QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Crystal Waters Permaculture Village & Ors v Boyle* [2020] QCATA 80
PARTIES:	**THE BODY CORPORATE FOR CRYSTAL WATERS PERMACULTURE VILLAGE CTS 20926** **CHERYL REID** **STEPHANIE LYNN RYAN** **BRIONY MAJELLA GOODMAN** **KATHRYN EUNICE BLACKBURN** **PATRIA CARDLE** **GABRIELE HILDE GOTTSELIG** **STEPHEN D HALL** (appellants) **v** **STEPHEN BOYLE** (respondent)
APPLICATION NO/S:	APL162-19
ORIGINATING APPLICATION NO/S:	0193/2019
MATTER TYPE:	Appeals
DELIVERED ON:	26 May 2020
HEARING DATE:	On the Papers
HEARD AT:	Brisbane
DECISION OF:	Member Roney QC
ORDERS:	**The appeal is allowed and the order of the Adjudicator is set aside.**
CATCHWORDS:	APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where s 289(2) of the *Body Corporate and Community Management Act* 1997 (Qld) allows a person aggrieved by an Adjudicator’s order to appeal on a question of law to the Queensland Civil and Administrative Tribunal – what is error of law – whether there was an error of law – failing to provide adequate reasons for decision – failing to adequately investigate the application.

REAL PROPERTY – STRATA AND RELATED TITLES – MANAGEMENT AND CONTROL – BYLAWS – Scheme operating as a permaculture eco-village and native animal sanctuary – whether a bylaw prohibiting a cat, dog or any other predatory animal on their lot or the common property at all or without the prior written consent of the Body Corporate valid– whether the Body Corporate had exceeded its statutory bylaw making power in making a bylaw prohibiting specific pets in a scheme – whether a bylaw prohibiting specific pets in a scheme but not all pets was valid regulation or invalid prohibition – where keeping of cats and dogs, whether on lots or on common property was not consistent with the permaculture and eco-village ethics of the scheme because such animals have a deterrent effect on wildlife

Body Corporate and Community Management Act 1997 (Qld), s 2, s 4, s 18, s 59, s 94, s 108, s 152, s 168, s 169, s 180, s 182, s 183, s 184, s 185, s 186, s 187, s 188, s 276, s 289, s 290
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 146

Ainsworth v Albrecht [2016] HCA 40; (2016) 261 CLR 167
Akiba on behalf of Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33
Albrecht v Ainsworth & Ors [2015] QCA 220
Body Corporate For Beaches Surfers Paradise v Backshall [2016] QCATA 177
Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47
Carroll v Alldritt [2013] NSWCTTT 525
Croyden & Anderson v Owners SP1583 [2015] NSWCATCD 104
Crystal Waters [2019] QBCCMCmr 236
Ericson v Queensland Building Services Authority [2013] QCA 391
George v Rockett (1990) 170 CLR 104
Kirra Wave [2012] QBCCMCmr 460
McCann v Owners SP 11318 [1998] NSWSSB 44
McKenzie v Body Corporate for Kings Row Centre CTS 11632 [2010] QCATA 57
Mineralogy Pty Ltd v The Body Corporate for "The Lakes Coolum" [2003] 2 Qd R 381
Owners – Strata Plan No 58068 v/ats Cooper [2019] NSWCATCD 62
Owners SP 67631 v Waters and Gardner [2010] NSWCTTT 343

Owners SP 69140 v Drewe [2017] NSWSC 845
Owners SP 69481 v Want [2013] NSWCTTT 440
Re Body Corporate for Viridian; Kjerulf Ainsworth & Ors v Martin Albrecht & Anor [2014] QCATA 294
The Inlet [2011] QBCCMCmr 309
Tutton v Body Corporate for Pivotal Point CTS 33550 [2008] QCCTBCCM 12

APPEARANCES & REPRESENTATION:

Appellants: Self-represented

Respondent: Self-represented

REASONS FOR DECISION

[1] This Appeal is from a decision of an Adjudicator appointed by the Queensland Body Corporate and Community Management Commissioner in reasons handed down 8 May 2019.[1] The decision of the Adjudicator was given under s 276 of the *Body Corporate and Community Management Act* 1997 (Qld) ('the Act' or 'the BCCM Act').

[2] Crystal Waters Permaculture Village (Crystal Waters) comprises 85 lots and common property. It was established in June 1988. Crystal Waters is situated in a rural setting with large lots varying in size from just over an acre, to several acres.

[3] At an extraordinary general meeting of the Body Corporate held on 9 December 2018, the Body Corporate for Crystal Waters adopted a new Bylaw 5, relating to the keeping of animals. There were twenty-five votes in favour of it, seven against and one abstention. An overwhelming majority of the lot owners clearly supported the policy behind the resolution.

[4] By-law 5 provided in relation to the keeping of animals:

> BY-LAW 5 – KEEPING OF ANIMALS
>
> 5.1 A resident must not, without the body corporate's written approval – (a) bring or keep an animal on the lot or the common property; or (b) permit an invitee to bring or keep an animal on the lot or the common property.
>
> 5.2 The resident must obtain the body corporate's written approval before bringing, or permitting an invitee to bring, an animal onto the lot or the common property. Written approval will only be granted in accordance with conditions set in the 'Animal Policy'. The Body Corporate Committee or its designated agents will, from time to time, review the Animal Policy. Changes to this policy need the approval by Special Resolution of a General Meeting of the Body Corporate.
>
> 5.3 Small non-predatory animals, such as poultry and guinea pigs, are exempted from this requirement.

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[1] *Crystal Waters* [2019] QBCCMCmr 236.

> 5.4 A resident must not bring or keep a cat, dog, or any other predatory animals on their lot or the common property, in recognition of our 'Land for Wildlife' status.
>
> 5.5 The owner of an animal is responsible for keeping it on their own lot or in an enclosed area as approved by the Body Corporate.
>
> 5.6 A person with a disability under the Guide, Hearing and Assistance Dogs Act 2009 who relies on a guide, hearing or assistance dog and who has the right to be on a lot, or on the common property, has the right to be accompanied by a guide, hearing or assistance dog while on the lot or common property. Such a person who is the owner or occupier of a lot has the right to keep a guide, hearing or assistance dog on the lot.

[5] The scheme's current CMS, containing that Bylaw, was recorded on 26 February 2019.

[6] By s 59 of the Act, the CMS for a community titles scheme is binding on each member of a body corporate. Further, s 168 and s 169 of the Act provide that bylaws are provisions that appear in a CMS and provide for, among other things, regulations applying to the use and enjoyment of lots included in the scheme. Section 94 of the Act imposes a duty on a body corporate to enforce the CMS. Sections 182 to 188 of the Act set out the process for pursuing an alleged contravention of a bylaw.

[7] Stephen Boyle, the present respondent and the owner of lot 14, brought an application against the Body Corporate challenging the validity of that by-law which he contended, and an Adjudicator decided in his favour, purported to prohibit residents from bringing or keeping a cat, dog or any other predatory animal on their lot or the common property, in recognition of the scheme's 'Land for Wildlife' status.

[8] Mr Boyle argued that by-law 5.4 was prohibitive, oppressive and unreasonable and was therefore invalid. He sought and obtained an order directing the body corporate to remove the offending by-law 5.4 from the CMS.

