Strata schemes and discrimination

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Introduction

Strata schemes present real difficulties in relation to discrimination law that have not been sufficiently thought through in Australia, either by legislatures or by some tribunals. There are some activities of a strata scheme that are irrefutably captured by discrimination legislation. For example, members of executive committees are prohibited from sexually harassing their strata or building manager[1] or engaging in racial discrimination when employing a tradesman.[2] However, there are many activities of strata schemes that are not captured, or it is unclear if they are captured. The crux of the issue is that discrimination law generally only applies in the public sphere and strata schemes are private property. As a matter of law, we are entitled to be discriminatory in our private lives and in our homes. We may not be liked for refusing to assist a person with a disability into our home, but it is perfectly legal.[3] Prima facie, residential strata schemes are the same category as any other home; both common property and lots are private property controlled by their owners. The existence of legislative provisions in all states that ban by-laws that prohibit guide dogs or assistance animals is evidence of this. If schemes were public property and clearly regulated by discrimination legislation, the provisions would not be necessary.

The private nature of strata schemes has been highlighted by courts. In *Hu v Stansure Strata Pty Ltd & Ors* [2014] FCCA 905, the Federal Court had to consider whether s18C of the *Racial Discrimination Act* 1975 (Cth) (made notorious by the successful action against Daily Telegraph columnist, Andrew Bolt[4]), could apply to actions that occurred inside a strata scheme. Section 18C provided that it is an offence to offend,

[1] Eg *Anti-Discrimination* Act 1977 (NSW), s22B; *Anti-Discrimination Act* (Qld), sXX
[2] *Racial Discrimination Act* 1975 (Cth), s15
[3] The *Racial Discrimination Act*, s15(5) specifically exempts employment inside a flat or a dwelling house from the general prohibition on racial discrimination in employment.
[4] *Eatock v Bolt* [2011] FCA 1103

insult, humiliate, or intimidate someone on the basis of race, 'otherwise than in private'. While the Court was adamant that the alleged acts had not occurred, concluding that the applicant suffered from delusions, it was equally adamant that the strata scheme was not a public place.[5]

Administrative law decisions have also focused on the private nature of strata schemes. In *Jennifer Elizabeth James v The Owners Strata Plan No SP 11478 (No 4),* Ball J held that a compulsorily appointed strata manager,[6] carrying out the functions of a body corporate, did not have a duty to afford procedural fairness to lot owners. Justice Ball found that:

> The duty to afford procedural fairness is an obligation that is generally imposed as a matter of public law on statutory or administrative bodies. In some cases, the duty has also been applied to private bodies which are sufficiently public in nature. So, for example, in *Forbes v New South Wales Trotting Club Ltd* [1979] HCA 27; (1979) 143 CLR 242 it was accepted that the New South Wales Trotting Club was under an obligation to afford procedural fairness before excluding someone from its race course in accordance with its rules. On the other hand, it has been held that a casino operator was not under an obligation to exercise procedural fairness in deciding whether to exclude a patron from the casino, even though a right of exclusion is given by s 79 of the *Casino Control Act* 1992: *Hinkley v Star City Pty Ltd* [2010] NSWSC 138. That was because the casino operator was not exercising a 'public power' but merely a common law right: at [169] per Ward J.
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> In the present case, Mr Anderson [the compulsorily appointed strata manager] is not exercising a public power or something analogous to it. Although he is exercising a statutory power, that power is concerned with the administration of private property in which a number of individuals have an interest. His position is analogous to that of a receiver or an administrator of a company. When an owners corporation makes a decision that affects other owners, it is not

[5] *Hu v Stansure Strata Pty Ltd & Ors* [2014] FCCA 905 at [36]-[50].

[6] If a strata scheme is dysfunctional or an owners corporation is failing to carry out some or all of its obligations under the *Acts*, an adjudicator can appoint a strata manager to carry out some or all of the functions of the body corporate: *Strata Schemes Management Act* 1996 (NSW), s 162.

> exercising a 'public power' and does not need to afford procedural fairness. In particular, the making of a by-law under ss 52 or 65A only affects the private rights, interests and expectations of other lot owners. The SSM Act sets out procedures to ensure that those rights, interests and expectations are not unfairly defeated. So long as the decision is made in accordance with those procedures, it is valid. The appointment of a strata scheme manager under s 162 does not convert what was otherwise a private power to make decisions for the management of the strata scheme into a 'public power'.[7]

Justice Ball's reference to other private bodies such as the NSW Trotting Club being subject to public law highlights the fact that the public/private divide can be blurred. While some organisations are technically private, if their activities affect significant numbers of people who are 'strangers' to decision-makers in the organization, their functions have a public dimension. While Justice Ball was firm in characterizing strata schemes as being on the private side of the divide, it is arguable that the characterization of private residential governing bodies is not quite so clear.

For example, the question of whether bodies corporate are public or private actors has received considerable attention in the United States. Initially, supporters of homeowner associations (bodies corporate) were eager to characterize associations in typically low-rise master planned estates as public, 'mini-governments'. In 1976, Wayne Hyatt, professor, lawyer and former president of the Community Association Institute, wrote that '[u]pon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government'.[8] Garbage collection and park maintenance are equivalent to municipal services, assessments equivalent to taxes and private security guards equivalent to a police force.[9] However, a decade later, HOA advocates were retreating from this stance because of the threat that constitutional limitations on

[7] [2012] NSWSC 590, [52]–[53].

[8] W Hyatt and J Rhoads, 'Concepts of Liability in the Development and Administration of Condominium and Home Owner Associations' (1976) 12 *Wake Forest Law Review* 915.

[9] Security is one of the most significant services provided by HOAs. It is estimated that there are more private security guards in America than police. Leisure World, a retirement or 'adult' community in California, has more than 300 security guards patrolling the grounds: Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press, 1994), 141.

municipal government, in particular freedom of speech, would apply to HOAs, limiting their power.[10]

Constitutional limits on the power of a private land-owning entity had been applied by the United States Supreme Court in *Marsh v Alabama*[11] in 1945. The Court had held that the refusal of a privately-owned company town to grant Marsh, a Jehovah's Witness, a licence to distribute religious leaflets and her subsequent charge of trespass by the State were a violation of her First and Fourteenth Amendment rights to free speech. The Supreme Court held that while the town's pavements might be private property, property rights had to be balanced against other rights such as freedom of religion and speech.

Half a century later, the authority of *Marsh* was used by HOA residents to challenge HOAs' power to ban signs and the distribution of pamphlets. Bans were largely designed to prevent visual 'pollution', (similar to 'no signage' by-laws that are common in Australia), but the application of these rules to political signs and pamphlets, particularly in large-scale communities the size of suburbs, raised questions about conflict with free speech provisions in the United States' and individual states' constitutions. Bans also captured the display of flags, causing community outrage when people were instructed to remove the national flag, or in Texas, the Lone Star; sentiment ran particularly high after September 11.[12] In *Committee for a Better Twin Rivers (CFBTR) v Twin Rivers Homeowners' Association (TRHA),*[13] home owners in HOAs with 10,000 residents alleged that the Association rules, as well as its decisions on posting signs, access to a community room, and access to a community newsletter were violating their rights to free speech and free association. They claimed that the President of the Board used the community newsletter as his 'personal political trumpet' and that there was a discriminatory two-tiered charging system for use of the community room,

[10] The latest edition of Hyatt's textbook states that 'common interest communities are almost never treated as state actors subject to the constitutional constraints placed on public governments': Hyatt, Wayne S and Susan F French, *Community Association Law: Cases and Materials on Common Interest Communities* (Carolina Academic Press, 2nd ed, 2008), 113.
[11] 326 US 501 (1946).
[12] See Joseph William Singer, 'How Property Norms Construct the Externalities of Ownership' in Gregory Alexander and Eduardo Peñalver (eds), *Property and Community* (Oxford University Press, 2010) 57.
[13] 192 NJ 344 (2007).

clubs approved by the Association being given a lower rate. The plaintiffs argued that as the Association effectively replaced the role of a municipality, it should be subjected to the free speech and association clauses of the New Jersey constitution. Despite the authority of *Marsh*, the Court disagreed. It held that Twin Rivers was a private residential community whose residents, including the plaintiffs, had contractually agreed to abide by the rules and regulations of the Association. Those rules were subject to the business judgment rule, legislative provisions on HOAs, and traditional principles of property law, but not constitutional protections.[14]

While the plaintiffs in *Twin Rivers* lost their attempt to have homeowner associations characterized as public actors, the question of the limits that might need to be placed on the power of citizens in private residential developments to affect significant numbers of unrelated people remains, both in the United States and in Australia. Professor Evan McKenzie captures the dilemma nicely in this quote:

> The most basic principle of liberal democratic and constitutional government is the requirement that it must include enforceable limits on the power of government … Liberal democrats of the Founders' era believed that people cannot be trusted with unlimited power, because we are naturally selfish creatures and our emotions override our intellect. We are easily convinced that, by an amazing coincidence, the very course of action that suits our own self-interest just happens to be the morally correct and wise rule for the entire society.[15]

One of the most important limits on power in strata schemes is the application of discrimination legislation, which prevents intentional and inadvertent actions that cause the most egregious harm to fellow citizens. Despite the general principle that discrimination legislation operates in the public sphere and strata schemes operate in the

[14] See Duncan Kennedy, 'Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers' (1995) 105(3) *Yale Law Journal* 761. Kennedy argues that HOAs should be treated as state actors in relation to non-members because they non-members have not consented to their formation or rules.

[15] Evan McKenzie, *Beyond Privatopia: Rethinking Residential Private Government* (Urban Institute Press, 2011), 114.

private sphere, there is some grey middle ground in which the actions of strata schemes are captured.

The strata legislation

All of the state strata Acts have some anti-discrimination provisions embedded in them. For example, all states have a prohibition on by-laws that restrict transfer, leasing and mortgaging of lots. Although this provision is typically characterized as the mechanism which avoided the aspect of company title that made banks reluctant to fund their purchase, (that is, the ability of Boards of Directors to veto the transfer of shares on a mortgagee sale),[16] the provision also prevents schemes discriminating against purchasers in order to create communities of 'people like us', (which is of course precisely what company title buildings were doing when they sought to disapprove the transfer of shares to an 'unacceptable' purchaser).

Prohibition on discrimination in land transfers and leasing is one of the areas in which discrimination legislation does atypically regulate the actions of private citizens and is relatively thoroughly covered by state and Federal legislation. However, there are some gaps which the general prohibition on restrictions on transfer and leasing in strata legislation fill. For example, the Federal *Racial Discrimination Act* 1975 makes it unlawful for a person to refuse to dispose of an interest in land to someone on the basis of race, colour or national or ethnic origin,[17] the *Sexual Discrimination Ac*t 1984 (Cth) makes it unlawful to do so on the basis of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding,[18] and the *Disability Discrimination Act* 1992 (Cth) makes it unlawful to do so on the basis of disability.[19] States extend prohibitions to include age, which has led a number of Queensland body corporate schemes to have to apply for special exemptions from anti-discrimination legislation to convert their schemes to retirement communities.[20] However, state legislation varies. For example, the Queensland *Anti-*

[16] C Sherry, 'Land of the Free and Home of the Brave? The Implications of United States Homeowner Association Law for Australian Strata and Community Title' (2014) 23 *Australian Property Law Journal* 94, 96.

[17] *Racial Discrimination Act* 1977 (Cth), s12(1)(a)

[18] *Sexual Discrimination A*ct 1984 (Cth), s 24

[19] *Disability Discrimination Act* 1992 (Cth), s26.

[20] *Caloundra Gardens Village Body Corporate Committee* [2012] QCAT 98 (successful application); *Body Corporate for Village Green (Caloundra)* [2015] QCAT 101 (unsuccessful application).

Discrimination Act 1991 extends the prohibition of discrimination in the disposition of interests in land,[21] to include 'religious belief or religious activity' and 'political belief or activity',[22] while the New South Wales *Anti-Discrimination Act* 1977 does not. As a result, if a strata scheme in Sydney tried to create a by-law prohibiting the sale of lots to purchasers who were Presbyterian or public supporters of the Islamic State, neither state nor Federal legislation would prohibit this, but the general prohibition on by-laws restricting transfer of lots would. Further, the questionable provision in the New South Wales *Community Land Development Act* 1989, which allows community management statements to restrict 'occupancy under the scheme to persons of a particular description',[23] is in turn limited by a stipulation within the same Act that provisions in management statements not be based on 'race, creed, ethnic or socio-economic grouping'.[24] 'Creed' is a usefully broad term defined by the Macquarie Dictionary as 'any system of belief or of opinion'.

The other anti-discrimination provision that is included in all states' legislation is the prohibition on by-laws that restrict guide dogs. As stated earlier, the very existence of these provisions highlight the prima facie private nature of strata schemes. It is not illegal to refuse the entry of a guide dog into your own home, but it is illegal to refuse a guide dog entry into a public place.[25] If strata schemes were clearly public space, a special provision in the legislation would be unnecessary.

The guide dog provisions, or more specifically, the gap between the traditional term 'guide dog' and the more contemporary term 'assistance animal',[26] is a good illustration of the strengths and weaknesses of relying on specific provisions in strata

[21] *Anti-Discrimination Act* 1991 (Qld, s77. For the application of this section to the by-laws of a body corporate see *Body Corporate for Village Green (Caloundra)* [2015] QCAT 10

[22] *Anti-Discrimination Act* 1991 (Qld), s7(i) and (j).

[23] *CLMA* s 17(1)(a). This raises a question about the relationship between community management statements and strata by-laws in strata schemes that are inside a community scheme. Strata schemes and their members are bound by the management statements of precinct or community associations of which the strata scheme is a member: *CLMA* s 13. If there is an inconsistency between strata by-laws and a management statement, the management statement prevails: *SSMA* s 58. Thus a community management statement could restrict the community to people of a particular description and it would exclude people who did not match that description from owning or residing in the strata scheme.

[24] Community Land Development Act 1989, sch 3, cl 5(1)(c). This was expressly included to eliminate discriminatory by-laws: New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 1989, 12920 (Ian Causley).

[25] *Disability Discrimination Act* 1992 (Cth), s23 and s9.

[26] See *The Owners of Strata Plan 56117 v Drexler* [2013] NSWDC 67

legislation to prevent discrimination. Although the gap is gradually being solved by legislative amendment,[27] it remains instructive.

The prohibition on by-laws that ban guide dogs clearly protects people who rely on sight dogs from discrimination in strata schemes. However, there are many other people who rely on assistance animals, other than for disabilities that relate to sight who remain unprotected. For example, in accordance with the legislation in force in New South Wales at the time, *Thornton & Farnham v The Owners SP 30653 (Strata & Community Schemes)* ('*Thornton*') upheld the exclusion of an alleged assistance animal from a strata scheme on the grounds that the scheme's power to ban animals was only limited by a legislative prohibition on restrictions on guide and hearing dogs.[28] The dog was conceded to be neither a guide nor hearing dog, and consequently the provision of the strata legislation that was designed to prevent discrimination was useless.

However, the applicants in *Thorton* were well aware of the limitations in the New South Wales Act and consequently mounted an argument based on the application of discrimination legislation to the strata scheme. The applicants relied on *Hulena v Owners Corporation Strata Plan 13672* ('*Hulena*'),[29] a decision of the Administrative Decisions Tribunal, which had held that owners corporation activity was captured by the New South Wales *Anti-Discrimination Act* 1977. The Act prohibited discrimination on the basis of disability in the provision of 'goods and services'.[30] Ms Hulena, who suffered from multiple sclerosis, argued that by providing accessible entrances and exits from the common property to individual apartments the owners corporation was providing a 'service' within the meaning of section 49M of the Act, and by failing to provide entrances and exits that Ms Hulena could use, the owners corporation had indirectly discriminated against her contrary to s49B(1)(b). The Administrative Decisions Tribunal accepted her argument.

[27] eg the new proposed s139(5) of the Strata Schemes Management Bill 2015 (NSW) uses the term 'assistance animal'

[28] SSMA, s49(4)

[29] [2009] NSWADT 119.

[30] In *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119 at [53] the body corporate was found to provide the service of providing accessible entrances and exits from the common property to individual apartments within the complex. This was not challenged on appeal, see *Hulena v Owners Corporation Strata Plan 13672* [2010] NSWADTAP 27.

In response to the applicant's reliance on *Hulena*, Member O'Keefe said in *Thorton* that:

a. The [CTTT] has no jurisdiction to apply Anti-Discrimination law. Similarly, the ADT [Administrative Decisions Tribunal] has no jurisdiction to hear disputes with respect to the management of a strata scheme. That jurisdiction resides with this Tribunal and the superior courts.
b. In finding that an owners corporation provides a 'service' within the meaning of s 49B(1)(b) of the *Anti-Discrimination Act* 1977, the ADT has misunderstood the functions of an Owners Corporation. The powers and functions of an Owners Corporation are conferred on it by statute and are exercised for the 'benefit of the owners'; it is not a service offered or provided to anyone. (See generally Chapter Three – Key Management Areas, relevantly, sections 61, 62 and 65A: Strata Schemes Management Act 1996.) Furthermore, on any construction, it is difficult to see how the mere fact of a building's physical structure could be characterised as providing a 'service'. With all due respect to the ADT, it appears to have overreached its jurisdiction in *Hulena*. If however, *Hulena* is good law, then it may well have a profound effect on thousands of existing strata schemes: for example, would it require an Owners Corporation to install an elevator in a two story building so as to permit a wheelchair-bound lot owner to access an upper level lot, where previously only stairs existed?
c. A decision of the ADT is not binding on this Tribunal and it is noted that the ADT's web site indicates that *Hulena* is currently on appeal;[31] and
d. *Query whether the legislation relied upon by the appellants could ever apply to the scheme, given that the scheme is a private residential property and not open to the public, except by invitation* [emphasis added]. For example, the *Companion Animals Act* makes reference only to a 'building or place open to or used by the public.' Of course, commercial strata schemes are generally open to the public. In such a scheme, an assistance animal could not be refused entry.[32]

[31] No appeal from the decision in *Hulena v Owner's Corporation Strata Plan 13672* [2010] NSWADTAP 27 has been reported.
[32] [2010] NSWCTTT 511, [10].

It is suggested that Member O'Keefe was too quick to dismiss the question of whether discrimination legislation applies to strata schemes, characterising them as wholly private. The statement in (a) glosses over the crux of the issue. If an activity of a strata scheme is captured by discrimination legislation, the ADT, (now subsumed within the New South Wales Civil and Administrative Tribunal (NCAT)), had jurisdiction. Similarly, while the Consumer, Trader and Tenancy Tribunal, (now also subsumed within NCAT) is not the appropriate forum to commence discrimination proceedings, the Tribunal was still required to have reference to law outside the strata Acts when exercising its jurisdiction.[33] For example, under ss43(3) of the *Strata Schemes Management Act* 1996, a by-law has no effect to the extent it is inconsistent with any other Act or law. If an order were sought to invalidate a by-law under s159 of the Act on the grounds that it was inconsistent with discrimination legislation, the CTTT would have to consider discrimination law. However, a by-law would only be inconsistent with discrimination legislation if discrimination legislation applies to the activity of an owners corporation creating a by-law. That is the nub of the matter that Member O'Keefe glossed over.

Other cases have grasped the nettle more firmly than the CTTT in *Thorton*. For example, in *C v A* [2005] QADT 14, the Anti-Discrimination Tribunal Member engaged in detailed analysis to conclude at [29] 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.

Consequently the body corporate was captured by s46 of the *Anti-Discrimination Act* 1991 (Qld) which prohibits discrimination in the supply of goods and services. The Member also held that the body corporate would be covered by s83(d) of the Act that prohibited treating another person 'unfavourably in any way in connection with the accommodation.' In *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163, the Tribunal applied the reasoning in *C v A* to hold that a residential incorporated association that had functions 'akin to a body corporate' provided

[33] A similar blanket statement was made by the Member in *Breakers North* [2011] QBCCMCmr 437 at [69] when he stated 'the application of disability discrimination legislation is beyond this jurisdiction'.

'services' in the form of maintenance and access to 'recreational, sporting, and leisure facilities on the common areas.'[34] The Association was found to have indirectly discriminated against the applicant by requiring him to walk 75 metres to the community swimming pool rather than providing vehicular access. In *Ondrich v Kookaburra Park Eco-Village* [2009] FMCA 260 Burnett FM held at [157] that a body corporate provided 'services' for the purposes of the *Disability Discrimination* Act 1992 (Cth).[35]

These cases clearly establish that there is no bright line separating strata schemes activities and discrimination law. The question of whether schemes are captured will depend on the circumstances of the case. The final section of the paper will examine a number of case studies of discrimination issues that schemes may need to address.

