

# Does discrimination law apply to strata schemes

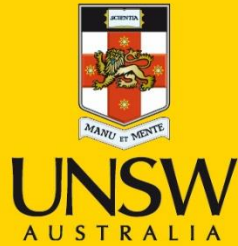
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# *Discrimination law and strata schemes*

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Never Stand Still

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# Sherry, *Strata Title Property Rights*, Routledge 2017



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# Does discrimination law apply to strata schemes?

- Discrimination law typically applies in the public, not private sphere
- Refusing to allow a guide dog into your private home or refusing to date someone because of their religion or ethnicity might make you an unpleasant person, but it is not illegal
- Strata schemes are private property and it is not clear whether discrimination law applies to them
- The strata Acts recognise this in the prohibition on by-laws that ban guide and hearing dogs and/or assistance animals – if those provisions were not there, prima facie schemes could prevent those animals entering schemes, in the same way as any privately-owned home.

# *Hu v Stansure Strata Pty Ltd & Ors* [2014] FCCA 905

- Applicant alleged that she had been subject to racial discrimination by the body corporate, the chairman and the strata manager.
- s18C *Racial Discrimination Act* 1975 (Cth) made it an offence to offend, insult, humiliate or intimidate someone on the basis of race, ‘otherwise than in private’.
- Burnett J held that that the applicant was ‘an inherently implausible and unreliable witness. Respectfully, I have concluded that she is delusional and detached from reality’.
- For example, applicant had alleged that the frail, ill, female, 77 year old chairman of the body corporate had pushed a wardrobe into her car. As a result, none of the claims were made out.



# Hu continued

But, even if the alleged acts had occurred a strata scheme was not a public place.

S11 Racial Discrimination Act – it is unlawful to refuse a person access to or use of any place that ‘members of the public are, or a section of the public is, entitled or allowed to enter or use’.

Barrett J said that ‘In this case the complaints concern common property within the Jarrah Court CTS area. It is private property and uninvited entry may constitute trespass. While there may be an implied licence for people to enter the land for a legitimate purpose, that does not mean that members of the public are entitled or allowed to enter the common property at will. In my view, this complaint is simply unsustainable.’



# s18C Racial Discrimination Act

Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a [person](#) to do an act, **otherwise than in private**, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another [person](#) or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other [person](#) or of some or all of the people in the group.

(2) For the purposes of [subsection](#) (1), an act is taken **not to be done in private** if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is **done in the sight or hearing of people who are in a public place**.

(3) In this section:

**"public place "** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.



# s18C

The section did not apply to the common property of a strata scheme which was a small townhouse development.

Barrett J said in Hu at [46] that the acts which the Applicant complains 'occurred within the confines of Jarrah Court, which is not a public place. There is nothing about the evidence suggesting that any offensive act, or otherwise, was done in circumstances where they would have been within earshot of members of the public. It follows that the complaints in this provision must also fail.'

- However, s18C would apply to statements made on the common property of a larger scheme that was open to the public, as many large body corporate communities are.
- The conditions of development consent include gating and will often stipulate public access
- Eg Breakfast Point foreshore, parks in Liberty Grove.





# What does discrimination law cover?

## Federal:

- *Racial Discrimination Act 1975 (Cth)*
- *Sex Discrimination Act 1984 (Cth)*
- *Disability Discrimination Act 1992 (Cth)*
- *Age Discrimination Act 2004 (Cth)*

## New South Wales

- *Anti-Discrimination Act 1977*

## Victoria

- *Equal Opportunity Act 2010*
- *Racial and Religious Tolerance Act 2001*
- *Charter of Human Rights and Responsibilities Act 2006*

## Queensland

- *Anti-Discrimination Act 1991*



# Characteristics

- Only **certain characteristics** are covered by legislation
- For example, there is no law against discriminating against a person on the basis of their golf handicap; golf handicaps are not covered.
- Typically characteristics covered:
  - Race, age, disability, sex, gender, marital status etc
- Variation from state to state
- Eg *Victorian Equal Opportunity Act 2010* and *ACT Discrimination Act 1991* legislation covers 'physical features', meaning height, weight, size or other bodily characteristics. Not covered in other states.