[9] Apart from what by-law 5.4 says, the rest of Bylaw 5 stands as part of the scheme's current CMS. Hence it remains the position under Bylaw 5.1, that whatever else can be said about the presence or use of cats dogs or any other predatory animals, without the body corporate's written approval none of them can be brought or kept on the lot or the common property by a resident and residents cannot permit an invitee to bring or keep an animal on the lot or the common property.

The Grounds of Appeal

[10] In the amended application for leave to appeal or appeal dated 6 August 2019, the Body Corporate sought that the decision made by the Adjudicator be set aside on the basis that the Adjudicator:

- Erred in law in applying s 169 and s 180(7) of the Act;
- Erred in law in the application of the cases cited in the reasons;
- Failed to give adequate reasons for the decision that the bylaw was invalid;
- Failed to give adequate reasons for the decision that the bylaw was unreasonable;

Failed to give sufficient consideration to submissions from the Body Corporate and the lot owners; and

Erred in concluding that it was a matter of well-established law that bylaws like that in Bylaw 5.4 were invalid.

[11] Although there are eight Appellants in the current appeal, one of which is the Body Corporate, only some of those Appellants have filed submissions in support of the application or otherwise appeared in some way or another to support it.

[12] The First Appellant Body Corporate filed a written submission as did the Third, Fourth and Fifth Appellants. Despite orders from this Tribunal that the Respondent file any written submissions he proposed to rely upon in response to the application, and as well, the application which had been made for an interim order stating the decision, he elected not to file any submissions, indicating that he had no intention of making any submissions and had nothing new to say that had not in effect been said to the Adjudicator.

[13] In the Reasons of the Adjudicator there was identified what the Body Corporate and some of the current Appellants argued in seeking to sustain the operation of Bylaw 5.4. They were set out as follows:

> [9] The opposing submissions, whilst mostly conceding that the existing prohibitive by-law 5.4 would likely be unenforceable, cited the following reasons for wanting to retain it in the CMS:
>
> - Crystal Waters is unique and different from most other bodies corporate in Queensland. It is situated on some 640 acres in a rural setting, with 85 dwellings occupying approximately 50 hectares. The remainder is common land, much of it a high ridge covered in Eucalypt forest and riparian zones adjacent to the Mary River, Scrub Creek and Kilcoy Creek, which form the scheme's boundaries. There are some 260 species of birds, many small native animals, kangaroos and wallabies.
> - The same rules as apply to bodies corporate in the city should not apply to Crystal Waters.
> - The scheme has always had a by-law that prohibited the keeping of dogs and cats. Owners are aware of the by-law before purchasing in Crystal Waters.
> - Dogs and cats will have a devastating impact on the abundant wildlife.
> - There are no fences between lots to allow for free movement of wildlife within the community.
> - The majority of lot owners agree that it is not desirable to have dogs and cats in the community. Granting the application involves dismissing the democratic decision-making of the body corporate.
> - The scheme attained 'Land for Wildlife' status in 2002.
> - A fundamental goal of permaculture is to exist in harmony with nature.

- The committee believes by-law 5.4 is essential to protect the abundant wildlife and peaceful environment as body corporate assets.

[14] The Adjudicator went on to find in the Reasons [10]-[14] as follows:

> [10] *Section 169* of the Act empowers a body corporate to make by-laws for the administration, management and control of common property and body corporate assets; and the regulation of the use and enjoyment of lots, common property, body corporate assets, and services and amenities supplied by the body corporate. *Section 180* of the Act sets out various limitations on by-laws, including that a by-law must not be oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property.
>
> [11] A plain reading of by-law 5.4 reveals that it purports to impose a blanket prohibition on the keeping of dogs and cats (and other predatory animals – although that term is not defined).
>
> [12] Many judicial decisions have considered the validity of by-laws that purport to prohibit all animals in a lot or on common property, or to prohibit certain classes of animals. The Queensland Civil and Administrative Tribunal has determined that a by-law that imposes a blanket prohibition on a normal domestic activity such as keeping a pet goes beyond the statutory role of regulating and is beyond the power of a body corporate to record.[2] It is now accepted that a body corporate does not have the authority under the Act to pass a by-law that entirely prohibits an ordinary domestic activity such as keeping a dog or cat.
>
> [13] When presented with by-laws of this nature, adjudicators have invalidated the by-law and ordered the body corporate to lodge a new CMS that removes the invalid by-law and adopts a different animal by-law[3].
>
> [14] As a matter of well-established law, by-law 5.4 is clearly invalid. However, it appears to stand alone and in contrast to the rest of the by-law in relation to the keeping of animals, which is permissive. Therefore, I consider that requiring the body corporate to simply remove by-law 5.4 and leave the rest of the by-law in relation to the keeping of animals intact, will suffice in this case.

[15] The Adjudicator went on to consider a submission about whether there were causes for concern about the application of the animal policy and concluded that such policies were not legally binding. That conclusion did not affect the outcome.

[16] It is true that “predatory animals” is not a term is not defined but the common dictionary definition, for example the Macquarie Dictionary and the Cambridge Dictionary, would mean it was an animal that preys upon in the sense of hunts, kills, and eats other animals. In other statutory contexts in other jurisdictions examples may be found of statutes which are protective of one class of animals and identify other classes as predatory. Predation by feral cats is listed as a key threatening process under section 188 of Australia’s national environment law, the *Environment Protection and Biodiversity Conservation Act* 1999.

[17] After making the findings set out above, the Adjudicator went on then to set out what was considered to be “guidance on how the Body Corporate can effectively regulate the

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[2] *McKenzie v Body Corporate for Kings Row Centre CTS 11632* [2010] QCATA 57; *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47.

[3] See for example, *The Inlet* [2020] QBCCMCmr 309.

keeping of dogs and cats at Crystal Waters applying a permissive bylaw in the unique circumstances of the scheme". The Adjudicator went on to discuss the duty to act reasonably in making decisions, identifying that a permissive bylaw does not require that all requests be approved.

[18] The ultimate conclusion in relation to the matter is set out in the Reasons at [23] as follows (footnote omitted):

> [23] The desire of the majority of the owners to retain a blanket prohibition on the keeping of dogs and cats within the scheme cannot be allowed to stand in light of recent decisions in relation to the keeping of animals in community titles schemes. These are clearly in favour of allowing owners the right to keep pets, unless it can be demonstrated that the particular animal could cause a nuisance or substantial inconvenience to other occupiers, objectively speaking.

[19] The recent decisions in relation to the keeping of animals referred to in that paragraph are the decisions in McKenzie v Body Corporate for Kings Row Centre CTS 11632 [2010] QCATA 57 and Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47.

[20] Neither is a particularly recent decision. Neither concerned a scheme such as the present.

[21] In McKenzie v Body Corporate for Kings Row Centre CTS 11632 [2010] QCATA 57 the tribunal member Mr Barlow as he then was identified that:

> The real issue in this case is whether the by-law, in regulating the keeping of animals in lots in the manner it does (that is, by prohibiting the keeping of cats and dogs but allowing the keeping of other animals with the committee's permission), is "oppressive or unreasonable". If it is, then it is contrary to subsection 180(7).

