use, and does not relate to physical works. The Tribunal said that it rejected that submission on the basis that 'the proposed physical works arise wholly from the proposed use'. This overlooks the fact that the planning system set up under the *Environmental Planning and Assessment Act 1979* (with which by-law 37.1 is concerned) treats 'the use of land' and 'the carrying out of a work', among other things, as separate kinds of development, each of which may require consent under the *Act* (see, for example, *Wehbe v Pittwater Council* (2007) 156 LGERA 446 at [25]-[30] (Preston J), *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400 at [28] (Preston J) and *Parramatta City Council v Brickworks Ltd (1972) 128 CLR 1 at 24-25 (Gibbs J)*.

48 Plainly, in its terms, by-law 37.1 relates only to the use of the Retail and Commercial lots. It does not relate to any physical works, including any 'fitout'. The word 'fitout' appears in condition I8 but does not appear in by-law 37.1, which is a further reason to doubt that by-law 37.1 was intended to encompass the entire obligation upon a retail or commercial lot owner referred to in condition I8.

49 Yoolee argued that by-law 37.1 should be construed beneficially with respect to it. The decision of Isaacs J in *Bull v Attorney General for New South Wales* (1913) CLR 370 at 384 was cited in support of that proposition. Isaacs J said, at p 384:

> Why, then, should not the ordinary meaning of these words be given to them? In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially (*per* Lord Loreburn LC in *Bist v London and South West Railway Co).* This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of the language will allow.

We reject Yoolee's argument. The by-laws in question here are not remedial legislation. There is no sense in which they are remedial. In addition, there is no ambiguity, and the meaning argued for by Yoolee would strain the language of by-law 37.1.

50 At paragraph 114 of its decision, the Tribunal says that the respondent's submission that by-law 37.1 does not relate to any physical works is 'a conflation of its function to consent or not to a development application with the following planning and approval process". We disagree. By-law 37.1, in its terms, does not relate to any physical works.

51 At paragraph 115 of its decision, the Tribunal says that the owners corporation's refusal to consent to the lodgement of the development application was 'unreasonable' because:

> … there is no hint that the owners corporation will not consent to a particular development application provided the specific requirements of by-law 37.1 are present: the development application is for a proposed use or for specific hours and a request has been made by the owner proposing the development.

52 There is no indication in by-law 37.1 that it was intended to deal with proposed physical works, or with a proposed change of use to the common property, or with the change of the mix of uses of the building. There is no basis upon which to infer that it deals with either of those things in the absence of express reference to them.

53 In view of our determination with respect to the interpretation of by-law 37.1, there is no need to deal with the issue of the asserted inconsistency between the interpretation of by-law 37.1 argued for by Yoolee and the *Strata Schemes*

Management Act 2015, and the consequent impact on the extent and effect of by-law 37.1 under s 136(2) of that Act.

Yoolee's submissions with respect to the need for the owners corporation's approval to its proposed development application

54 In its written submissions, Yoolee said:

> 10. To the extent that the development application related to works wholly within the boundaries of the lot property, the respondent was not obliged, under the planning legislation, to obtain the consent of the appellant to the lodging of that application: *OSP 50411 v Cameron North Sydney Investments Pty Ltd* [2003] NSWCA 5, per Heydon JA at [163]. Nevertheless, the standard form of development application issued by the North Sydney Local Council, the relevant consent authority, expressly required: "*if the property is a unit under strata title or a lot in a community title, then in addition to the owners signature, the common seal of the body corporate must be stamped on this form over the signature of the owner and signed by the chairman or secretary of the body corporate or the appointed managing agent."*
>
> 11. In *The Bunker 2017 Pty Ltd v North Sydney Council* [2019] NSWLEC 1365, the Land and Environment Court was required to determine whether or not the affixing of physical works wholly within a lot to the common property, and the use of the existing services, constituted development to the common property requiring the owners corporation's consent to the making of a development application. The Court, relying on the Court of Appeal decision in *OSP 50411 v Cameron North Sydney Investments Pty Ltd,* held that it did not (at [53]):
>
> > Similarly to the facts in *Cameron* the office fitout of the space in lot 148 has included fixings to the soffit of the structural slab, the walls and floor for the stability of the buildings works, as well as the use of existing services. These fixings to common property can be distinguished from the more extensive works to common property carried out in Pham. As the fixing of building works to the common property and the use of existing services were not held to be works to the common property requiring the body corporate's consent to the making of a development application in *Cameron*, it follows that the CA implicitly characterised any fixings to the common property to support the building works as "works wholly within the lot", at [157]. For the is reason, I am satisfied that the fixing of the building works within lot 148 to the common property and the use of existing services are not works to common property and do not require the consent of the owners corporation to the making of an application.
>
> 12. Here, the works to the common property that were the subject of the expert evidence, and which are identified at [11] of the appellant's written submissions, were similar in nature to those under consideration in *The Bunker 2017 Pty Ltd.*
>
> 13. It follows that the Tribunal did not err in determining (at [113]) that bylaw 37.1 extended to a development application that involved the carrying out of physical works.

