



Review of the keeping of animals in strata schemes in NSW

Report under section 276A of the *Strata Schemes
Management Act 2015*

August 2021

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1. Introduction

This report is required under section 267A of the *Strata Schemes Management Act 2015* (the **Act**). Section 276A of the Act requires the Minister for Better Regulation and Innovation to review the Act as it relates to the keeping of animals on lots in strata schemes. The requirement to undertake the review was introduced as part of the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* (the **Sustainability Infrastructure Act**).

The Sustainability Infrastructure Act received assent on 24 February 2021 and contained amendments to the Act to reduce barriers to the installation of sustainability infrastructure in strata schemes. It also included miscellaneous amendments, including two about the keeping of animals:

- **section 137B** – prevents a by-law or a decision of an owners corporation under a by-law from banning the keeping of an animal unless the animal unreasonably interferes with another occupant's use and enjoyment of their lot or the common property. This section also allows for regulations to be made specifying circumstances in which unreasonable interference occurs. Section 137B is due to commence on 25 August 2021.
- **section 276A** – requires the Minister for Better Regulation and Innovation to review the Act as it relates to the keeping of animals on lots in strata schemes. Section 276A sets out the matters that must be considered by the review and requires a report on the review to be tabled in both Houses of Parliament by 25 August 2021.

These amendments are intended to provide clarity in the way the Act regulates the keeping of animals following the decision of the Court of Appeal of the Supreme Court of NSW in *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250 (**Cooper**). In *Cooper*, the Court of Appeal overturned a by-law that imposed a blanket ban on the keeping of animals and provided a general ruling on how the prohibition on harsh, unconscionable and oppressive by-laws is to be applied.

The changes introduced through the Sustainability Infrastructure Act, including the requirement to undertake this review, build on the precedent set by the Court of Appeal in *Cooper*.

1.1 Consultation

This report has been informed by four months of public consultation as part of the statutory review of the Act and an additional survey relating specifically to the keeping of animals in strata schemes.

A discussion paper on the statutory review was released in November 2020, which sought public feedback on how the Act is performing and whether any changes to the Act are needed. Over 60 submissions to the broader statutory review commented on the regulation of animals in strata schemes.

Organisations that provided a stand-alone submission on the keeping of animals included:

- Domestic Violence NSW

- Animal Care Australia
- RSPCA NSW
- Cat Protection Society of NSW
- Women's Legal Service NSW
- Owners Corporation Network
- Mars Petcare Australia
- NSW Young Lawyers (Animal Law Committee), and
- Western Sydney University Institute for Culture and Society.

After the Sustainability Infrastructure Act passed NSW Parliament in February 2021, public consultation on the broader statutory review was updated to include an additional survey on the keeping of pets and was extended by a month to 7 April 2021. The pets in strata survey was open for six weeks on the NSW Have Your Say website and received 1,601 responses.

This report is informed by responses to the pets survey and the statutory review, as well as broader media, academic and legal research, and a review of NSW Fair Trading information on strata complaints and inquiries.

1.2 Scope

Section 276A of the Act sets out the matters that this report is required to address, including:

- a) the circumstances in which it is reasonable to prohibit the keeping of animals,
- b) the impacts of kept animals on the health and wellbeing of residents,
- c) the barriers faced by residents in the keeping of animals and by persons who require assistance animals, including vulnerable persons (such as those fleeing domestic violence),
- d) the welfare of kept animals,
- e) how to limit any adverse impacts of kept animals on common property, including the adequacy of existing laws to deal with this,
- f) how to resolve disputes about the keeping of animals, and
- g) the effects of a change to the by-laws for a scheme that prohibits the keeping of an animal that was lawfully kept on a lot before the change.

While the regulation of animals in strata schemes is mostly covered by the Act, other NSW legislation can affect whether a person living in a strata scheme may keep an animal.

For example, the *Residential Tenancies Act 2010* gives a landlord discretion to refuse a tenant keeping an animal in the tenanted property, including strata lots. In those circumstances, a tenant will not be able to keep an animal on their lot even if the strata scheme's by-laws allow the keeping of pets.

The Department of Customer Service has also drawn on the *Companion Animals Act 1998* (**Companion Animals Act**) to inform this report. This has been considered in the drafting of regulations under section 137B of the Act that set out circumstances in which the keeping of an animal unreasonably interferes with another person's use and enjoyment of their lot or the common property.

2. Executive Summary

Australia has one of the highest rates of pet ownership in the world.¹ Sixty-one percent of Australian households currently own a pet and 91% of households have had a pet at some point in their lives. The keeping of animals in strata schemes is becoming an increasingly important topic as more people choose to live in apartments. More than 15% (approximately 1,125,000) of NSW's total residents, and 22% (approximately 600,000) of the state's total households live in apartments. These figures continue to grow as around 1,000 new strata schemes are established each year. The growing importance of this topic is also reflected in the large response to the public consultation on this issue.