[22] In that case he held that it was, but in a later judgement by the same member in the other decision referred to by the Adjudicator, that in Body Corporate for River City Apartments CTS 31622 v McGarvey, Member Barlow was careful to clarify what the significance of that earlier decision of his was. He held that his decision in McKenzie "did not mean that any by-law prohibiting the keeping of a certain type of pet in every scheme must of itself be oppressive or unreasonable. It should not be read as disregarding the facts upon which that decision was based".

[23] The decision in Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47 is not authority for the proposition for which it is cited by the Adjudicator namely that a "desire of the majority of the owners to retain a blanket prohibition on the keeping of dogs and cats within the scheme cannot be allowed to stand". Indeed it is to contrary effect.

[24] Although no part of the reasons deal with the basis for making the specific order which was made, the Adjudicator ordered that within three months of the date of the order, the Body Corporate must lodge a request to record a new Community Management Statement that removes Bylaw 5.4. There was no analysis as to why that should occur, but it may be inferred that the Adjudicator considered that this was what necessarily followed from a finding that the bylaw was invalid. Reference was made in the reasons to the fact that "when presented with by-laws of this nature, adjudicators have

invalidated the by-law and ordered the body corporate to lodge a new CMS that removes the invalid by-law and adopts a different animal by-law"; citing The Inlet [2020] QBCCMCmr 309. The decision in the Inlet is not to be found at that citation.

[25] The Inlet is an early decision handed down in 2011 and is to be found at [2011] QBCCMCmr 309. It did not involve the making of any order for a Body Corporate to adopt a different animal by-law to the invalid one.

[26] The Adjudicator in The Inlet held after finding that a new pet bylaw was invalid as a total prohibition on all pets that:

> [37] Schedule 5 of the Act, although not limiting the power of an adjudicator to make an order that is just and equitable in the circumstances, provides examples of the sorts of orders adjudicators are empowered to make. Item 20 of Schedule 5 provides that - if satisfied that a by-law, having regard to the interests of all owners and occupiers in the scheme, is oppressive or unreasonable - an adjudicator may make an order requiring a body corporate to lodge a new CMS that removes the by-law and, if appropriate, reinstates an earlier by-law.
>
> [38] It is common when a pet by-law is invalidated to reinstate the previous valid by-law.

[27] In my view it is highly doubtful that an adjudicator has power to order a Body Corporate to adopt a different animal by-law or indeed any animal by-law except possibly to reinstate a former by-law where the existing one is invalid. That is not a matter I need to decide here in any event.

[28] The BCCM Act s 169 empowers a body corporate to make by-laws for a number of purposes, including the regulation of the use and enjoyment of lots and common property. The BCCM Act s 180(7) also provides that a by-law must not be oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property.

[29] So there are three separate but related questions to be asked in this case. First, is a particular bylaw invalid because it is not regulatory but is prohibitive insofar as it concerns the use and enjoyment of lots and common property. Secondly, is a particular bylaw invalid because it is oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property. One could add to those issues a third issue but one which in its application here is unlikely to make a material difference to the outcome in a case such as the present: is the act of passing a resolution by a Body Corporate in general meeting unreasonable conduct in contravention of s 94 of the BCCM Act and if it is, does that affect whether a particular bylaw is valid.

[30] None of those three questions was considered by the Adjudicator in this case because the proposition advanced was that many judicial decisions have considered invalid by-laws that purport to prohibit all animals in a lot or on common property, or to prohibit certain classes of animals. And also because this Tribunal is said to have determined that a by-law that imposes a blanket prohibition on a normal domestic activity such as keeping a pet goes beyond the statutory role of regulating and is beyond the power of a body corporate to record and that it is "accepted" that a body corporate does not have

the authority under the Act to pass a by-law that entirely prohibits an ordinary domestic activity such as keeping a dog or cat.

The relevant statutory provisions

[31] Section 2 of the BCCM Act sets out the primary object of the Act as follows:

> **2 Primary object**
>
> The primary object of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.

[32] Section 4 of the BCCM Act provides for the secondary objects as follows:

> **4 Secondary objects**
>
> The following are the secondary objects of this Act—
>
> (a) to balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;
>
> (b) to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
>
> (c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;
>
> (d) to provide a legislative framework accommodating future trends in community titling;
>
> (e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;
>
> (f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;
>
> (g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;
>
> (h) to ensure accessibility to information about community titles scheme issues;
>
> (i) to provide an efficient and effective dispute resolution process.

[33] Section 94 of the BCCM Act relates to the general functions of the Body Corporate and provides:

94 Body corporate's general functions

(1) The body corporate for a community titles scheme must—

(a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and

(b) enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under this Act); and

(c) carry out the other functions given to the body corporate under this Act and the community management statement.

(2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.

Examples for subsection (2) of a body corporate making a decision—

passing a motion by resolution at a general meeting or a committee meeting

not passing a motion after a vote at a general meeting or a committee meeting

owners of lots included in a specified two-lot scheme entering into a lot owner agreement for the scheme (see section 111E(2))

owners of lots included in a specified two-lot scheme failing to enter into a lot owner agreement following a request made by one of the owners (see section 111H(3))

[34] Section 152 of the BCCM Act provides:

152 Body corporate's duties about common property etc.

(1) The body corporate for a community titles scheme must—

(a) administer, manage and control the common property and body corporate assets reasonably and for the benefit of lot owners; and

(b) comply with the obligations with regard to common property and body corporate assets imposed under the regulation module applying to the scheme.

(2) Nothing in this part, or in a regulation made under this part, stops—

(a) an item of personal property that is a body corporate asset from becoming part of the common property because of its physical incorporation with common property; or

(b) a part of common property from becoming a body corporate asset because of its physical separation from common property.

The Regulation v Prohibition issue

[35] There is now a body of jurisprudence that has accepted that a by-law prohibiting an activity without the written consent of the body corporate, which sets out an objective standard by which to judge the request and which provides (directly or indirectly) that

consent cannot be unreasonably withheld, would not necessarily go beyond regulation. This has as its foundation the River City decision (Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47), at [38] which in turn applied Mineralogy Pty Ltd v The Body Corporate for "The Lakes Coolum" [2003] 2 Qd R 381.

[36] For this reason, by-laws allowing pets or companion animals other than assistance dogs or other assistance animals for persons with a disability subject to written approval of the body corporate and conditions (such as limits on the height or weight of the animal) are likely to be enforceable and not open to serious challenge.