55 In response, the owners corporation made the following submission:

> 13. It can be accepted that the Owners Corporation's consent is not required under r 49(1) of the EPA Regs for a development application relating solely to the respondent's lots. However, the Proposed DA does not relate solely to the respondent's lots, it also relates to the common property.
>
> 14 In *The Bunker 2017,* the proposed works were wholly contained within the applicant's lot, save for "the fixing of the building works wholly within lot 148 to the common property and the use of the existing services": at [48]. The Court held that, in that respect, the impact on the common property was similar to the works the subject of *Cameron*, in that it would be impossible to carry out the proposed works without fixing them to the structural parts of the building for stability: at [52]-[53]. The Court therefore distinguished that case from the decision of Cowdroy J in *Owners – Strata Plan 37762 v Pham and Ors* [2005] NSWLEC 500. In *Pham,* it had been proposed to create an excavation in the floor filled with reinforced concrete, and install vents into the roof, in circumstances where the floor and the roof of the lot were parts of the common property. Cowdroy J distinguished *Cameron* and held at [38] that the development application, properly construed, proposed developments to both the applicant's lot and the common property.
>
> 15. At RS [12] the respondent submits, without elaboration, that the works to the common property in this case (as identified at AS [11]) are similar in nature to those under consideration in *The Bunker 2017* (and, by implication, should be distinguished from the works under consideration in *Pham).* The respondent's submission appears to be that the Tribunal's finding below at [113] that the physical works in the Proposed DA "arise wholly from the proposed use" ought to be read as a finding that:
>
> (a) to the extent that they affect the common property, the works proposed in the Proposed DA are of the type considered in *The Bunker 2017* and *Cameron* (as opposed to *Pham*); and
>
> (b) accordingly, the Proposed DA, properly construed, proposes development only to the respondent's lots and not to the common property.
>
> 16. That submission should be rejected. The Tribunal below did not refer to any of *The Bunker 2017, Cameron* or *Pham,* and neither did it refer to the factors that were relevant to those decisions (ie whether the extent of the works to the common property is to fix internal works to structural parts of the building and to connect to existing services).
>
> 17. Further, the Tribunal below found that the Owners Corporation *did* have a right of veto over the Proposed DA under r 49(1) of the EPA Regs: see at [85] – [89]. The respondent's interpretation of [113] is directly inconsistent with that finding, which the respondent has not sought to appeal from.
>
> 18. To the extent that it is relevant, the appellant submits that the works in this case do go significantly beyond fixing items to the structural components of the building and installing connections to existing facilities. Some of the works are of that character, but the works also include:
>
> (a) the removal of common property walls;
>
> (b) alternations to the common property floors associated with the installation of a new staircase;
>
> (c) building up the concrete slab in the basement with screed; and

(d) rotation of entry doors.

19. It follows that this case is more comparable to *Pham* than to *The Bunker 2017* or *Cameron*, and therefore the Proposed DA does propose development of the common property, such that the Owners Corporation's consent is required under r 49(1).