# Direct vs Indirect discrimination

- Direct discrimination is discriminating against someone on a prohibited ground (eg gender, race).
- *Wardley v Ansett Transport Industries (Operations) Pty Ltd* (1984) EOC – Ansett was guilty of direct discrimination for refusing to allow the applicant to join a trainee pilot program because of her child-bearing capacity
- Indirect discrimination is a requirement that while applying to everyone, will have a disadvantageous effect on particular groups eg requiring all employees to work full-time might have disproportionately affect women who are more likely to be caring for children. There is a question of whether the requirement is reasonable.



# Circumstances

Discrimination legislation only applies **in particular circumstances**, most of which are public

- Employment
- Education
- Accommodation
- Sale of land
- Provision of goods and services
- Access to premises, typically only premises that the public or a section of the public can enter

There is no doubt that strata schemes are covered by discrimination legislation in their capacity as employers, for example. A body corporate could not discriminate against a strata manager because she was pregnant or likely to get pregnant.



# Are BCs captured re: their own members?

Many people wrongly assume that bodies corporate are obviously bound by all discrimination legislation, but in relation to:

1. their management of common property, (eg retrofitting)
  2. their decisions and
  3. their creation and application of by-laws,
- it is not at all obvious that they are bound.

**“Accommodation”** is a common area in which discrimination is prohibited, but bodies corporate do not provide accommodation. This generally only covers landlords etc.

**“Provision of goods and services”**, but do bodies corporate provide goods and services?



# Does a body corporate provide goods and services?

*C v A* [2005] QADT 14

This concerned access to the swimming pool and recreation area of a large strata scheme and disability discrimination under the *Anti-Discrimination Act* 1991 (Qld)

Held that

‘the essential function of the body corporate ‘A’ is to provide services to the residents of the complex including relevantly, maintaining or improving the access ways to facilities on the common property and access to and from individual apartments within the building to those facilities.’

The Member held that the BC had discriminated

1. in the supply of ‘goods and services’: s46, and
2. treating a person ‘unfavourably in any way **in connection** with the accommodation’: s83(d)



## *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119

Ms Hulena had multiple sclerosis. She sued the OC for disability discrimination because there were no accessible entrances and exits for the apartment building.

Was the OC captured by the *Anti-Discrimination Act 1977* (NSW)?

“Disability” defined in s4 to include

- total or partial loss of a person’s bodily or mental [functions](#) or of a part of a person’s body, or
- the presence in a person’s body of organisms causing or capable of causing disease or illness, or
- the malfunction, malformation or disfigurement of a part of a person’s body

# Anti-Discrimination Act 1977 (NSW) - disability

## Division 2 Work

## Division 3 - Discrimination in other areas

[49L.](#) Education

49LA. (Repealed)

[49M.](#) Provision of goods and [services](#)

[49N.](#) [Accommodation](#)

[49O.](#) [Registered clubs](#)





# Anti-discrimination Act 1977 (NSW)

## Provision of goods and services

### 49M Provision of goods and services

(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of disability:

(a) by refusing to provide the person with those goods or services, or

(b) in the terms on which he or she provides the person with those goods or services.

(2) Nothing in this section renders it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services would impose unjustifiable hardship on the person who provides the goods or services.



# Unjustifiable hardship

(1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the **first person**) would be an **unjustifiable hardship**, all relevant circumstances of the particular case must be taken into account, including the following:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial and other assistance to the first person;
- (e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by [paragraph](#) (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.

(2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.



# Hulena

Held:

1. that the owners corporation had not directly discriminated against Ms Hulena because the same requirements to access the premises were applied to everyone, but
2. that the OC had indirectly discriminated against her because it had required her to comply with a requirement with which a substantially higher proportion of persons who did not have that disability (MS) were able to comply.