[37] In Mineralogy, the Court of Appeal, by McPherson JA, with whom Jerrard JA and Philippides J (as Her Honour then was) agreed, held:

> [6] If that were the only arguable deficiency in bylaw 53.1, it would be a valid exercise of the bylaw making power and the decision below would not be open to challenge. However, at the conclusion before us of submissions by the applicant, the Court raised the question whether bylaw 53.1 can properly be considered as providing for "regulation" as distinct from the prohibition of using and enjoying. What, s 131(1)(b)(i) authorises is the making of a bylaw providing "only" for "regulation of .. the use and enjoyment of ... lots ...". On its face, it confers no power to make a bylaw prohibiting use and enjoyment. The question then is whether bylaw 53.1 in substance prohibits rather than regulates the carrying out of any construction, etc on a lot. There is no doubt that in form the provision is stated as a prohibition. It says:
>
> > "An occupier must not carry out any construction, improvements ... or landscaping on the lot..."
>
> It then proceeds to qualify the prohibition by adding "other than those to which the Body Corporate Committee ... has given approval in writing as hereafter provided".
>
> [7] In *Swan Hill Corporation v Bradbury* [1937] HCA 15; (1937) 56 CLR 746, 762, Dixon J said:
>
> > "... the force of the word 'regulating' has been discussed repeatedly and the cases dealing with its application have grown only too familiar. Prima facie a power to make bylaws regulating a subject matter does not extend to prohibiting it either altogether or subject to a discretionary licence or consent. Bylaws made under such a power may prescribe time, place, manner and circumstance and they may impose conditions, but under the prima facie meaning of the word, they must stop short of preventing or suppressing the thing or course of conduct to be regulated."
>
> Similar statements are found in judgments in other cases. For example, in *Brunswick Corporation v Stewart* [1941] HCA 7; (1941) 65 CLR 88, 95, Starke J said:
>
> > "Prima facie a power to regulate and restrain a subject matter does not authorize prohibiting it altogether or subject to a discretionary licence or consent ... But, as might have been expected, this proposition cannot be universally applied (*Slattery v Naylor* (1888) 13 App Cas 446)."

[8] The underlying rationale is that a power to regulate an activity implies that the activity will, despite such regulation, be capable of continuing, which it would not do if it were completely prohibited. See *City of Toronto v Virgo* [1896] AC 88, 93. Prohibition of an activity in part, in a particular case, or in a particular way, may however in some circumstances be needed in order to achieve effective regulation. "The extent to which such partial prohibition is permissible" the Privy Council has said, "depends on the terms of the power to regulate and on the context in which the power is to be operated": *Ng Enterprises Ld v Urban Council* [1996] UKPC 30; [1997] AC 168, 177. The Australian authorities, a few of which are referred to in that decision are in accord with that view. See, for example, *Goldberg v Law Institute of Victoria* [1972] VicRp 69; [1972] VR 605, where Gillard J held that a prohibition upon exhibiting a sign or nameplate of more than a specified size on solicitor's premises was authorised by a power to make rules regulating professional duties, practice, conduct and discipline of practitioners. In *Brunswick Corporation v Stewart* [1941] HCA 7; (1941) 65 CLR 88, 95, Starke J said that the court "should have regard to the body entrusted with the power and the language in which the power is expressed and the subject matter with which the body has to deal". In reliance on that statement, Gillard J held that the provision relating to exhibiting signs was no more than a particular prohibition in a solicitor's practice, and was valid as a form of regulation ([1972] VR 605, 610).

[9] The provision in bylaw 53.1 does, it must be acknowledged, go considerably further. It commences with a prohibition on the carrying out of construction, improvements, renovations, alterations, additions or landscaping, all of which are described as "the works". In the case of a vacant lot like that owned by the applicant, the effect is to prevent what is generally accepted as a basic right of a landowner, which is to build a dwelling on the land. That activity is prohibited by the bylaw unless it takes place with the prior written approval of the Body Corporate Committee. Prima facie, as Dixon J said in the passage referred to above, such a prohibition goes beyond mere regulation. It begins by committing to the discretion of the Committee or its agent the owner's ability to construct works. The discretion is, however, not altogether unqualified or unlimited. Approval "must not be unreasonably withheld", provided that the works "are in harmony with the architectural design ..." and other matters specified in subpara (i) of bylaw 53.1(c). The quoted formula ("not ... unreasonably withheld") is commonly found in covenants in leases and in statutory provisions regulating them, where its meaning has proved neither elusive nor difficult to ascertain or apply.

...

[12] Given that the bylaw supplies an objective standard by which to judge the harmonious character of the proposed works, and that approval to carrying them out must not be unreasonably withheld, it does not seem to me that the bylaw is invalid on the ground of its being prohibitory rather than regulatory. In *Brunswick Corporation v Stewart* [1941] HCA 7; (1941) 65 CLR 88, 96, the question of validity was approached as one to be determined according to whether or not the requisite approval under the bylaw could be arbitrarily withheld. Starke J said:

> "It thus appears that the bylaw does not invest the surveyor with a power of prohibiting building altogether or subject to a discretionary licence or permit or consent. The provisions of the bylaw do not commit the grant or refusal of a permit to build to the discretion or arbitrary and capricious authority of the surveyor but give him an authority merely to examine and

> satisfy himself that the bylaws are being complied with, subject even then to the arbitrament of an independent and skilled body of architects. Despite *Bradbury's Case*, bylaw 53 appears to me within the power to regulate the erection and construction of buildings."

So here, although the question whether the proposed works will achieve harmony with existing improvements involves an element of individual taste, it is not something that is committed to the arbitrary and capricious authority of the Body Corporate Committee or its nominated agent, either generally or without an opportunity for challenging the decision to refuse approval on the ground that it is unreasonable.

[38] As the decision in River City noted, by-laws prohibiting particular types of pets would not automatically be unreasonable or oppressive. The validity of the by-law would have to be decided having regard to the facts before the adjudicator, the context of those facts and the interest of all owners and occupiers in the scheme.

[39] Associate Professor Sherry has made the observation in her work entitled "Strata Title Property Rights: Private governance of multi-owned properties" published in 2016 that characterisation of the prohibition on pets as "not regulation" is untenable. She expresses the view that logically and as a matter of legal reality regulation frequently prohibits certain activities; for example the fisheries legislation, which was the subject of the High Court decision in Akiba on behalf of Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 was clearly regulation yet it implemented a blanket prohibition on commercial fishing without a licence. Properly understood as a power to regulate by making by-laws for the regulation of the use and enjoyment of lots and common property, regulation of, or even prohibitions on some kinds of pets onsite is a subcategory of the general regulation of the property itself. Conceptually one could prohibit entirely certain conduct on common property for example and it could still constitute regulation of the use of common property albeit prohibition of a specific activity.

[40] The language of Bylaw 5 in this case is somewhat problematic and probably reflects an approach to drafting bylaws by a lay person, rather than one skilled in drafting such matters. Self-evidently Bylaw 5.1 would by itself be capable of covering the field in terms of the way in which animals of any kind were permitted on the property, whether on a lot or on common property. But it might involve engaging in the process of considering and deciding applications to bring specific dogs or cats to the site.

[41] Bylaw 5.2 really is clarification of the methodology by which pet owners could comply with Bylaw 5.1. In real terms it duplicates the language of Bylaw 5.1 but adds the notion that approval will only be granted in accordance with conditions set out in the animal policy. There is no appeal here from any finding made by the Adjudicator in relation to the legality of that part of the bylaw. It is therefore unnecessary for the purposes of deciding this appeal to consider whether there is any limitation on the Body Corporate's capacity to limit itself to approvals which are consistent with the animal policy.

[42] Bylaw 5.3 is not really a restrictive bylaw at all, but is permissive in that it creates a clarified exclusion to the operation of Bylaw 5.1, in that it apparently excludes all "small non-predatory animals" from the operation of the regulation in Bylaw 5.1

requiring approval. It gives as examples of what are small non-predatory animals, poultry and guinea pigs.