56 Yoolee formulated its development application which, as described above, proposes a change in use of the building by the introduction of a new use, namely an educational and training facility, which will use both Yoolee's lots and significant areas of common property, and also proposes the undertaking of physical works to common property both within and outside of Yoolee's lots, including the removal of several common property walls. Yoolee sought the approval of the owners corporation to the lodgement of Yoolee's development application to the North Sydney Council. Yoolee applied to the Tribunal for an order under s 232(1)(a), (e) or (f) or s 232(6) of the *Strata Schemes Management Act 2015* directing the owners corporation to give its consent to the lodgement of Yoolee's development application. The Tribunal at first instance made the order sought by Yoolee. The owners corporation has appealed to this Appeal Panel under s 80 of the *Civil and Administrative Tribunal Act 2013* (NSW) and Yoolee has cross appealed.

57 At no time in the course of the proceedings prior to the hearing of the appeal has the question of whether Yoolee requires the approval of the owners corporation to the lodgement of its development application under reg 49(1)(b) of the Environmental Planning and Assessment Regulation 2000 been raised. It was not the subject of the proceedings at first instance, it is not mentioned in the decision at first instance and it is not the subject of any ground of appeal.

58 We do not consider that the determination of the question of whether Yoolee can be required by the North Sydney Council to obtain the consent of the owners corporation to Yoolee's development application as a precondition to the ability to lodge that development application can be decided by this Appeal Panel as a collateral issue in this appeal.

59 The first reason for that is that there is, as yet, as far as the evidence shows, no relevant administrative decision by the North Sydney Council which could be the subject of a collateral challenge.

60 Yoolee is not attacking the validity of reg 49(1)(b) of the Environmental Planning and Assessment Regulation 2000, but is arguing for a particular interpretation of it, in the circumstances of this matter, with a view to imposing that interpretation upon the North Sydney Council at the time of the lodgement of the development application, which is a point of time in the future.

61 Such a question of interpretation is not encompassed within the category of issues which can be decided by way of collateral challenge. A collateral challenge requires, at least, a past administrative or legislative act to form the subject matter of the challenge, and may be limited to a challenge on the basis of ultra vires or excess of jurisdiction (see Ousley v The Queen (1997) 71 ALJR 1548).

62 The issue raised by Yoolee relates to the future conduct of the North Sydney Council in relation to Yoolee's proposed development application. The question calls for an answer which would be advisory. The North Sydney Council is not a party to these proceedings and has not been heard in them. No application has been made to join the North Sydney Council to the proceedings.

63 We further note that, if Yoolee's argument with respect to the interpretation of reg 49(1)(b) of the Environmental Planning and Assessment Regulation 2000 were to be entertained and accepted, Yoolee's application for an order under s 232 of the *Strata Schemes Management Act 2015*, which is the basis of these proceedings, would be otiose.

64 For these reasons, we decline to consider the question of whether reg 49(1)(b) of the Environmental Planning and Assessment Regulation 2000 requires the approval of the owners corporation to Yoolee's proposed development application.

65 If we are wrong about that, then we prefer the submissions of the owners corporation in relation to the question and we accept those submissions.

Ground of appeal 5

66 Ground of appeal 5 alleges that the Tribunal at first instance failed to take into account the considerations mandated by s 232(6) of the *Strata Schemes Management Act 2015,* which provides:

(6) **Disputes relating to consent to development applications**

The Tribunal must consider the interests of all the owners of lots in a strata scheme in the use and enjoyment of their lots and the common property in determining whether to make an order relating to a dispute concerning the failure of an owners corporation for a strata scheme to consent to the making of a development application under the *Environmental Planning and Assessment Act 1979* relating to common property of the scheme.

67 The Tribunal did not take these considerations into account because, on its interpretation of by-law 37.1, the owners corporation had no discretion and the considerations did not, therefore, arise.

68 On the view we have taken of by-law 37.1, the considerations in s 232(6) do arise, and must be taken into account.

Conclusion as to the DA proceedings

69 In the DA proceedings, the owners corporations appeal will be allowed and order 1 of the Tribunal at first instance will be quashed. Yoolee's cross appeal will be allowed. The matter will be remitted to the Tribunal at first instance for reconsideration.