The decision of the Court of Appeal in *Cooper*, and the subsequent amendments contained in the Sustainability Infrastructure Act make it clear that an owners corporation cannot impose a blanket prohibition on the keeping of animals in a strata scheme. The regulation of animals in strata schemes now involves balancing the right of strata occupants to use their property as they like – including keeping an animal – with the right of other occupants not to suffer unreasonable interference as a result.

The findings and recommendations of this report reflect careful consideration of the 1,601 responses to the pets in strata survey and over 60 submissions to the broader statutory review of the Act that considered the regulation of animals.

This report is intended to inform the making of the supporting regulations under section 137B(3) of the Act. Importantly, the report intends to consider and comment on whether the Act is working to safeguard the rights of strata occupants as they relate to the keeping of animals.

A summary of the report's findings and recommendations is included below.

Findings

Finding 1

The circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property are:

- the animal persistently makes a noise that occurs to the degree that the noise unreasonably interferes with the peace, comfort or convenience of another occupant, or
- the animal repeatedly runs at or chases another occupant, a visitor of another occupant or an animal kept by another occupant, or

¹ Animal Medicines Australia (AMA) 2019, *Pets in Australia: a national survey of pets and people*, Animal Medicines Australia.

- the animal attacks or otherwise menaces another occupant, a visitor of another occupant or an animal kept by another occupant, or
- the animal repeatedly causes damage to the common property or another lot, or
- the animal endangers the health of another occupant through infection or infestation, or
- the animal causes a persistent offensive odour that penetrates another lot or the common property, or
- for a cat that is kept on a lot — the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998*, section 31, or
- for a dog that is kept on a lot — the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998*, section 32A, or
- the animal is a restricted dog within the meaning of the *Companion Animals Act 1998*, section 55(1), or
- the animal is declared to be a menacing dog or a dangerous dog under the *Companion Animals Act 1998*, section 34.

Finding 2

The owners corporation of a strata scheme should be allowed to impose reasonable conditions on the keeping of an animal in their by-laws.

Finding 3

The keeping of animals in strata schemes can have both positive and negative impacts on residents in strata schemes. Animal owners should practise responsible pet ownership to reduce the negative impacts on those with allergies or a fear of animals.

Finding 4

The commencement of section 137B should address the most prevalent barriers to animal ownership identified through consultation.

Finding 5

Section 137B should also benefit owners of assistance animals. Owners may no longer need to disclose that their animal is an assistance animal in order to obtain approval, or if they do, their pathway to approval should be easier.

Finding 6

Barriers to the keeping of an animal in a strata scheme can create negative outcomes. This particularly affects people who want to leave a situation of family or domestic violence with their pet, and people experiencing homelessness with a companion animal.

Finding 7

The evidence does not support assertions that it is harmful to an animal's welfare to allow them to live in strata schemes.

Finding 8

There are appropriate channels in place to report concerns about animal cruelty or neglect.

Finding 9

The Act is not the appropriate legislative mechanism to set requirements for consideration of animal welfare.

Finding 10

Owners corporations and strata committees do not have expertise in assessing animal welfare and should not be required to make such assessments.

Finding 11

Section 137B of the Act will operate alongside and complement the existing provisions of the Act that regulate the types of by-laws that an owners corporation can make and the process for enforcement of by-laws. The existing provisions in the Act, including the new section 137B, should be adequate to address the impact of kept animals on the common property. It is not necessary to create a further additional regulatory framework under the Act for the regulation of pets in strata schemes.

Finding 12

The ongoing statutory review of the Act should evaluate how the parts of the Act that regulate by-laws are performing and whether any further changes are necessary.

Finding 13

The dispute resolution regime outlined in the Act is consistent with survey respondents' preferred dispute resolution options, including the use of escalating tiers. Dispute resolution can begin with a process internal to the strata scheme in which they occur. Following this, disputes can be brought to NSW Fair Trading for mediation. If the dispute remains unresolved, it may then be taken to the NSW Civil and Administrative Tribunal (the **Tribunal**) to seek an order.

Finding 14

Survey respondents' preferred option is for previously approved animals to be allowed to stay in a scheme that changes its by-laws to ban an animal.

Finding 15

The commencement of section 137B will limit those situations where an animal was previously allowed in a strata scheme but will no longer be allowed. Owners corporations that move to prohibit an animal that was previously allowed will only be able to do so if there is unreasonable interference with other occupants. Owners corporations should be careful to act reasonably and

explore options that would enable the animal to remain, especially in light of the prohibition in section 139(1) on by-laws being 'harsh, unconscionable or oppressive'.

Recommendations

Recommendation 1

The circumstances listed in Finding 1 should be included in regulations made under section 137B(3) of the Act.

Recommendation 2

Regulations made under section 137B(3) of the Act should operate alongside and complement the existing provisions of the Act and other NSW legislation that regulates animals, including the *Companion Animals Act 1998*.

3. The current regulation of pets in strata schemes

In 2015, the *Strata Schemes Management Act* was rewritten following a comprehensive review by the NSW Government. The Act now includes additional consumer protections not found in the repealed 1996 Act. For example, section 139(1) of the Act provides that a by-law of an owners corporation must not be harsh, unconscionable, or oppressive. Further to this, the Act gives powers to the Tribunal to invalidate a harsh, oppressive or unconscionable by-law under section 150.

The Tribunal has the power to make orders related to the keeping of animals. Sections 156 – 158 of the Act allow the Tribunal to make an order either permitting, or requiring the removal of, an animal from a strata scheme which was either permitted or not permitted under the scheme's by-laws.

The Act modified protections for residents requiring assistance animals. Under section 139(5) of the Act, a by-law cannot prevent a resident from keeping an assistance animal as defined by the *Disability Discrimination Act 1992* (Cth). However, the owners corporation can ask for evidence of an assistance animal's status in accordance with section 139(6) of the Act.

The 2010 Regulation was also remade in 2016 to reflect the changes to the Act. The *Strata Schemes Management Regulation 2016* (the **Regulation**) contained updated model by-laws, which included two options for the keeping of animals:

1. Option A, the default option, allows animals in the scheme so long as written notice is provided to the owners corporation, or
2. Option B allows an owner to keep an animal on a lot with the written approval of the owners corporation, which must not be unreasonably withheld.

It is noted that a scheme can choose not to use the model by-laws in the Regulations. Instead, a scheme can adopt their own by-law to regulate the keeping of animals – so long as the by-laws do not conflict with the Act or another law.

On 12 October 2020, the Court of Appeal of the Supreme Court of New South Wales handed down its decision in *Cooper*. The Court of Appeal ruled that a by-law of the Horizon Building in Darlinghurst that imposed a blanket prohibition on the keeping of animals was an oppressive by-law, which contravened section 139(1) of the Act.

The Court of Appeal's decision in *Cooper* provides a general ruling about how a by-law can be "harsh, unconscionable or oppressive". The judgment provides that a by-law can be oppressive if it limits the ability of an owner to use their property, without exception or qualification, on a basis that has no connection to the impact on other lot owners.

Amendments were introduced through the Sustainability Infrastructure Act for legislative clarity on the *Cooper* decision by providing that a by-law, or an owners corporation's decision under a by-

law, cannot unreasonably prohibit the keeping of an animal. Under section 137B of the Act, a provision was introduced to clarify that the keeping of an animal is taken to be reasonable *unless* the animal unreasonably interferes with another resident's use and enjoyment of their lot or the common property.

Further to this, amendments to the Sustainability Infrastructure Act also provided that regulations may specify circumstances in which such unreasonable interference occurs. Importantly, an amendment was introduced under section 137B(6) of the Act which requires that if a report under this section has been tabled in Parliament, the Minister must not recommend the making of a regulation unless the Minister has considered the report.

4. Analysis and findings

The survey about keeping animals in strata schemes received 1,601 responses over six weeks, which is among the highest rates of response to recent NSW Government public policy consultations. These responses have been considered together with over 60 submissions to the broader statutory review of the Act that commented on the regulation of animals.

Of the 1,601 respondents to the pets in strata survey:

- 936 own and live in strata
- 293 rent a unit in a strata scheme
- 210 own but do not live in strata
- 28 work in the strata industry
- 24 are legal professionals
- 22 represent people that own or live in strata
- 9 are industry associations representing people that work in strata
- 181 belong to other categories such as a prospective strata owner or tenant, or a veterinarian.

Out of 1,304 respondents who live in strata schemes, 72% said they either own or would like to own an animal and 28% said they do not or would not. The pets in strata survey identified that the most popular animals kept in strata schemes in descending order are dogs, cats, birds, fish and reptiles.

The results of the public consultation show that the issue of the regulation of pets in strata attracts strong views from people who wish to keep animals on their lot. Equally strongly held views were expressed by people who would like the right to decide whether their owners corporation allows any animals to reside in the scheme.

4.1 The circumstances in which it is reasonable to prohibit the keeping of animals

Section 137B(2) of the Act provides that it is reasonable to keep an animal on a lot unless the animal unreasonably interferes with another occupant's use and enjoyment of their lot or the common property. The regulation may specify circumstances in which an animal causes unreasonable interference with other occupants, which is one of the matters that this report is required to examine under section 276A.

The pets in strata survey sought feedback on targeted questions about circumstances that might constitute "unreasonable interference". The survey asked whether animals were likely to cause interference with other occupants, what that interference would be, and when it is reasonable to prohibit an animal in a strata scheme.

Of 1,590 responses, 59% (943) thought that residents keeping animals in a strata scheme would not interfere with another resident's use and enjoyment of their lot or the common property, while 41% (647) said that it would.

When asked about how an animal could interfere with other occupants, responses included:

- noise,
- smell,
- other adverse impacts on health and wellbeing, and
- potential damage to or soiling of common property.

Other concerns about the presence of animals in strata schemes cited by respondents included:

- anxiety from a general fear of animals,
- risk of being attacked by an animal,
- allergies,
- negative impacts on local wildlife, and
- animals trespassing on and causing damage to neighbouring property.