[43] Bylaw 5.4 is the offending bylaw. On its face it could have been read as being consistent with or supplementing the operation of Bylaw 5.1. It does not cover the same territory as Bylaw 5.1 because it is only concerned with bringing or keeping animals on the lot by a resident and has no application apparently permitting invitees to bring them onto the lot or the common property. Had the Body Corporate contended for the position that the operation of Bylaw 5.4 was a subcategory of the operation of Bylaw 5.1, or alternatively was subject to an implied requirement that there could be an application brought for permission to bring on such an animal, which would have been required to be resolved by the Body Corporate acting reasonably, that it may have been possible to uphold the validity of Bylaw 5.4 without treating it a otherwise offending the prohibitions in the Act. As the submissions for the Appellants here make clear, they insist that the Body Corporate ought be entitled to keep and apply a bylaw which contains an absolute prohibition on keeping cats or dogs or any other kind of animal which could be broadly described as “predatory”. In other words, they insist they are entitled to impose an absolute prohibition on the bringing or keeping of such animals onto the lot or common properties. None of those submissions contended that the offending bylaw was one which was subject to any capacity for the Body Corporate to exercise a discretion as to whether to apply it or refuse to permit predatory animals to be present.

The submissions made by the parties

[44] For the Body Corporate it is submitted[4] that the Adjudicator erred in the findings in paragraph 12 of the Reasons. QCAT had determined that a blanket prohibition on the keeping of pets went beyond the statutory role of regulating and is beyond the power of the Body Corporate. As I have said already, the decisions cited in the Reasons in support of that proposition are those in McKenzie v Body Corporate for Kings Row Centre CTS 11632 [2010] QCATA 57 and Body Corporate for River City Apartments CTS 31622 v McGarvey [2012] QCATA 47.

[45] The Body Corporate submits that the decision in Body Corporate for Kings Row Centre did not make such a finding but rather held that the prohibition on keeping dogs and cats did not amount to a prohibition or a so called “blanket ban” on all pets, only particular types of pets.

[46] The Body Corporate submits that s 180(7) of the Act requires that bylaws not be oppressive or unreasonable having regard to the interests of all owners and occupiers. From that proposition, the argument is developed that one can have a prohibitive bylaw, or one which prohibits the holding of certain types of pets provided that the bylaw is “reasonable”.

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4 The submissions filed on behalf of Ms Goodman and Ms Ryan, the Third and Fourth Appellants, are identical to those of the Body Corporate. The written submissions on behalf of Ms Blackburn, the Fifth Appellant, is a truncated version of the submissions for the Body Corporate, although there are some variations on its themes.

[47] I briefly mentioned the decision in River City Apartments v McGarvey [2012] QCATA 47 earlier in these reasons. Mr Barlow SC as he then was, said at [59]-[64] in relation to a case involving an attempt to have a dog where a bylaw prohibited all pets:

> The adjudicator noted a number of previous decisions that had determined that an absolute ban on the keeping of animals in a community titles scheme was unreasonable. He said he could find no reason to conclude otherwise and by-law 13 was therefore unreasonable and must be removed. That decision appears to have been made on the basis that the adjudicator considered that a by-law that places an absolute ban on the keeping of animals (or certain types of animals) in a community titles scheme is unreasonable in all circumstances, simply because it imposes a blanket ban.
>
> Subsection 180(7) provides that a by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme.
>
> That subsection clearly requires the consideration of a by-law in the context of the particular scheme for which the by-law operates.[11]
>
> That, of course, is in contra-distinction to consideration of the proper construction of s 169 in which, as I have said above, the circumstances of an individual scheme are not relevant.
>
> It cannot be said that in all cases a by-law prohibiting the keeping of certain pets in a scheme is automatically unreasonable or oppressive. It must be determined in the context of each particular scheme. Although, in many cases, a by-law which did not provide for the body corporate to consider individual circumstances in determining whether or not to allow a particular lot owner to keep a certain type of pet would be unreasonable or oppressive, it is necessary for that question to be considered in each case having regard to the facts before the adjudicator and, in the context of those facts, the interests of all owners and occupiers in the scheme and the use of the common property.
>
> My decision in McKenzie did not mean that any by-law prohibiting the keeping of a certain type of pet in every scheme must of itself be oppressive or unreasonable. It should not be read as disregarding the facts upon which that decision was based.
>
> The body corporate contends, in this respect, that the adjudicator was wrong in applying the “gold fish test” referred to in the decision of Mr Dorney QC (as his Honour then was) in Tutton v Pivotal Point. That test, which I also applied in McKenzie, is likely to be of relevance in many cases, but it must be considered having regard to the circumstances of each scheme”.
>
> Therefore, in my opinion, the adjudicator was incorrect not to consider the reasonableness of the by-law having regard to the particular circumstances of the scheme before him. However, in this case that error has not affected the outcome of this appeal.

[48] In the McKenzie decision to which Mr Barlow referred, the by-law in question did not prohibit the keeping of pets, but only the keeping of certain types of pets. Therefore, he concluded, it did purport to regulate, rather than to prohibit, a use of lots in the scheme – namely, the keeping of pets.

[49] In Tutton v Pivotal Point[2008] QCCTBCCM 12 , as in River City Apartments v McGarvey, the by-law prohibited altogether the keeping of pets in the scheme. But it does not appear to have been submitted there that the by-law went beyond regulation and was therefore not within the power under s 169.

[50] The submission of the Body Corporate then goes on to develop the argument that the bylaw in its prohibition is neither oppressive or unreasonable, and implicitly contends that it is reasonable on various bases which have a factual foundation.

[51] The Body Corporate submits that the Adjudicator failed to consider the reasonableness of the bylaw having regard to the particular circumstances in this scheme. That submission is clearly correct. The Adjudicator seemed to take the approach that no such consideration was required because the decided cases were determinative of the outcome. As I have already noted, the duty on the Adjudicator was to consider whether the Applicant below had demonstrated that bylaw 5.4 was invalid because it is not regulatory but was prohibitive insofar as it concerns the of the use and enjoyment of lots and common property. Secondly the duty on the Adjudicator was to consider whether this particular bylaw was invalid because it was oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property. Thirdly the duty on the Adjudicator was to consider whether the act of passing the resolution by the Body Corporate in general meeting was unreasonable conduct in contravention of s 94 of the BCCM Act and if it was, did that affect whether a particular bylaw is valid. The failure by the Adjudicator to consider those questions means that the Adjudicator did not engage with the necessary legal analysis, and failed to grapple with the legal problem at hand. The failure to do so was an error of law. It was also an error of law to conclude that the decided cases were determinative of the outcome, when they were not.

[52] The Body Corporate argues that one can distinguish examples such as that in McKenzie v The Body Corporate for Kings Row because that case involved units in a high rise, and where the keeping of a domestic cat indoors was more feasible than would be in a situation where there are individual dwellings on one or larger acre lots.

[53] The Body Corporate seeks to distinguish the factual basis for the decisions in Rhode Island [2012] QBCCMCmr 227 and Tutton v Body Corporate for Pivotal Point Residential, as cases where there was a blanket prohibition on all pets, which is not what is sought here. That point is well made.