The By-laws proceedings (SC 18/27917)

70 The determination of the Tribunal at first instance with respect to the validity of several by-laws and amendments to by-laws was challenged in the owners corporation's appeal. However, at the appeal hearing, the parties indicated that the sole remaining issue in contention in the By-laws proceedings was the amendments to by-law 8.3 made by the owners corporation at the extraordinary general meeting on 29 March 2018.

71 The amendments to by-law 8.3 were challenged at first instance by Yoolee under s 150 of the *Strata Schemes Management Act 2015* which provides:

150 **Order invalidating by-law**

(1) The Tribunal may, on the application of a person entitled to vote on the motion to make a by-law or the lessor of a leasehold strata scheme, make an order declaring a by-law to be invalid if the Tribunal considers that an owners corporation did not have the power to make the by-law or that the by-law is harsh, unconscionable or oppressive.

(2) The order, when recorded under section 246, has effect as if its terms were a by-law repealing the by-law declared invalid by the order (but subject to any relevant order made by a superior court).

(3) An order under this section operates on and from the date on which it is so recorded or from an earlier date specified in the order.

72 In paragraph [128] of its decision, the Tribunal at first instance set out by-law 8.3, as it was prior to 29 March 2018, and as it was subsequent to the amendment.

(a) By-Law 8.3 original:

"8.3 Restrictions about fire safety

You must not:

(a) keep flammable materials on Common Property; or

(b) interfere with fire safety equipment; or

(c) obstruct fire stairs or fire escapes; or

(d) keep flammable materials in your car space."

(b) By-Law 8.3 as amended:

"8.3 Restrictions about fire safety

You must not:

(a) keep flammable materials on Common Property; or

(b) interfere with fire safety equipment; or

(c) obstruct fire stairs or fire escapes; or

(d) keep flammable materials in your car space*; or*

(e) not create or permit any fire safety risk in any way whatsoever that affects or may affect the Building or any part thereof.

(f) do, permit or otherwise allow anything to be done that increases or may increase the fire safety requirements applicable to the Building or any part thereof. For the avoidance of doubt, the fire safety requirements so applicable to the Building include, without limitation, the following:"

i Essential fire safety measures, for instance: smoke detectors, alarm and communication systems, sprinklers, emergency lights, exit signs, fire hose reels, fire doors, fire exits and paths, fire hydrant systems, fire services, fail-safe devices and other fire safety systems;

ii Any item or measure that protects life, prevents injury and damage to a building in the event of a fire including prevention, detection, suppression of fire and spread of fire;

iii Fire evacuation procedures and related services;

iv Any requirements relating to Annual Fire Safety requirements;

v Any matters affecting the performance levels of fire safety measures (above) and its maintenance, renewal, replacement of repair;

vi Any fire related requirements under the Development Approval, requirements of the Building Code of Australia, national construction code, fire safety order, Government Agency or as required under law;*

vii Any increases in insurance relating to an increase in fire safety requirements."

> * Under “Part 4 – Interpretation” of the by-laws: “Development Approval means Council’s approval of development consent application no. 126/13 as modified, varied or amended”.

73 Clearly, there is an error in the drafting of by-law 8.3(e), in that the subclause begins with ‘not’, as does the preamble, creating a double negative and thus a positive. We will ignore this error for the purposes of discussing the issue with respect to the appeal in relation to this by-law, and treat by-law 8.3(e) as if the word ‘not’ did not appear in (e).

74 We note that the *Strata Schemes Management Act 2015* provides, in s 139(1):

> **139 Restrictions on by-laws**
>
> (1) **By-law cannot be unjust** A by-law must not be harsh, unconscionable or oppressive.
>
> **Note**. Any such by-law may be invalidated by the Tribunal (see section 150).