# *Thorton & Farnham v The Owners SP 30653*

## Guide dogs vs assistance animals

Not directly relevant in NSW anymore because the new SSMA prohibits by-laws that restrict assistance animals but still relevant in state that still only make reference to guide dogs.

(BUT, **what is an assistance animal** is centrally relevant all states)

In *Thorton*, applicants had an alleged assistance animal that they wanted to keep in their apartment. The NSW provision that prohibits by-laws that ban guide and hearing dogs was of no use because the dog was neither.

The applicants relied on *Hulena* arguing that the OC was discriminating on the basis of a disability in relation to the provision of goods and services.



# Thornton

The Tribunal Member held that:

- The CTTT (now NCAT) has no jurisdiction to apply anti-discrimination law
- The Administrative Decisions Tribunal has no jurisdiction to hear strata disputes
- An OC does not provide a 'service' to anyone, nor could a building's physical structure be described as a 'service'
- If *Hulena* is good law, it would have a profound effect on thousands of strata schemes that are not disability accessible. Would it require putting in lifts in schemes with only stairs?
- Query whether discrimination legislation could ever apply to a scheme as it is a 'private residential property and not open to the public, except by invitation.'



# Thornton

Thornton is arguably wrong:

- NCAT clearly has jurisdiction to determine by-laws are valid.
- A by-law is invalid if it is inconsistent with any other law.
- Whether a by-law banning assistance animals is inconsistent with any other law depended on whether the DDA applied to strata schemes.
- Brings us back to the question of whether strata schemes provide goods or services
- NCAT had to decide that.



# Assistance animals

Most states now have prohibitions on by-laws that restrict assistance animals.

Eg SSMA 2015 (NSW), s139(5): A by-law has no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of an assistance animal used by an owner or occupier of the lot as an assistance animal or the use of an assistance animal or the use of an assistance animal by anyone else on a lot or common property.

Assistance animal is defined by the definition in s9 of the *Disability Discrimination Act 1992 (Cth)*

Ss(6) a by-law can require someone **who keeps an assistance animal on a lot** to provide evidence to the OC that the animal is an assistance animal under s9 of the *Disability Discrimination Act 1992*. This only applies to people keeping an animal in a lot, not people who might be on common property with an assistance animal.

However, s54A (5) DDA says it is not discrimination to ask for evidence



# Definition of assistance animal

*Dog or other animal:*

1. accredited under a law of a State or Territory **OR**
2. accredited by an animal training organisation prescribed by the regulations (none are prescribed) **OR**
3. trained:
  - (i) to assist a person with a disability to alleviate the effect of the disability; and
  - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place

In other words, an animal **does not** have to be professionally trained and they do not need to have accreditation

So when asking for 'evidence' of an animal being an assistance animal under s9 DDA, that evidence does not need to be professional training or accreditation





# The State of Queensland (Queensland Health) v Che Forest [2008] FCAFC 96

The applicant suffered from a psychiatric disorder and had two dogs who he had trained to help him. Qld Health had refused to let him bring the dogs into Cairns Base Hospital and a dental clinic because they had not been approved by the hospital management and management thought they were ill-behaved, ill-controlled and there was inadequate evidence of training.

Primary judge held that discrimination had been made out

On appeal, the Full Federal Court did not question primary judge's finding:

- that assistance dogs did not have to be a particular breed, and
- they could be trained by the owner; confirmed in *Mulligan v Virgin Australia Airlines Pty Ltd* [2015] FCAFC 130

The Court held that the animal had to be trained to assist someone **to alleviate their disability.**



# The Owners of Strata Plan 56117 v Drexler [2013] NSWDC 67

Dispute over whether Larry, a fox terrier, was a 'hearing dog' and thus, under s49(4) of the old SSMA 1996 (NSW) was not affected by a by-law prohibiting animals.