Disability modification

The owners of a three story apartment that includes a garage and two levels of living space want to modify their apartment for the next phase of their lives. One of them has a chronic bone marrow disorder and is becoming too frail to use the stairs. They apply to the owners corporation for approval to install a lift from within their garage to the upstairs living spaces within their apartment. They agree to pay the cost of this estimated in the order of $60,000 and propose a by-law under which they assume the responsibility for the future maintenance and indemnify the owners corporation for any future loss. The installation does not affect the amenity of any other lot or common property. The proposal simply requires a hole to be cut in the common property slab and connections to utilities. An earlier proposal from another owner for a lift had been defeated, but it differed from the current proposal by using part of the common property

[34] *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163 at [30], [48]. However, the Tribunal found that s49N(2) of the *Anti-Discrimination Act* 1977 (NSW) did not apply to the Association. This section stated that,

'It is unlawful for a person, whether as principal or agent, to discriminate against a person on the ground of disability:

(a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person.'

The Tribunal held at [56] that the Association was not acting as a principal or agent in the provision of accommodation.

[35] The applicant in *Ondrich* did not succeed, not because the *Disability Discrimination Act* 1992 (Cth) did not apply to the body corporate community but because the evidence did not establish that the dog in question, Punta, had been trained to alleviate her disability in accordance with s9(1)(f) of the Act.

foyer.

Relations between owners and the owners corporation are not good. While the owners corporation has passed a by-law permitting the modifications necessary for the proposed lift, it has so far refused to permit the commencement of construction. Each time the applicants think they have satisfied the owners corporation requirements another is imposed. In the meantime, the applicant's bone marrow disorder is becoming worse and they seek advice. Dispute resolution proceedings under the *Strata Schemes Management Act 1996* (NSW) is not a favourable option as it is likely to take 3-6 months.

Proving discrimination under any piece of legislation is a multi-step process. First, it has to be determined that the applicant has an attribute covered by a discrimination statute. In this case, it is relatively straightforward. Disability is covered at both Federal and state level and the definition of disability is broad; in this case the presence in the body of organisms causing, or capable of causing disease or illness.[36] Secondly, the crucial question is whether any activity of a strata scheme is captured. Relying on the authority of *Hulena* and other cases noted above, it could be argued that by maintaining accessible entrances and exists to common property or by approving modification of common property, the owners corporation is providing goods and services.[37]

Thirdly, it has to be proved that there was discriminatory conduct. This can be problematic in strata schemes in which there have been unhappy relationships between owners, and ineffective decision-making; distinguishing between unlawful discrimination and hostility can be hard. For example, in *Fox v "Points North" Community Titles Scheme 4774*,[38] years of inaction, indecisiveness and complaints of discrimination proceeded the installation of a lift giving the applicant access to the pool. The applicant then brought further proceedings alleging that access was insufficient for his needs as the pathway contained a two inch step. The factual findings in that case concluded there had been no discrimination because, in the Tribunal Member's observation, Mr Fox had no difficulty negotiating a six inch step in Court, and there was 'no act or inaction of the body corporate as to the provision of improved access to the

[36] *Disability Discrimination Act 1992* (Cth), s 4; see also *Anti-Discrimination Act* 1977 (NSW), s 4.
[37] *Disability Discrimination Act* 1992 (Cth), s 24; *Anti-Discrimination Act* 1977 (NSW), s49M.
[38] [2008] QADT 13.

pool for people with Mr Fox's impairment is proved to have been motivated by unfavourable views of Mr Fox's impairment'.[39]

One of the crucial questions in relation to discriminatory conduct is whether direct or indirect discrimination has occurred. In the lift example at hand, there is no direct discrimination because all owners are presumably subject to the same processes, but there may be indirect discrimination. It could be argued that the owners corporation has by its conduct effectively denied the installation and therefore imposes a requirement on the applicant to use the stairs, which is something persons with her condition cannot do and that requirement is not reasonable having regard to the circumstances of the case.[40]

Finally, even if there is indirect discrimination, it is possible for the discriminator to argue that they have the benefit of a statutory exemption based on 'unjustifiable hardship'. If a discriminator would have to conduct major renovations to property in order to prevent the discrimination, they may not be required to do so, depending on the circumstances of the case. However, case law suggests that owners corporations with relatively large budgets and reserve funds, may have difficulty making out a case.