75 The Tribunal set out its approach to determining whether a by-law was invalid under s 150 in paragraphs [142]–[146]:

> 142. I do not accept that the Macquarie definition of “harsh” quite captures the extent of that word. In my opinion “ungentle” and “unpleasant”, without more, are too mild. I prefer the (online) Cambridge Dictionary definition: “unpleasant, unkind, cruel, or more severe than is necessary”. The word should have that element of severity if not necessarily, in every case, cruelty.
>
> 143. Similarly, it is necessary to explain what is meant by “unconscionable” as “unreasonably excessive”. In my opinion, when the word “unconscionable” as applied to a by-law that means that the operation of that by-law does more than that which can be justified in rational terms or for which there is no good reason. Again, as with “harsh”, I consider there must be that element of extreme or extremity, not to the maximum possible degree necessarily but beyond what can be justified by reason.
>
> 144. “Oppressive” has a very long history of judicial analysis and consideration in corporate law and corporate governance. In my view the Macquarie definition of “burdensome” and “tyrannical” includes that appropriate element that the by-law creates greater burdens than are necessary to achieve the apparent purpose of the by-law. Again, it is the element of being more extreme than is reasonably required.
>
> 145. The purpose of the above analysis is to explain my determination, or rather my understanding, that the phrase as used in s. 139 is intended to set a high bar, going beyond nuisance value.
>
> 146 In practical terms, I think it is necessary to analyse the subject by-laws to see whether the following features for some of them might be present:
>
> (1) Does the by-law provide for unnecessary or unreasonable differential treatment between lot owners or occupiers?

(2) Does an aggrieved lot owner have a reasonable expectation (in the circumstances of the particular case) that any restriction(s) would not be required or imposed?

(3) Does the by-law provide for reasonable exceptions?

(4) Does the by-law provide a "complete embargo" as found in *John Maait Properties*?

(5) Is it appropriate that an owners corporation establish some control and is the level of control appropriate?

(6) Does the by-law include provision for consideration of individual needs which may not be necessary in relation to the majority of owners or occupiers?

(7) Does the by-law allow particular works or benefits but at an unreasonable cost?

(8) In considering each of the above factors (and any other factors which may suggest themselves), does the by-law include that element of extremity necessary to meet the high standard set by s. 139

No doubt many other examples will suggest themselves in an appropriate case.

76 The determination of the Tribunal at first instance in relation to the amendments to by-law 8.3 appeared in paragraph [147(1)] of its decision:

> In my opinion the amendments to by-law 8.3 are harsh, unconscionable and oppressive. In relation to new clause (f), in my opinion it is quite reasonable for a lot owner to propose development of his or her lot which may increase the fire safety requirements applicable to the building. Indeed, that is one of the considerations which the approving authority (the Council) would need to determine. Why should not a development application include provision for an exit sign? No explanation is included within the by-law. I make the same or similar finding in relation to new clause (e): consider a very common development application to change the use of a lot from, say, a lawyer's office to a restaurant. I assume (with the benefit of zero expertise) there would be a greater fire risk associated with a restaurant than with a professional office. It is not reasonable to refuse such a development application for that reason alone. No doubt every day somewhere in New South Wales an approving authority is permitting such a development but with appropriate fire safety controls.

77 The Tribunal made an order under s 150 of the *Strata Schemes Management Act 2015* declaring that the amendments to by-law 8.3 made on 29 March 2018 were invalid on the basis that they are harsh, unconscionable or oppressive.

78 The owners corporation appealed on the following grounds:

> 6. The Tribunal erred in finding at [147(1)] of the decision below that the amendment to by-law 8.3 was invalid within the meaning of s 150 of the *Strata Schemes Management Act 2015* (NSW), because:
>
> (a) in relation to proposed by-law 8.3(f):
>
> (i) it took into account irrelevant considerations, namely:

(A) whether it would be reasonable for a lot owner to proposed development of a lot which may increase fire safety requirements;

(B) what the approving authority of a development application would need to determine in relation to fire safety requirements; and

(C) whether the by-law explained why a development application should not include provision for an exit sign;

(ii) it failed to apply the correct test, namely whether the by-law is harsh, unconscionable, or oppressive, having regard to the objects and purpose of the Strata Management Act 2015 (NSW) and the interests of the owners of the strata scheme.

(b) in relation to proposed by-law 8.3(e):

(i) it took into account irrelevant considerations, namely:

(A) whether there would be a greater risk of fire associated with a restaurant than with a professional office;

(B) whether it was reasonable to refuse a development application for the reason that there would be a greater risk of fire associated with a restaurant than with a professional office; and

(C) whether every day in New South Wales an approving authority is permitting a development of a restaurant with appropriate fire safety controls.