Held: that the description of a hearing dog from a Lions Hearing Dog pamphlet was not a definition of hearing dog for the purposes of the Act.

Registration of Larry as an assistance animal under the *Companion Animals Act 1998* (NSW) and his exemption from a fee as a result, was evidence of him being an assistance animal under s9 of the DDA



# Sheehan v Tin Can Bay Country Club [2002] FMCA 95

Assistance dog for Vietnam veteran who had a psychiatric disability

Held: That the Club could not require Mr Sheehan to have Bonnie on a leash when she was inside. Guide dogs are not always on leashes and nor should other assistance animals be.



# Disposal of interests in land: NSW

This is not covered by the Anti-Discrimination Act 1977 (NSW), with the exception of sexual harassment, (s22H ADA).

At Federal level, refusal to dispose of land prohibited on grounds of:

- Racial Discrimination Act: s12 'race, colour or national or ethnic origin'
- Sex Discrimination Act 1984: a 'person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding'
- Disability Discrimination Act: s26 refusal to dispose of land or on different terms because of a disability.
- Age Discrimination Act s30

Others states, disposal of land is also covered in discrimination legislation:

Eg *Equal Opportunity Act (Vic) s 47*; *Anti-Discrimination Act (Qld) Pt 4 Div 7*

The result is that in NSW, it is not illegal to refuse to transfer land to someone on grounds that would be illegal in other states, the most glaring example being religion

**However, s139(2): 'No by-law is capable of operating to prohibit or restrict the devolution of a lot'.**



# *Community Land Management Act 1989 (NSW)*

There is no general prohibition on restrictions on transfers in the community legislation but:

s17: By-laws in community schemes can fix the essence or theme of a development by:

‘limiting occupancy under the scheme to persons of a particular description’.

*Community Land Development Act 1989 (NSW)*, sch 3, cl 5(1)(c) excludes any prohibition or restriction based on ‘race or creed, or on ethnic or socio-economic grouping’.

This would prohibit themes based on religion (‘creed’ being belief).



# By-laws limiting occupancy

- New *Strata Schemes Management Act 2015* (NSW), s137: by-law may limit the occupancy of a lot but no less than 2 adults per bedroom
- ss6 "bedroom" is a room approved for use as a [bedroom](#) under, or indicated as a [bedroom](#) in any plans the subject of, a [planning approval](#) and includes any other room prescribed by the regulations as a [bedroom](#) for the purposes of this section.

Will have a disproportionately high impact on overseas students and people of limited financial means: people will typically only live with 3 or more adults to a bedroom because they have no financial alternative.

Occupancy limits have been routinely used in the US as a covert form of discrimination



# *Strata Schemes Management Regulation 2016*

Reg 36: the limit on occupancy does not apply if all adults are 'related to each other'.

A person is related to another person if:

- a) the person is the parent, guardian, grandparent, son, daughter, grandchild, brother, sister, uncle, aunt, niece, nephew or cousin of the other person, or
- b) the person is such a relative of the other person's spouse or de facto partner or former spouse or de facto partner
- c) the person is the spouse or de facto partner of the other person
- d) the person is the carer of, or is cared for by, the other person

For the purposes of this clause, a person who is an Aboriginal person or a Torres Strait Islander is also related to another person if the person is, or has been, part of the extended family or kin of the person according to the indigenous kinship system of the person's culture.



# Conclusion

1. Strata managers and building managers will all need to understand the definition of assistance animal, hearing and guide dog to ensure that by-laws restricting animals do not restrict these animals, contrary to the strata Acts.
2. If strata schemes provide 'goods and services', then strata schemes will be captured more generally by discrimination legislation in relation to
  - their management and retrofitting of common property and
  - their creation and implementation of by-laws.

That legislation will cover discrimination on the grounds of disability, age, race, gender, sexuality etc

It will vary from state to state eg religion is covered in most states, but not New South Wales.