Appeals to this Tribunal

[54] The appeal to this Tribunal is governed by s 289 of the Act, which provides:

289 Right to appeal to appeal tribunal

(1) This section applies if—

(a) an application is made under this chapter; and

(b) an adjudicator makes an order for the application (other than a consent order); and

(c) a person (the aggrieved person) is aggrieved by the order; and

(d) the aggrieved person is—

(i) for an order that is a decision mentioned in section 288A, definition order—an applicant; or

(ii) for another order—

(A) an applicant; or

(B) a respondent to the application; or

(C) the body corporate for the community titles scheme; or

(D) a person who, on an invitation under section 243 or 271(1)(c), made a submission about the application; or

(E) an affected person for an application mentioned in section 243A; or

(F) a person not otherwise mentioned in this subparagraph against whom the order is made.

(2) The aggrieved person may appeal to the appeal tribunal, but only on a question of law.

[55] Section 290 of the Act provides:

290 Appeal

(1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.

(2) If requested by the principal registrar, the commissioner must send to the principal registrar copies of each of the following—

(a) the application for which the adjudicator's order was made;

(b) the adjudicator's order;

(c) the adjudicator's reasons;

(d) other materials in the adjudicator's possession relevant to the order.

(3) When the appeal is finished, the principal registrar must send to the commissioner a copy of any decision or order of the appeal tribunal.

(4) The commissioner must forward to the adjudicator all material the adjudicator needs to take any further action for the application, having regard to the decision or order of the appeal tribunal.

[56] Section 146 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') provides:

146 Deciding appeal on question of law only

> In deciding an appeal against a decision on a question of law only, the appeal tribunal may—
>
> (a) confirm or amend the decision; or
>
> (b) set aside the decision and substitute its own decision; or
>
> (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—
>
> (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
>
> (ii) with the other directions the appeal tribunal considers appropriate; or;
>
> (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).

[57] Pursuant to s 146, read with s 289 of the BCCM Act, in deciding an appeal against a decision on a question of law, this Appeal Tribunal is not engaged in a rehearing of the matter. Twice the Court of Appeal has decided that where this Tribunal is charged with determining a matter where the appeal is on a question of law, the Appeal Tribunal cannot treat the appeal as a rehearing, nor receive fresh evidence, nor make new findings of fact. And only if the determination of the legal error is capable of resolving the matter as a whole, can it substitute its own decision. Otherwise, the appeal must be allowed and the matter remitted.[5]

[58] Although the Court of Appeal decision in Albrecht was overturned by the High Court on the basis that the Court of Appeal made numerous errors of law in arriving at its conclusions in that decision, it did not make any finding which differed from that which the Court of Appeal determined on that aspect of the appeal.

[59] In Albrecht v Ainsworth & Ors[6] the Court of Appeal held at [94] that:

> The appeal to QCATA was limited to a question of law. It was an appeal in the strict sense, not an appeal by way of re-hearing. It had to be determined on the material before the adjudicator. But had QCATA correctly identified an error of law, I do not accept the applicant's contention that its only course was to remit the matter to the same adjudicator for determination according to law. Once an error of law affecting the adjudicator's decision was correctly identified, QCATA could exercise the adjudicator's powers and substitute its own decision based on the material before the adjudicator, consistent with the adjudicator's undisturbed factual findings. So much is clear from the terms of s 294 BCCM Act and s 146 QCAT Act.

[60] It follows that I am empowered to exercise the adjudicator's powers and substitute my own decision based on the material before the adjudicator, consistent with the adjudicator's undisturbed factual findings.

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5 *Ericson v Queensland Building Services Authority* [2013] QCA 391, [25]-[28]; *Albrecht v Ainsworth & Ors* [2015] QCA 220, [94].

6 [2015] QCA 220.

[61] By way of demonstration of the way in which that duty to act reasonably has been construed can be seen from the analysis by Carmody J in Body Corporate For Beaches Surfers Paradise v Backshall.[7] There, at [99]-[100], His Honour held in a case involving pet use, and a dog called Marley, that:

> [99] The committee acted reasonably in the BCCM sense if a notionally reasonable committee faced with the same issue could (not would) have honestly and rationally reached the same conclusion on a proper consideration of all the available material.8
>
> [100] A reasonable committee, in my opinion, would consider:
>
> - its proper legal requirements and its functions;
> - the source, purposes and limits of its discretion;
> - all the relevant circumstantial considerations;
> - arguments for and against permitting Marley as distinct from dogs or pets in general;
> - the likely future consequences or gravity of refusing or granting permission on both the applicant and the CTS including any precedent value of its decision either way;
> - the nature and extent of any infringement on the applicant's rights, interests and reasonable expectations of the other pet loving residents;
> - the majority view;
> - the assessed magnitude and frequency of the risk that dog smells would adversely impact on the enjoyment rights of others;
> - whether the objections could be ameliorated (e.g. whether the perceived risks to rights and reasonable expectations of other CTS users could be reduced to the level of acceptability by affordable practical measures via imposition of conditions); and
> - practical ways of resolving the tension between the rival positions rather than reasons not to do so.

Failure to give reasons

[62] None of the submissions filed for the Appellants address the grounds of appeal that there was a failure to give adequate reasons for the decision that the bylaw was invalid or unreasonable or failed to give sufficient consideration to submissions from the Body Corporate and lot owners.

[63] In the decision in Body Corporate for River City Apartments, Mr Barlow SC, as he then was, held at [55] and [56]:

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7 [2016] QCATA 177.

8 Citing the QCAT Appeal Tribunal's decision in *Re Body Corporate for Viridian; Kjerulf Ainsworth & Ors v Martin Albrecht & Anor* [2014] QCATA 294.

> [55] In Drew v Makita (Australia) Pty Ltd [2009] QCA 66; [2009] 2 Qd R 219 at [58], Muir JA said:
>
> > "The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with a 'justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or incident of judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further judicial accountability."
>
> [56] It is not necessary for a court or tribunal, in order to give procedural fairness, to discuss in reasons for decision every submission that was made by the parties. Although the failure to give sufficient reasons is an error of law, the reasons given need only apprise the parties of the broad outline and constituent facts of the reasoning on which the decision maker has acted. In other words, what is necessary is a basic explanation of the fundamental reasons which led to the conclusions reached.

[64] This is really not a complaint about a failure to provide reasons for arriving at any factual or legal conclusion, but a complaint that the Adjudicator did not specifically apply the requisite test and reason through the process required. That explains why there are no such reasons.

[65] I have already set out what the proper approach of the Adjudicator ought to have been. I have also concluded that the decisions referenced by the Adjudicator as determinative of the problem were not authority for the proposition for which the Appellant relies upon them.

[66] The submissions filed with the Adjudicator for consideration were lengthy and detailed. The reasons of the Adjudicator do not focus on them in the sense of conducting an analysis of them in the context of applying what I have said to be the correct approach. In light of the approach I have decided to take, the failure to provide reasons for rejecting the contention that that the bylaw was invalid or unreasonable is not fatal since I will conduct that analysis myself.

Discussion and disposition

[67] The first issue is whether bylaw 5.4 is oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property.

[68] "Unreasonable", means, in its ordinary sense, not endowed with reason, not guided by reasonable good sense, not agreeable to, based on or in accordance with reason or sound judgment, exceeding the bounds of reason, immoderate, capricious or exorbitant.

[69] Similar language to that found in the BCCM Act can be found in the equivalent laws of NSW although they add the word unconscionable to the oppressive and unreasonable bylaw prohibitions: see, e.g., the discussion in McCann v Owners SP 11318 [1998] NSWSSB 44; and Owners SP 67631 v Waters and Gardner [2010] NSWCTTT 343 ("if there was on the material before the Owners Corporation a sound basis for making that decision; conversely if there was no such basis it would be unreasonable"); Carroll v

Alldritt [2013] NSWCTTT 525; Owners SP 69481 v Want [2013] NSWCTTT 440; Owners SP 69140 v Drewe [2017] NSWSC 845 at [43].

[70] I dealt with that notion of what was unreasonable at considerable length in my decision in Re Body Corporate for Viridian; Kjerulf Ainsworth & Ors v Martin Albrecht & Anor [2014] QCATA 294. In the High Court on appeal in that case in Ainsworth v Albrecht [2016] HCA 40; (2016) 261 CLR 167 at [41] the language used by the Court focused on whether the opposition (in that case to a motion) "… was not unreasonable because it had a logical and rational basis".

[71] The Macquarie dictionary definition of the word oppressive is "unjustly harsh or burdensome in exercise of power."

[72] The authorities, and particularly *Body Corporate for River City Apartments CTS 31622 v McGarvey* [2012] QCATA 47 at [58]-[65] make clear that the ordinary meaning of the terms oppressive and unreasonable is to be applied in relation to a by-law in the context and circumstances of a particular scheme.[9] That follows from the inherent character of the terms, which require a judgment of a character that may vary according to context. It also follows from the inherent character of the words that the context and the circumstances being dealt with must be assessed objectively.

[73] There is also no express prohibition in the BCCM Act of bylaws that permit "no cats or dogs" or for that matter "no pets" at all by-laws. There is the continuing possibility of adapting a by-law to allow certain types of pets with minimum requirements (for approval or otherwise) and grade the requirements for other types of pets. In other words, there is no requirement for individual applications for each pet, unless the Body Corporate chooses to adopt a by-law with that requirement.

[74] It is common knowledge even to the extent that it is referenced on Governmental websites, that common conditions bodies corporate impose on the keeping of animals include that:

- The animal is not allowed on the common property, except for the purpose of being taken in or out of the scheme land.
- The animal must be on a lead or adequately restrained while on common property.
- The animal must be regularly treated for fleas.
- The animal must not cause nuisance or interfere unreasonably with any person's use or enjoyment of another lot or common property.
- The animal be kept in good health and free from fleas and parasites.
- Any animal waste must be disposed of in such a way that it does not create noxious odours or otherwise contaminate the scheme.

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9 See also *George v Rockett* (1990) 170 CLR 104 at 112; *Kirra Wave* [2012] QBCCMCmr 460 at [32]; *OC SP69481 v Want* [2013] NSWCTTT 440 at [40]; *Croyden & Anderson v Owners SP1583* [2015] NSWCATCD 104 at [26].

- Reasonable steps must be taken to minimise the transfer of airborne allergens from the animal, such as regular vacuuming and/or grooming.
- The committee can withdraw approval for the animal to remain on the scheme if the specified conditions are not complied with.
- The approval only applies to the animal in the application and does not allow the keeping of any additional replacement or substitute animals on the lot.

[75] In a recent decision on this issue in the NSW Civil and Administrative Tribunal in Owners – Strata Plan No 58068 v/ats Cooper [2019] NSWCATCD 62 at [110]-[114] ,a decision of Burton SC, it was held referencing similar but not identical language to that in Subsection 180(7) of the BCCM Act that:

> The foregoing summary of legislative intent means, in my opinion, that a scheme which wishes to have a blanket "no pets" by-law needs objectively to justify that choice in the context and circumstances of the scheme where, and once, that choice is challenged by a particular owner or owners in respect of particular types of pet and where evidence is led that gives a proper basis for that challenge: cp, in a property rights context, Rielly v Owners SP 18687 [2007] NSWCTTT 58; Owners SP 69140 v Drewe [2017] NSWSC 845 at [30]; Gurram v Owners SP 36589 [2018] NSWCATCD 39 at [32]; John Maait Properties PL v Owners SP 50936 [2019] NSWCATAP 26 at [69]-[70].
>
> There may be schemes that, in their context and circumstances, objectively justify a "no pets" by law.
>
> A very small strata scheme, for example, or a scheme with a high number of absentee landlord owners and a high tenant turnover or which permits short-term occupancy, may demonstrate that the attendant costs and disruption from any form of pet permission (or beyond an absolute discretion in the strata committee on pet permission) on balance means that any challenge to the scheme's blanket ban on pets fails to establish the requirements in s 139(1) or s 148 (if applicable).
>
> That may not be the case for a scheme with more stable occupancy patterns where, for instance, generalised approval of particular types of pet is justified because of a greater propensity to observe and ability to enforce observance of amenity by-laws.
>
> A blanket "no pets" policy may be objectively justified, as another example, if owners when buying in have clear notice, confirmed by express written acknowledgement, of the no pets by-law, more controversially coupled with a written undertaking not to challenge such a by-law other than by proposing successfully the required resolution in a general meeting.

[76] The Adjudicator noted and appears to have accepted and there is nothing to suggest that it should not be accepted that Crystal Waters is unique and different from most other bodies corporate in Queensland. It is situated on some 640 acres in a rural setting, with 85 dwellings occupying approximately 50 hectares. The remainder is common land, much of it a high ridge covered in Eucalypt forest and riparian zones adjacent to the Mary River, Scrub Creek and Kilcoy Creek, which form the scheme's boundaries. A fundamental goal of permaculture which is the goal of this policy and the Scheme owners is to exist in harmony with nature. That goal is consistent with the terms of the "offending bylaw".

[77] The committee and most of the lot holders consider that Bylaw 5.4 is essential to protect the abundant wildlife and peaceful environment as body corporate assets. There is nothing to suggest that such a conclusion was not reasonably arrived at or is unreasonable.

[78] The Body Corporate submitted that Crystal Waters was designed as a permaculture village with the first guiding ethic of permaculture being to permit for the provision of all life systems to continue and multiply, and to work towards a balanced natural ecology. There is no reason to question this as a factual matter.

[79] There is nothing to suggest that it should not be accepted and it should be accepted that there are some 260 species of birds, many small native animals, kangaroos and wallabies. There are no fences between lots to allow for free movement of wildlife within the community.

[80] There is nothing to suggest that it should not be accepted and it should be accepted that the scheme attained 'Land for Wildlife' status in 2002. That is an important attainment and has a perceived benefit to a scheme that promotes the philosophy of permaculture.

[81] There is nothing to suggest that it should not be accepted and it should be accepted that the scheme has always had a by-law that prohibited the keeping of dogs and cats. Owners are aware of the by-law before purchasing in Crystal Waters. The majority of lot owners agree that it is not desirable to have dogs and cats in the community. Granting the application involves dismissing the democratically exercised decision-making process of at least two thirds of the voting members the body corporate, not merely its committee. That is clearly reflected in the vote in favour of enacting these bylaws.

[82] The Body Corporate put evidence before the Adjudicator which was not contradicted and not inherently implausible that the keeping of cats and dogs, whether on lots or on common property is not consistent with the permaculture and eco-village ethics of Crystal Waters because such animals have a deterrent effect on wildlife, and this is in part the reason why National Parks ban cats and dogs generally. There is a body of academic work which was referred to in the submissions and other material before the Adjudicator and this Tribunal in support of these propositions.