(ii) it failed to apply the correct test, namely whether the by-law is harsh, unconscionable, or oppressive, having regard to the objects and purposes of the Strata Schemes Management Act 2015 (NSW) and the interests of the owners of the strata scheme.

79 In its submissions, the owners corporation contrasted s 148 of the *Strata Schemes Management Act 2015*, under which the Tribunal is empowered to revoke an amendment to a by-law, with s 150. As we understand it, the Tribunal at first instance exercised its power under s 150, so we will confine our consideration to that provision.

80 Yoolee, in its written submissions, argued that the Tribunal at first instance had applied the correct test and made the correct decision in relation to the validity of by-law 8.3 as amended.

81 The owners corporation argued that the Tribunal at first instance should have taken into account the meaning of the word “unconscionable” in equity as meaning the taking of advantage by one party of the vulnerability of another. We agree that the meaning of ‘unconscionable’ is not entirely reflected by “unreasonably excessive”. A by-law may be ‘unconscionable’ if it is contrary to conscience, in the sense of being unethical or unjust, in a range of

circumstances (see *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd & Ors* (2003) 214 CLR 51 at [42]-[46]).

82 The owners corporation argued that the Tribunal at first instance should have taken into account the meaning of the word "oppressive" as it has been interpreted in the context of s 232 of the *Corporations Act 2001* (Cth). In that context, 'oppressive' conduct is conduct which is unfair to members in circumstances where those members are unable to prevent that unfairness because they lack the requisite degree of control over the company (*Wayde v NSW Rugby League Ltd (1985) 180 CLR 459* at [471]–[473] per Brennan J*).* However, that interpretation flows from the wording of s 232 of the *Corporations Act 2001* (Cth), which refer to conduct which is "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members".

83 We agree that a by-law which discriminates against a minority group of lot holders may be oppressive. However, we do not consider that the meaning of 'oppressive' in s 150(1) of the *Strata Schemes Management Act 2015* is confined to these circumstances. It seems to us that the meaning of the word set out by the Tribunal at first instance is also applicable.

84 The owners corporation argued that the Tribunal at first instance misled itself by considering whether the amended by-law 8.3 was harsh, unconscionable or oppressive only in the context of the making of a development application. We agree. Although the Tribunal considered the meaning of "harsh unconscionable or oppressive", it failed to then consider adequately whether the by-law 8.3, as amended, could be described by any of those words.

85 The formulation of questions by the Tribunal at first instance in paragraph [146] does not, with respect, seem to us to be particularly useful in this matter.

86 The Tribunal at first instance has misdirected itself in its assessment of whether by-law 8.3, as amended, was harsh, unconscionable or oppressive. This led to the Tribunal taking into account irrelevant considerations and failing to take into account relevant considerations. Accordingly, we will set aside Order 2(a) made by the Tribunal at first instance and remit the question back to the Consumer and Commercial Division of the Tribunal for re-consideration.

Orders

87 We make the following orders:

(1) The appeal is allowed to the following extent:

(a) Order 1 made on 26 July 2019 by the Tribunal in the Consumer and Commercial Division is set aside.

(b) The application by Yoolee in SC 18/18886 under s 232 of the *Strata Schemes Management Act 2015* for an order directing the Owners Corporation of Strata Plan 91157 to provide consent to the lodgement of a development application under by-law 37.1 is remitted to the Tribunal in the Consumer and Commercial Division for reconsideration having regard to this decision.

(c) Order 2 made on 26 July 2019 by the Tribunal in the Consumer and Commercial Division is set aside.

(d) The question of whether by-law 8.3, as amended on 29 March 2018, should be declared to be invalid on the basis that it is harsh, unconscionable or oppressive is remitted to the Tribunal in the Consumer and Commercial Division for reconsideration having regard to this decision.

(e) (2) The cross appeal by Yoolee Holdings Pty Ltd, by which it was asserted that, contrary to the determination of the Tribunal at first instance, the Tribunal had jurisdiction under s 232(1) and (6) to hear and determine the dispute in relation to the giving or withholding of consent to the development application, is allowed by consent.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar