



Complete guide to body corporate by-laws



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Introduction

By-laws are an integral part of the administration of a body corporate.

The purpose of by-laws is to provide the committee with the power to regulate the use of lots, body corporate assets and common property.

Committees have a statutory obligation to enforce the body corporate's by-laws. However, by-laws are often forgotten about until they need to be enforced.

The problem for bodies corporate with that is:

- there are a myriad of legislative requirements for a by-law to be valid (and if it is not valid it cannot be enforced);
- the laws that govern by-laws change from time to time (making some by-laws obsolete or unenforceable); and
- changing by-laws is not necessarily a quick process.

This can leave the committee in a position where it cannot effectively regulate improper conduct when that improper conduct actually takes place, leading to the view that by-laws are a toothless tiger.

In this guide we discuss:

- what are body corporate by-laws
- why they are important
- how they are made
- how they are changed
- what can by-laws include
- what can't by-laws include
- how they are enforced

Mahoneys is recognised as one of Australia's leading body corporate law firms – having been awarded the "Strata Law Firm of the Year" at both the 2023 and 2024 Strata Community Association (QLD) awards.

Our dedicated Body Corporate team is made up of industry-leading lawyers with experience in providing body corporate advice, transaction support and dispute resolution services.

Feel free to contact us if you have any questions about preparing, changing, registering and enforcing body corporate by-laws.

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How are by-laws made?

By-laws are documented in the Body Corporate's community management statement (CMS) which must be registered with Titles Queensland.

The CMS includes:

- a list of the lots included in a body corporate's scheme;
- the contribution and interest schedule lot entitlements for each lot, and the totals;
- the future development of a scheme;
- by-laws;
- architectural codes or statutory easement details; and
- any exclusive use areas.

What are body corporate by-laws?

By-laws are a set of rules that a body corporate makes to:

- administer, manage and control the common property and body corporate assets;
- regulate the use and enjoyment of:
 - lots included in the scheme;
 - common property, including utility infrastructure;
 - body corporate assets, including easement areas relevant to common property; and
 - services and amenities supplied by the body corporate;

A body corporate can choose to adopt the standard by-laws that are set out in Schedule 4 of the *Body Corporate and Community Management Act 1997* (BCCM Act) or, more commonly, it can make its own.

Why are legally enforceable by laws important?

Without some form of rules, bodies corporate would be unable to effectively regulate the conduct of owners and occupiers or control the body corporate's facilities.

How by-laws are changed

A body corporate can make new by-laws, or change its existing by-laws at any time.

To do this a body corporate must pass a special resolution at a general meeting. If the change includes a new or amended exclusive use by-law, a resolution without dissent is needed.

A by-law is only effective once it is registered at the Titles Office. However, registered by-laws are not automatically valid.

What can by-laws include?

The relevant section of the *Body Corporate and Community Management Act 1997* (Qld) (**BCCMA**) is 169(1) which provides:

The by-laws for a community titles scheme may only provide for the following –

- (a) the administration, management and control of common property and body corporate assets;*
- (b) **regulation** of, including conditions applying to, the use and enjoyment of –*
 - (i) lots included in the scheme; and*
 - (ii) common property, including utility infrastructure; and*
 - (iii) body corporate assets, including easement areas relevant to common property; and*
 - (iv) services and amenities supplied by the body corporate;*
- (c) other matters this Act permits to be included in by-laws.*

Where many by-laws come unstuck is the emphasis of the important word, "regulation". Adjudicators interpret regulation to mean by-laws cannot prohibit certain conduct.

In simple terms, this means that a by-law cannot ban or stop something from taking place and is why:

- there can be no buildings with a no pets by-law;
- smoking could not previously be banned in its entirety; and
- short term letting and Airbnb cannot be banned.

Despite this requirement, regulation does not mean that a committee is powerless. If a by-law is carefully and properly drafted, a committee can be empowered with the necessary control to properly and reasonably administer the body corporate.

For example, the following by-law would be unlawful as it prohibits conduct:

An Owner or Occupier must not allow an auction of their lot to take place on scheme land.

However, if the by-law was amended to include the bold underlined words (below), it becomes lawful and gives the committee the ability to regulate auctions within the scheme:

*An Owner or Occupier must not, **without the prior written approval of the Body Corporate**, allow an auction of their lot to take place on scheme land.*

The by-law is now compliant as it does not prohibit the conduct, but allows the committee the ability to grant or refuse a request to hold an auction. However, when considering the request the committee just has to act reasonably when taking into account the details of the request including the impact on the scheme.