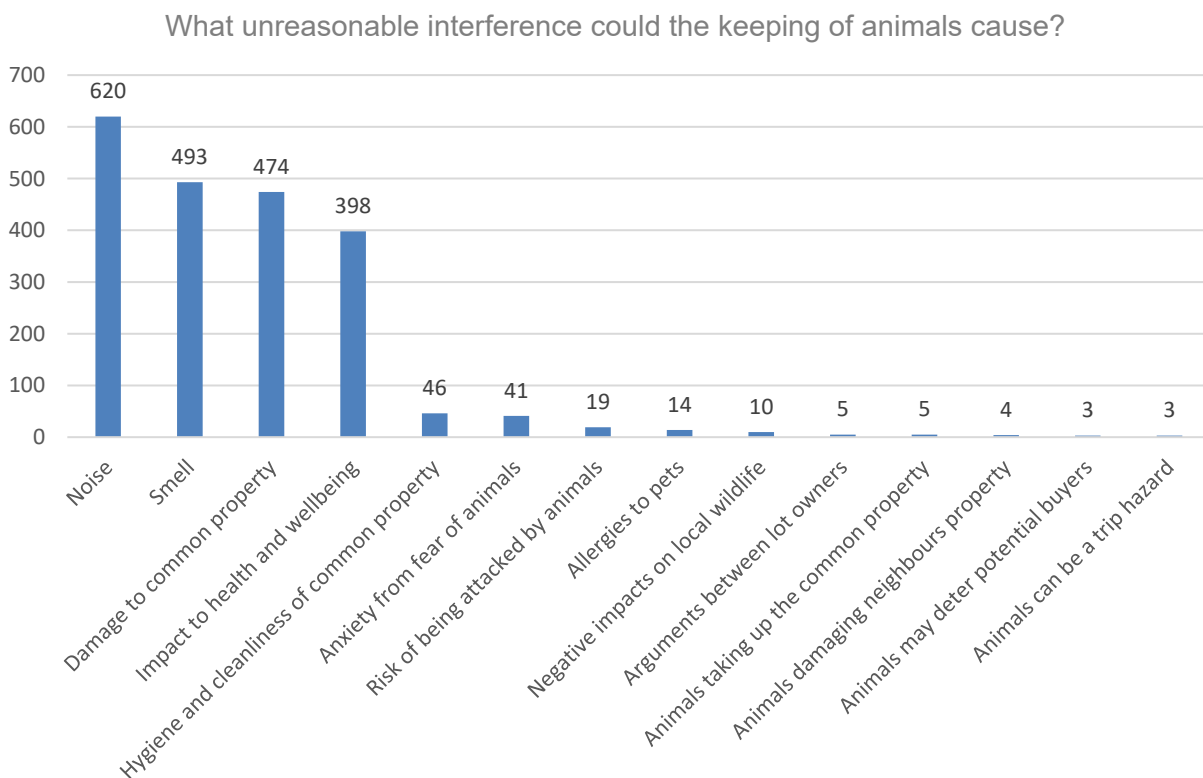


Figure 1 – Responses to “What is unreasonable interference?” (respondents could provide more than one answer).

The survey also asked when it would be reasonable to prohibit the keeping of an animal in a strata scheme. Responses to this question were generally consistent with the most common responses to “What is unreasonable interference?”. Responses included: when the animal causes noise,

adverse impacts on hygiene and health, the animal is a dangerous breed, the owner does not take responsibility for the animal, and the animal damages common property or neighbouring property.

The full list of responses is found in the table below.

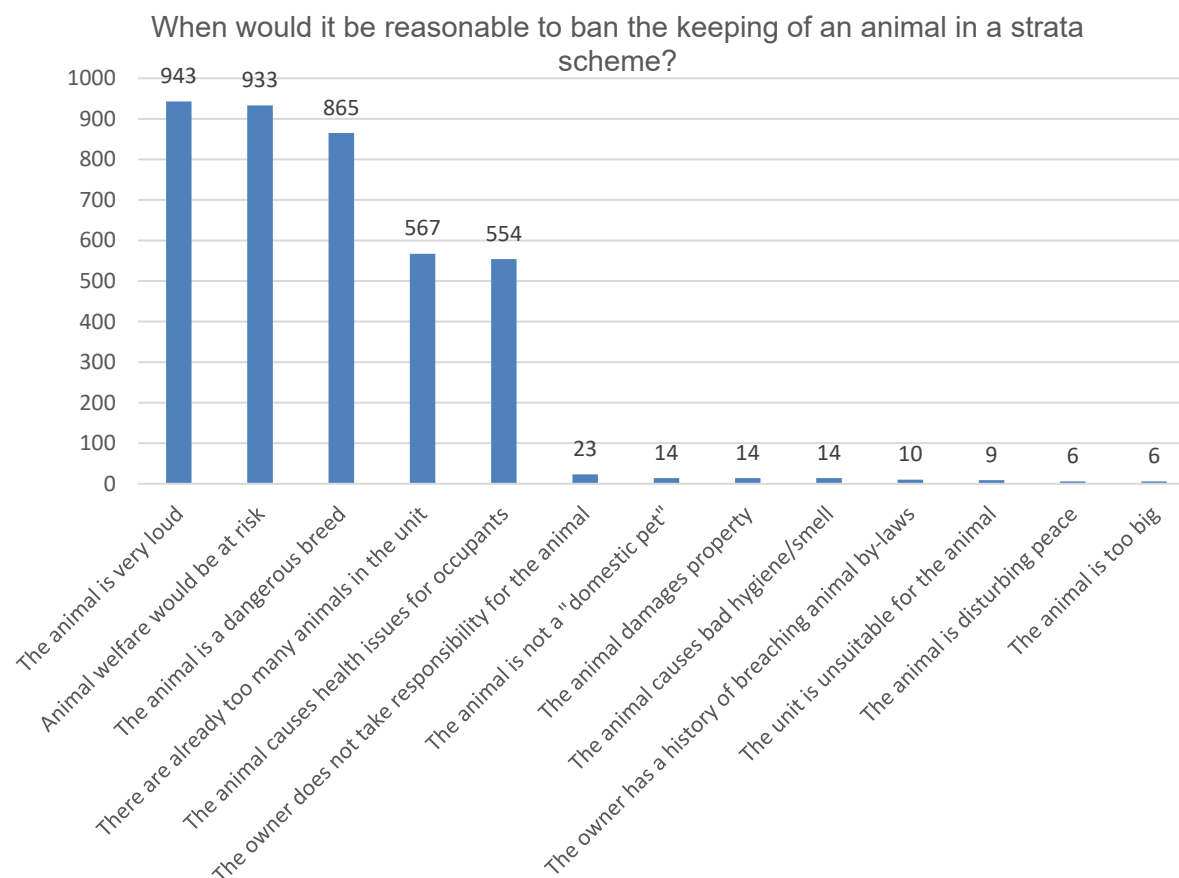


Figure 2 – Responses to “When is it reasonable to prohibit the keeping of an animal in a strata scheme?”

In determining which types of interference are unreasonable and should be specified in the regulations, this review has been informed by a number of sources. This includes: the *Cooper* decision, the general framework governing by-laws made by strata schemes and the common law tort of nuisance, which also involves a judgement of when the interference with someone’s right to enjoy their property is unreasonable and should be prevented.

In *Cooper*, the Court of Appeal emphasised that lot owners in strata schemes are entitled to enjoy and exercise the ordinary rights attached to ownership of property, including the keeping of pets, subject to the by-laws validly made by an owners corporation. While the Act enables owners corporations to make many of their decisions by simple majority (an ordinary resolution), the Court clarified these democratic processes did not permit owners corporations to function as a “majoritarian dictatorship”. The Court went on to say that owners corporations’ decisions are still

subject to legal constraints protecting minorities from oppression, and that even a unanimous decision may be held to be oppressive based on its effect.

The tort of private nuisance is committed when a person substantially and unreasonably interferes with another person's right to the use and enjoyment of their property. The mere causing of *some* inconvenience is not enough to cause a nuisance. Instead, the impact needs to be substantial, unreasonable and ongoing, when considering ordinary and reasonable uses of the land, usually by a person of ordinary sensitivity. Consideration may also be given to whether the person could do anything reasonable to lessen the impact.

The decision in *Cooper*, and the extent of responses to the survey and submissions to the broader statutory review demonstrate the need for clarity on this issue. In light of this, it is clear that the regulation of animals in strata schemes requires carefully balancing the rights of strata owners to use their property, which includes the keeping of animals, with the rights of all other occupants not to suffer an unreasonable interference, nuisance or hazard.

The review found that the circumstances prescribed under the regulations as causing unreasonable interference should be clearly established. This is because once those circumstances are shown to exist, the prohibition of an animal will generally be difficult to challenge.

The prescribed circumstances in the regulations should be those that can be objectively assessed by an owners corporation without special expertise.

The review therefore recommends that the following are circumstances where the keeping of an animal unreasonably interferes with another occupant's use or enjoyment of their lot or the common property:

- the animal makes a noise that persistently occurs to the degree that the noise unreasonably interferes with the peace, comfort or convenience of another occupant
- the animal repeatedly runs at or chases another occupant, a visitor of another occupant or an animal kept by another occupant
- the animal attacks or otherwise menaces another occupant, a visitor of another occupant or an animal kept by another occupant
- the animal repeatedly causes damage to the common property or another lot
- the animal endangers the health of another occupant through infection or infestation
- the animal causes a persistent offensive odour that penetrates another lot or the common property
- for a cat that is kept on a lot — the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998* section 31 (declaring the cat to be a nuisance cat)
- for a dog that is kept on a lot — the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998*, section 32A (declaring the dog to be a nuisance dog)
- the animal is a restricted dog within the meaning of the *Companion Animals Act 1998*, section 55(1)
- the animal is declared to be a menacing dog or a dangerous dog under the *Companion Animals Act 1998*, section 34.

Other circumstances suggested in the consultation are not suitable to be included in the regulations. The circumstances should not include personal preferences or fears, which are difficult to objectively assess, may involve someone with extraordinary sensitivity, and are not a sound basis on which to restrict another occupant's right to use their property. The animal impacting on local wildlife is not an impact on other occupants' use and enjoyment of their property, so this circumstance does not fall within the regulation-making power.

'There are already too many animals in the scheme' was raised in public feedback as grounds for unreasonable interference. However, this should not be included in the regulations. There is no objective way to assess how many is too many, and the applicable test is instead whether the keeping of the animal or animals in question impacts unreasonably on other occupants.

The issue of animal allergies is dealt with below in considering the impact of animals on health and wellbeing.

The owners corporation can set reasonable conditions on the keeping of an animal

The review found that it is common for owners corporations to impose conditions on the keeping of animals in the scheme's by-laws.

Both options A and B in the model by-laws prescribed under Schedule 3 to the *Strata Schemes Management Regulation 2016* include the following clause:

If an owner or occupier of a lot keeps an animal on the lot, the owner or occupier must—

- (a) keep the animal within the lot, and
- (b) supervise the animal when it is on the common property, and
- (c) take any action that is necessary to clean all areas of the lot or the common property that are soiled by the animal.

Section 137B of the Act will prevent owners corporations from making a by-law, or from making a decision under a by-law, to prohibit an animal unless that animal causes an unreasonable interference to other residents. However, in order to prevent or minimise unreasonable interference, owners corporations may use the by-laws to set reasonable conditions on how animals are to be kept in the scheme, as demonstrated through the model by-laws above.

Dealing with animal waste is one example of an issue that should be managed through by-laws. The model by-laws provide one method for dealing with animal waste, however the review found that other methods may also be appropriate. Schemes may choose not to permit animals to soil common areas due to the impact it may have on other residents. Schemes with green areas may wish to provide authorised spaces within the common property for animal use, including for laying waste. Since approaches to the soiling of common property may vary between schemes, there is

no recommendation that soiling a lot or the common property should itself be included in the regulation as a circumstance of unreasonable interference.

Instead, owners corporations should be afforded flexibility to settle on reasonable requirements that are appropriate for their scheme. Conditions may be set for managing an animal's waste and maintaining hygiene. In doing so, it is important to distinguish that the mere act of laying waste itself should not be prohibited. Instead, reasonable conditions would specify the areas where an animal may or may not lay waste, or any actions that must be taken afterward to fix or clean any soiled areas.

There are other conditions that can be found in strata schemes' by-laws beyond those prescribed in the model by-laws. These include: that the animal is required to be microchipped, vaccinated, carried or tethered in lifts and through other common areas such as apartment building lobbies, or must use a dedicated pets entrance to the building to keep them clear of passing human traffic.

The regulations will operate alongside existing provisions in the Act and other NSW laws that regulate animals

Section 137B of the Act and the regulation made under it will augment, not replace, existing provisions of strata law governing the keeping of animals. They are designed to give owners corporations greater certainty when making pets by-laws and making decisions under pets by-laws, particularly in relation to:

- refusing approval for the keeping of an animal,
- issuing notices to comply with a by-law, or an application to the Tribunal for the removal of an animal from the strata scheme, and
- the drafting of by-laws that place limits on the types of animals that may be kept in a strata scheme and the conditions under which they must be kept.

Section 153 of the Act requires owners, occupiers and other persons not to:

- cause a nuisance or hazard to any other occupiers of any other lot, or
- use or enjoy their lot or the common property in a way that unreasonably interferes with another occupant's use or enjoyment of their lot of the common property.

Division 3 of Part 8 of the Act allows the Tribunal to order the removal of an animal either permitted or not permitted under by-laws. This Part also allows the Tribunal to make an order permitting the keeping of an animal (where either the owners corporation's permission has been refused or the strata scheme's by-laws prohibit the animal).

The new regulations under section 137B should also operate consistently with other NSW legislation that regulates animals, such as the Companion Animals Act. The Companion Animals Act sets out animal behaviour that constitutes grounds for a local council to declare a cat or a dog a nuisance animal, or to declare a dog to be dangerous or menacing. It also contains a list of dog breeds that are classified as restricted.

4.1.1 Findings (1, 2)

1. The circumstances in which the keeping of an animal unreasonably interferes with another occupant's use and enjoyment of the occupant's lot or the common property are:
 - the animal persistently makes a noise that unreasonably interferes with the peace, comfort or convenience of another occupant
 - the animal repeatedly runs at or chases another occupant, a visitor of another occupant or an animal kept by another occupant
 - the animal attacks or otherwise menaces another occupant, a visitor of another occupant or an animal kept by another occupant
 - the animal repeatedly causes damage to the common property or another lot
 - the animal endangers the health of another occupant through infection or infestation
 - the animal causes a persistent offensive odour that penetrates another lot or the common property
 - for a cat that is kept on a lot — the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998* section 31
 - for a dog that is kept on a lot — the owner of the animal fails to comply with an order that is in force under the *Companion Animals Act 1998*, section 32A
 - the animal is a restricted dog within the meaning of the *Companion Animals Act 1998*, section 55(1)
 - the animal is declared to be a menacing dog or a dangerous dog under the *Companion Animals Act 1998*, section 34.

2. The owners corporation of a strata scheme should be allowed to impose reasonable conditions on the keeping of an animal through their by-laws.

4.1.2 Recommendations (1, 2)

1. The circumstances listed in Finding 1 should be included in regulations made under section 137B(3) of the Act.
2. Regulations made under section 137B(3) of the Act should operate alongside and complement the existing provisions of the Act and other NSW legislation that regulates animals, including the *Companion Animals Act 1998*.

4.2 The impacts of kept animals on the health and wellbeing of residents

Much like the question of whether owners corporations should be allowed to ban pets, the pets in strata survey revealed strongly held and divergent views about the impact that animals have on the health and wellbeing of residents. In Australia, over 80% of people with a dog or cat consider their pets to be a part of the family or a valued companion, and 90% of pet owners say their animals have a positive impact on their lives.² In contrast, people who are allergic to animals or have a fear of animals speak of their desire to live in an animal-free strata scheme, and argue that the law should provide for this.

Question 9 (Q9) of the pets in strata survey asked, “How could the health and wellbeing of all residents be impacted if a strata scheme allows animals to be kept?”

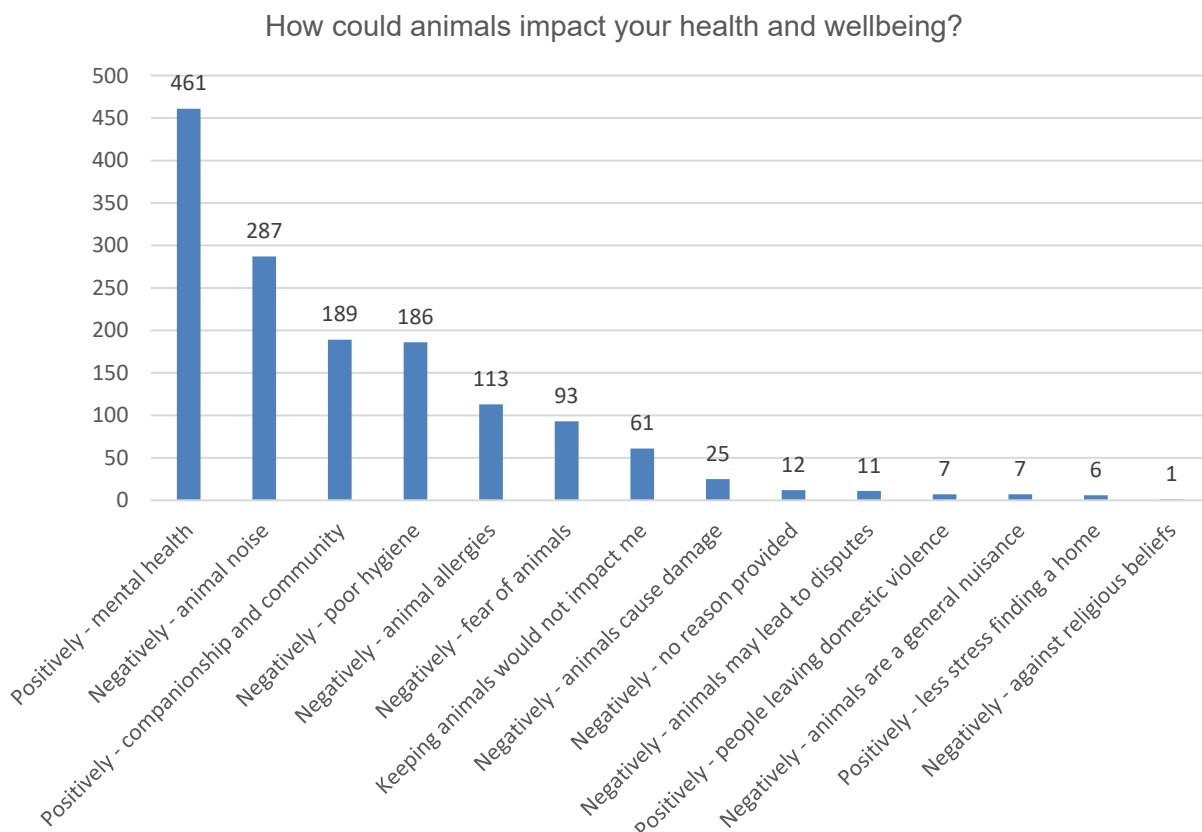


Figure 3 – Responses to “How could the health and wellbeing of all residents be impacted if a strata scheme allows animals to be kept?”

² Ibid.