For example, in *Sutherland v Tallong Park Association*,[41] above, in which the Tribunal found that an association had indirectly discriminated against Mr Sutherland by failing to provide vehicular access to the pool, the cost of installing a roadway to allow him to park close to the pool was up to $15,218. This was found not to constitute unjustifiable hardship in the context of an association with net assets of $1,061,854.23, and being in keeping with expenditure on other amenities such as a children's playground area. In *C v A*, the installation of proximity devises for opening a pool gate that would cost "some thousands of dollars" was justified in circumstance where the respondent was a large body corporate for units valued at approximately $750,000, there would be minimal disruption from the installation and no incidental detriment to others.[42] In *Hulena* modifications of $16,247 plus power supply and maintenance would not impose an

[39] Ibid at [18].
[40] *Anti-Discrimination Act* 1977 (NSW), s 49B(1)(b).
[41] [2006] NSWADT 163.
[42] [2005] QADT 14 at [55].

inappropriate burden on the owners corporation with owners funds of $957,256.78.[43] In the case at hand unjustifiable hardship would be even less likely as the owners had agreed to pay for the installation and be responsible for its future repairs and maintenance. Further, the installation would not affect the amenity of lots or common property.

With a rapidly aging population, retrofitting of strata schemes to accommodate disability is going to become a pressing sector for the industry. Owners corporations refusal to consent to modifications to common property paid for by a lot owner arguably lacks commonsense when there is a clear possibility that is a consequence of discrimination legislation, owners corporations might be required to bear those costs themselves.

Public strata schemes – large master planned estates and commercial schemes

The size and nature of a strata scheme may determine if it is covered by discrimination legislation. For example it is illegal to prevent a woman from breastfeeding in a public place under Federal and all state legislation. This raises the question, would a strata scheme have breached the law if a member of the executive committee or a building manager asked a woman to stop breastfeeding on common property while she was waiting for a friend?

The Federal *Sex Discrimination Act* 1984 (Cth) covers breastfeeding in s7AA, but only in relation to specific areas such as employment, clubs, education, dispositions of interests in land, accommodation and goods and services. If the woman were a resident of the scheme, it is possible that preventing her from breastfeeding on common property would amount to denying her a 'benefit associated with accommodation' occupied by her, contrary to s23(2)(a) of the Act. However, if the woman were not a resident, whether the prohibition on breastfeeding would amount to illegal discrimination would depend on the nature and size of the scheme. This is because s22 of the Act makes it

[43] *Hulena v Owners Corporation Strata Plan 13672* [2009] NSWADT 119, [120], [123], [124]; *Hulena v Owners Corporation Strata Plan 13672* [2010] NSWADTAP 27, [36].

illegal to discriminate when making 'facilities available'. An owners corporation would not be 'making facilities available' to a non-resident by the provision of space or a chair in the foyer of an ordinary residential scheme, but it arguably would be in the foyer of a commercial strata scheme or in a publicly-accessible park in a large, low-rise residential scheme. Although technically private property, common property that is accessible by the public will be captured by the *Sex Discrimination Act*.

Similarly, s23 of the *Disability Discrimination Act* 1992 (Cth) makes it unlawful to discriminate on the basis of disability in relation to 'any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not)' and as a result, regardless of whether responsibility for common property is considered provision of a 'service', (discussed above), if the common property is accessible by the public, it must be accessible to everyone. Identifying the dividing line between purely private property and private property that the public are entitled to enter turns on the nature of the building in question. In *Allen v United Grand Lodge of Queensland* [1999] HREOCA 19, in determining whether the United Grand Lodge of Queensland Masonic Temple in Brisbane and the Kingaroy Masonic Lodge were premises to which the Act applied, the Inquiry Commission said,

> Therefore what constitutes a section of the public for the purpose of s.23 will be determined having regard to the nature of the premises and the purpose for which the premises will normally be entered or used, the relationship between the premises and the public generally, the degree of control which the owner or controller of premises will lawfully exercise in respect of entry to and use of those premises, the nature and extent of the person or persons who are the usual entrants or users, whether any special relationship or connection exists between the premises and the usual entrants or users and whether a section of the public is comprised of persons possessing particular or specific characteristics which bears some special relationship or connection with the use of the particular premises.
>
> Each case will fall to be determined by reference to its own facts and circumstances.

Of course modern strata schemes that are accessible to the general public will have been required to provide disability access as a condition of their development, but the question may nonetheless arise. Strata schemes would also be entitled to argue that they are exempt from providing disability access to members of the public on the grounds of 'unjustifiable hardship',[44] but the larger the scheme and the bigger its budget, the more difficulty it may have making this argument.

Use of community facilities

A Muslim women's group would like to use the community hall for regular prayer meetings. Worried that religious activity on common property may disturb or offend other residents, the executive committee approves their request with the proviso that the group cover the windows with brown paper.

Religious display has been the source of considerable debate in private communities in the United States, but not subject to attention in Australia. In *Bloch v. Frischholz*, 587 F. 3d 771 - Court of Appeals, 7th Circuit 2009, long-time condominium residents, the Blochs, were ordered to take down a mezuzah[45] that they had outside their door, as it violated a condominium rule against objects in the hallway. The Blochs successfully sued their condominium association alleging religious and racial discrimination. The details of United States Fair Housing legislation discussed in the case are not relevant for our purposes here, but the facts illustrate the way in which by-laws of a private community, including those which seem neutral, can be discriminatory.[46] Similar tensions have arisen over Christmas lights and whether it is acceptable for levies to be used to fund lights, or whether it is acceptable for lights to be displayed at all.[47]

The question of whether the requirement to cover windows with brown paper is discriminatory would depend on the state in Australia in which these fact occurred.

[44] *Disability Discrimination Act*, s29A and s11

[45] A mezuzah is small box containing a scroll with passages from the Torah, which many Jews through desire or religious conviction, attach to their right door post.

[46] For a discussion of the case, see Martha C Nussbaum, 'Deliberation and Insight: Bloch v Frischholz and the Chicago School of Judicial Behavior Essay' (2010) 77 *University of Chicago Law Review* 1139.

[47] Robert H Nelson, *Private Neighbourhoods and the Transformation of Local Government* (Urban Institute Press), 59.

There is no general provision prohibiting religious discrimination at Federal level, nor is there in state law in New South Wales. As a result, even if the women's prayer group felt that they had been discriminated against, they would have no avenue for complaint in New South Wales.

In contrast, all other states have provisions covering religious discrimination, but it is not clear that they would capture a strata scheme. For example, if this fact scenario occurred in Victoria, s6(n) of the *Equal Opportunity Act* 2010 defines religion or religious activity as an 'attribute' that must not be the basis of discrimination. However, there must also be an area of activity in which discrimination is prohibited. The only possibilities are s44 of the Act which prohibits a person discriminating in 'the terms on which goods or services are provided to the other person' or 'subjecting the other person to any other detriment in connection with the provision of goods or services to him or her'. This section would only apply if the management of common property is a 'service' within the meaning of the Act, and arguably, if it could be shown that only Islamic prayer groups, and not all prayer groups, were subjected to the requirement to cover the community hall windows when at prayer. Alternatively, it could be argued that it would only need to be shown that other groups within the community were not required to cover the windows, no matter what the activity, religious or not.

The other possible section of the legislation to capture the owners corporation decision would be 'denying or limiting access by [another] person to any benefit associated with [their] accommodation', contrary to s53(b). The application of this provision suffers from the fact that discrimination in 'accommodation' prima facie covers accommodation *providers* like landlords. An owners corporation does not provide accommodation.[48] That owners corporations are not covered by the general provisions on discrimination in accommodation is strengthened by s56 of the Act which is a special provision on owners corporations. It prohibits an owners corporation from refusing to allow an owner or an occupier of a lot with a disability to alter common property at their own expense, if the alteration will not adversely affect other lot owners or the owners corporation and if the common property can reasonably be rectified and

[48] The Tribunal Member in *C v A* [2005] QADT accepted that a similar provision on 'accommodation' applied in the case, while the Member in *Sutherland v Tallong Park Association Incorporated* [2006] NSWADT 163 rejected such a contention; see above n 34.

the person with the disability agrees to restore if before vacating. If the general provisions on non-discrimination in the provision of accommodation applied to owners corporations, s56 would be unnecessary.

The conclusion of this scenario is that the decision of the owners corporation may be covered by discrimination legislation and that it would depend on the state in which it occurred

Conclusion

The blurred line between the public/private divide in strata schemes will be a source of growing tension in years to come. It is commonplace to hear people refer to strata schemes as the 'fourth tier of government' and we need to grapple with the social and legal consequences of that characterisation. Even if owners corporations are not 'governments' per se, the law readily accepts that the activities of some private organisations can be sufficiently public to justify limitations on their powers. Discrimination legislation is a significant limit on the exercise of public power and public activities, and it will be applied with increased frequency to strata schemes.