From 1 May 2024, the one exception to this prohibition rule now extends to smoking. The BCCMA now permits bodies corporate to install by-laws which prohibit smoking on any:

- parts of the common property (excluding exclusive use areas);
- outdoor exclusive use areas; and
- outdoor areas of a lot.

What can't by-laws include?

Sections 180 and 181 of the BCCMA set out 8 limitations for by-laws.

Limitation 1

"If a by-law for a community titles scheme is inconsistent with this Act (including a regulation module applying to the scheme) or another Act, the by-law is invalid to the extent of the inconsistency."

In other words, a by-law must not say something that is contrary to any legislation. Although this is a relatively simple principle, it is one of the most common reasons that a by-law can be deemed unlawful.

A common example is when a by-law seeks to authorise the committee's ability to access a lot with 3 days' notice.

The issue with this by-law is that:

- the body corporate's powers to access a lot are set out in the legislation;
- a by-law cannot give the committee additional powers (at least that is the case under the BCCMA); and
- the by-law is inconsistent with section 163 of the BCCMA which sets out a number of other requirements that need to be met before the committee can access a lot.

Limitation 2

"If a lot may lawfully be used for residential purposes, the by-laws cannot restrict the type of residential use."

This means that the body corporate cannot interfere with the residential use of a lot and is why by-laws:

- cannot restrict Airbnb and short term letting (which is a lawful type of residential use); and
- can restrict certain commercial uses (e.g. to protect caretaking service contractors from a competing business).

Limitation 3

"A by-law cannot prevent or restrict a transmission, transfer, mortgage or other dealing with a lot."

This limitation prevents by-laws from affecting an owner's fundamental property rights and prevents any by-law which seeks to:

- determine who can purchase a lot; or
- let a lot out on a short term basis (including via Airbnb).

Limitation 4

"A by-law must not discriminate between types of occupiers."

This prevents by-laws from making different rules for different occupiers.

For example, common property facilities cannot be reserved only for owner occupiers as opposed to tenants.

Limitation 5

"A by-law (other than an exclusive use by-law) must not impose a monetary liability on the owner or occupier of a lot included in a community titles scheme."

This limitation is commonly contravened as there are many by-laws which seek to:

- impose costs upon owners or occupiers for by-law breaches; or
- set a levy recovery process.

These by-laws are all invalid. A by-law cannot create a monetary liability for an owner or occupier – unless it relates to an exclusive use by-law.

The BCCMA has its own specific mechanisms for monetary liabilities to be recovered from owners or occupiers. Those mechanisms can be enforced separately to any by-law enforcement action.

Limitation 6

"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."

This is the catch-all that is often disputed in the Office of the Commissioner for Body Corporate and Community Management.

Like any reasonableness argument it is often subjective as to whether a particular by-law is unreasonable.

However, some common by-laws that are invalidated on this basis include:

- by-laws requiring all pets to be carried across common property irrespective of their size;
- by-laws imposing a particular hard flooring rating is attained (if the specified rating is unattainable); and
- by-laws that ban otherwise lawful conduct.

Limitation 7

"A by-law must not include a provision that has no force or effect under the Building Act 1975, chapter 8A, part 2."

This is a very specific limitation that prevents a by-law seeking to preserve the aesthetics of a building at the expense of interfering with the sustainable housing provisions of the Building Act 1975 (Qld) such as:

- roof colours with certain solar absorptance values;
- energy efficient windows;
- house orientation, floor area and minimum bathroom / bedroom requirements; and
- solar hot water or solar panel installations.

Limitation 8

Section 181 of the legislation provides that a by-law cannot interfere with the rights of a person with a disability who has the right to be accompanied by a guide, hearing or assistance dog to:

- be on the common property or a lot; and
- keep the dog in their lot.

By-law enforcement

Section 94 of the *Body Corporate and Community Management Act 1997* (Qld) (**BCCMA**) sets out two specific obligations that a Body Corporate must follow in respect to by-laws. First, they must enforce the by-laws and second, they must act reasonably when doing so.

Accordingly, there is a statutory obligation on the body corporate to enforce the by-laws for the Scheme unless it would be unreasonable to do so.

Committees have been criticised by adjudicators of the Office of the Commissioner for Body Corporate and Community Management (**OCBCCM**) for not taking enforcement action when it has an obligation to do so.

For example, in *Artique* [2021] QBCCMCmr 596 the adjudicator relevantly provided:

[46] I will make a comment about the body corporate. The body corporate has said this is a matter between the applicant and the respondent and it declined to make a submission on this application. It did not issue a by-law contravention notice in response to the applicant's complaints. In correspondence to the applicant, it said it gave the respondent a copy of the bylaw and tried to 'broker a resolution', but that it was a personal interpretation as to whether there was a breach and it could not make that determination.