[83] There is nothing to suggest that it should not be accepted and it should be accepted that dogs and cats, whether on common property or even in transit on common property will have a devastating impact on the abundant wildlife. It may be inferred that any risk to the health of the 260 species of birds, many small native animals, kangaroos and wallabies is an undesirable outcome for this scheme and should be avoided, even if it leads to inconveniencing or disappointing some owners or residents who would like to own a cat or dog. The priority of the members in this scheme is to ensure there is no risk to or deterrent effect on wildlife that exists on the site as a whole.

[84] The submissions also reference the risk of such animals escaping the confines of the owner's lot and preying on native animals. There is no reason to suggest that this risk is not reasonably perceived.

[85] Finally, it is an undoubted fact and the Body Corporate has highlighted the fact that many owners and occupiers in the scheme are people who specifically bought in there because of the no dogs and cats bylaw, and that the Adjudicator should have given

more weight to the submissions of residents on that issue. As the Adjudicator noted, there were 18 submissions from individual owners in relation to the application for the Adjudicator, 16 of which were opposed to it and only one of which was supportive of it. That is a matter of considerable significance.

[86] Amongst the written material which was before the Adjudicator and which is also before this Tribunal and about which there appears to have been no controversy whatsoever are the following matters to which reference should be made:

- That although Bylaw 5.4 might be regarded by some as prohibitory and therefore potentially invalid, its existence amongst bylaws has significant benefits to the scheme and to management of the wildlife on the scheme.
- That although it was not conceded that as a matter of law that it was prohibitory, it was accepted that there may be problems with its legality but lot owners nevertheless voted in favour of the resolution enacting it at the general meeting, and they exceeded a two third majority of members.
- The special bio-diverse environment in which the scheme is situated has been created by 30 years of extensive work and that special environment, including its wildlife, is seen as the Body Corporate's biggest asset and many people come to live at Crystal Waters because of that special environment.
- Additionally, the protected environment is also a reason why others come to visit at the scheme and it significantly contributes to the income of many Body Corporate members by attracting guests, students and tourists who come to see the local wildlife at close quarters anywhere on the property. Even though there was a pre-existing animal policy which restricted domestic animals to private lots, there was always the risk that such animals would not be properly restrained and if only one owner was lax about restraining the animal, it could have a significant impact on the local wildlife.
- The local wildlife is very sensitive to the smell and sounds of such animals and move away.
- One of the special features of Crystal Waters which those who live there and visited it had identified, was that it was a place that did not in fact have cats or dogs on site.
- Apart from the effects of smells and sounds which might deter the presence of local wildlife, the refusal to permit dogs and cats on the site is seen as fundamental to giving native animals a chance to thrive, which they have. The prohibition was also designed to avoid disturbances of the peace by a distressed barking from dogs.
- There are other controls in place on the site which are consistent with the bylaw prohibiting predatory animals, for example there is a recommended speed limit of 30 to 40 km per hour within the community, which is in part designed also to protect the wildlife.
- The abundance and diversity of native wildlife at Crystal Waters was directly attributable to the absence of domestic dogs and cats. It is surrounded by

farmland and rural acreage on which most owners have dogs and often cats. It is rare to see kangaroos and wallabies in the fields and surrounding the roads beyond the boundaries of Crystal Waters, but they are common at Crystal Waters. Sometimes neighbours' dogs have entered Crystal Waters in pursuit of wildlife.

The Body Corporate had investigated and identified that the impact of dogs and cats on native Australian fauna is well documented and significant and that that data indicated that domestic cats kill approximately 61 million native birds per year and that dogs have been attributed as the cause of death and injury and have been identified as an even bigger problem than cats in some areas. There was academic literature to support these conclusions.

Crystal Waters was seen as something of a refuge for native wildlife, and that outcome had been largely achieved. It was in the interests of preserving its refuge status that the "offending bylaw" was enacted.

[87] Turning to the stated bases on the part of the Respondent in this Tribunal, who was the Applicant below for opposing the by-law, his position had nothing to do with his desire to own or keep a dog, cat or other predatory animal on the site. His concerns were enlivened in the middle of 2018 when the Body Corporate took action against one lot owner who began keeping a dog on her property. The Respondent acknowledged that there was a vocal anti-dog/cat lobby at Crystal Waters, which is another way of saying that there was a substantial proportion of people who lived or owned within the scheme who believe it was inappropriate for there to be cats or dogs on site as a blanket rule, save for support animals. His objection seems to be rather one of principle, namely that prohibiting cats or dogs was unlawful because it was a prohibition not a regulatory activity. It was not based on any challenge to the propositions set out in paragraph 86 of these reasons.

[88] The respondent acknowledged that in 2002 the Body Corporate applied for "Land for Wildlife" status and in 2003 entered into an agreement which permitted it to have that status which included an obligation to make a reasonable effort on the land to pursue the maintenance and enhancement of native flora and fauna and to integrate nature conservation with other land management objectives. His contention was that the Land for Wildlife program did not forbid the keeping of domesticated dogs on the land, and participation in the program could not be rationally used as justification for the "offending bylaw".

[89] Nothing in the materials suggest that there was any person, let alone any significant group of persons present, or who were owners at Crystal Waters who actually thought it was appropriate to permit dogs, cats or other predatory animals on site.

[90] It was not suggested that there was any particular disadvantage in imposing the requirement that they not be present, and thereby depriving the theoretically interested occupiers from having them or bringing them to site.

[91] Overwhelmingly, the justifications for enacting the "offending bylaw" are well thought out, the result of a longstanding policy to similar effect, and had the broad, if not entirely unanimous approval of the lot owners. The existence of such a bylaw, even if the same outcome (i.e. prevention of the bringing of predatory dogs and cats onto the site) could be achieved by Bylaw 5.1, the presence of By-law 5.4 was significant in

that it stood as a statement of the significant point of difference that Crystal Waters sought to achieve as a permaculture village, and which it could in effect broadcast to identify as its public position on that issue.

[92] It is a notorious fact that in National Parks, and in many other places in Queensland communities, domestic animals whether predatory or not, are completely banned, and that there is policy of substance which stands behind those decisions. The unique aspects of Crystal Waters as a fauna sanctuary in effect places it in an entirely different category of cases to those where, for example elderly residents living in a high rise urban environment might want to find themselves being comforted by the presence of a domesticated dog or cat.

[93] There is no basis to conclude that bylaw 5.4 is oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property on this unique and particular scheme. The enactment of the bylaw itself was not unreasonable because it had a logical and rational basis and continues to do so. Occupiers and lot owners are able to bring other pets onto site in some cases without any formal approval and in others without it. In the interests of protecting the well being of the fauna on this particular site it is not unreasonable to curtail completely the bringing of predatory animals onsite, and all cats and dogs, whether or not any particular specimen might not be predatory toward the local fauna. The learned Adjudicator held no different view but felt constrained by what was seen as a body of case law that necessarily struck down all such bylaws.

[94] It follows, that for the reasons that I have already expressed, the appeal must succeed.

[95] I order that the Appeal be allowed and the order of the Adjudicator is set aside.