47] The body corporate is not obliged to enforce section 167 of the Act, but it does have a statutory obligation to enforce the by-laws, including By-law 5. Moreover, it must act reasonably in undertaking its functions and in making decisions. If the body corporate did not reasonably believe the respondent was in breach of By-law 5, it did not need to issue a by-law contravention notice to her. If it was unsure if the by-law had been breached, it could have asked the applicant for more evidence to assist it in making a decision. However, I do not consider that it could fail to act simply because it thought it was not its responsibility to decide if the by-law had been breached or that it was just a matter between residents.

Once the body corporate has been made aware of a by-law contravention and has sufficient evidence they must issue either a:

- continuing contravention notice – if the breach is ongoing (such as an unapproved installation); or
- future contravention notice – for anticipated and recurring breaches (such as noise complaints or intermittent parking issues).

Whilst there are template forms available from the OCBCCM, there is no prescribed form that must be used.

In order for a contravention notice to be enforceable, the notice must:

- relate to an enforceable by-law;
- be authorised by the committee through a resolution;
- be reasonable in all of the circumstances;
- be issued in circumstances where the committee believes the recipient:
 - has contravened the by-laws (or is contravening the by-laws); and
 - will likely contravene (or continue to contravene) the by-laws again;
- specifically include the following statements:
 - that the body corporate believes the person has contravened a by-law;
 - the by-law the body corporate believes has been contravened;
 - details sufficient to identify the contravention;
 - for a continuing contravention – the period in which the contravention must be remedied;
 - for a future contravention – that the person must not repeat the contravention; and
 - that if the person does not comply with the notice the body corporate may, without further notice, take steps in the Magistrate's Court or OCBCCM.

The contravention notice must also be sent to the owner of the lot if the lot is tenanted.

If the by-law contravention notice is not complied with, the body corporate has the power and obligation to commence proceedings in either the:

- Magistrate's Court (which is rare, but may result in the court imposing a fine); or
- OCBCCM (which is the most common path). This then usually involves:
 - conciliation; and
 - if conciliation is not successful, adjudication (which may provide an enforceable order).

Enforcing by-laws is an important part of administering a body corporate. Committees often try to shortcut the process in an attempt to expedite a resolution. However, if a committee does not follow the prescribed enforcement process it will often be met with an unsuccessful outcome.

From 1 May 2024, the one exception to this prescribed process now allows bodies corporate to tow vehicles which:

- are that of an owner or occupier; and
- are parked contrary to the by-laws.

Importantly, this does not mean that the committee can tow cars without any limitations. Relevantly, the committee will still need to:

- ensure the parking of the vehicle is by an owner or occupier;
- comply with the other legislation relevant to towing a car, such as:
 - ensuring a towing agreement is in place; and
 - obtaining implied consent (such as through appropriate signage).

About the firm

Mahoneys is an independent law firm offering a range of commercial advice, transaction support, and dispute resolution services. With offices in Brisbane and the Gold Coast, we have a dedicated team of lawyers who specialise in body corporate and strata law.

We have a long history of acting for bodies corporate - our work includes acting for lot owners and bodies corporate on all matters relating to the Body Corporate and Community Management Act and associated legislation – including in the following areas:

- Management rights assignments and variations
- Common property subdivision and sales
- General disputes and advice
- Community management statements
- By law enforcement and by law reviews
- Selling schemes to developers
- Caretaker performance issues
- Debt and levy recovery
- Lot entitlement issues
- Building defect disputes
- Building management statements
- Laan access notices
- Defamation
- Neighbouring development issues

Mahoneys was named “Law Firm of the Year” at both the 2023 and 2024 Strata Community Association (Qld) awards.

About the Team

A key to our success has been the quality of our team and our unwavering commitment to providing market leading legal services. Our dedicated body corporate team is made up of leading industry lawyers, led by 2 experienced partners:



Todd Garsden who heads up Mahoneys’ body corporate practice is an industry-leading body corporate lawyer who predominately acts for bodies corporate, body corporate managers and lot owners on all matters affecting bodies corporate.



Ben Secombe who heads up the Mahoneys’ Dispute Resolution team, is a nationally recognised litigator with significant experience advising bodies corporate including on contract issues between resident manager and body corporate, by-laws, building and construction (including defect management), statutory compliance and insurance. Ben also has significant experience helping bodies corporates terminate and sell body corporate schemes to developers.

Want to know more?

To receive updates on body corporate matters, you can visit our dedicated body corporate page www.mahoneys.com.au/industries/bodies-corporate-strata, follow us on LinkedIn www.linkedin.com/company/mahoneys or sign up to our body corporate focused newsletter www.mahoneys.com.au/subscribe.



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