The number one impact identified by survey respondents was positive; respondents said animals could help relieve anxiety and stress, leading to improved mental health. Many respondents also discussed the companionship their animal provided, particularly throughout the social distancing restrictions introduced in response to the COVID-19 pandemic. Another common positive impact identified by survey respondents was that animals can lead to an improved sense of community spirit in a strata scheme, and that they often became a talking point to break the ice between neighbours.

Fifty per cent of the overall feedback to Q9 was about the potentially negative impacts of animals residing in a strata scheme. However, throughout this feedback there was a common theme that most of these issues – such as noise, hygiene or damage – depended on the owner taking appropriate responsibility for their pet. This demonstrated that issues could be managed, for example by an owner cleaning up after their animal, keeping the animal supervised or on a leash, and monitoring its behaviour.

Medical evidence has shown that pet ownership is associated with improved health. In 2020, the University of Adelaide published evidence that pet owners are reportedly happier, healthier and even more likely to live longer.³ Owning a pet has been observed to reduce blood pressure, loneliness, anxiety, fearfulness and generally contribute to improved wellbeing.⁴

In contrast, people who have an allergy to animals spoke of their desire to live in an animal-free environment. Most animal allergens are found in dander, saliva and urine.⁵ They are commonly found on small particles that allow airborne dispersion and also dispersion by adherence to surfaces such as clothing.⁶

Submissions from those with allergies to animals spoke of their experience living with an allergy and that some people can react to pet dander and saliva after the animal has left the vicinity.

Typical symptoms of an allergy to animals include:

- Sneezing
- Runny nose
- Itchy, red or watery eyes
- Nasal congestion

³ Young, J, Pritchard, R, Nottle, C, & Banwell, H 2020, 'Pets, touch and COVID-19: health benefits from non-human touch through times of stress', *Journal of Behavioural Economics for Policy*, vol. 4, COVID-19 special issue 2, pp. 25-33.

⁴ Ibid, p 32.

⁵ Dander is composed of fine, even microscopic flecks of skin shed by cats, dogs, rodents, birds and other animals with fur or feathers.

⁶ Ownby, D & Cole Johnson, C 2016, 'Recent understandings of pet allergies', *F1000Research*, vol.5, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4755411/>>.

- Itchy nose, roof of mouth or throat
- Postnasal drip
- Cough
- Facial pressure and pain.

The sensitivity and severity to animal allergens can differ from one person to another, however are generally limited to the symptoms listed above.

To assess whether exposing an allergic person to animal allergens constitutes unreasonable interference, the review considered the reasoning applied by the Court of Appeal in *Cooper* and the common law test for actionable nuisance. Prohibiting the keeping of an animal is a significant restriction of the property rights of an occupant of a lot, while the effect of an allergy can be variable, and can be minimised by strategies such as carrying an animal across the common property and keeping it within a lot. In light of this, it would be difficult to justify allowing, for example, a large strata scheme to prohibit the keeping of all animals when an animal may have no contact with, and be housed a considerable distance away from, an allergic person.

Given that it would be difficult for an owners corporation to test the allergic person's claim about the seriousness of their allergy, there is concern that claims of allergic reactions could be misused by people who generally oppose pets being allowed in their scheme.

On balance, the review therefore recommends that the fact an occupant of a lot has an allergy to animals not be specified in the regulation as a circumstance in which the keeping of an animal causes unreasonable interference to another occupant of a strata scheme.

However, the review recommends that owners corporations should be able to limit the exposure of lot owners to animal allergens through imposing reasonable conditions on the keeping of animals in their scheme, for example, by having a designated entrance for animals. This is supported in Section 4.1.1, above.

4.2.1 Findings (3)

3. The keeping of animals in strata schemes can have both positive and negative impacts on residents in strata schemes. Animal owners should practise responsible pet ownership to reduce the negative impacts on those with allergies or a fear of animals.

4.3 The barriers faced by residents in the keeping of animals, including assistance animals and vulnerable persons

Owners corporations or landlords refusing to allow animals is the second most common barrier to pet ownership nationwide, after having a home or lifestyle that is not suitable for keeping a pet.⁷

Barriers can be perceived as unfair, but they can also be used as a check and balance to reasonably protect the interests of residents within a scheme.

The changes introduced under section 137B and the proposed regulations intend to provide reasonable checks on the keeping of animals in a strata scheme, while ensuring strata living remains a genuine housing option for pet owners.

4.3.1 Context

The Act allows owners corporations to set up an approval process that requires the permission of the owners corporation to keep an animal. However, following commencement of section 137B, an owners corporation's decision on whether to grant permission to keep an animal must be based on how the animal will impact other residents. Otherwise, the owners corporation risks the animal being automatically approved under section 137B(5)(a).

Many owners corporations already have an established approval process, which can vary widely between schemes.⁸ Some owners corporations may require detailed information on the animal or documentation, such as behavioural references and evidence of vaccinations.

In addition to the approval process, the by-laws may set conditions on how animals are kept. The model by-laws in the Regulation provide an example, with conditions like supervising the animal when it is on common property and cleaning any areas soiled by the animal. Owners corporations may choose to adopt these model conditions and include others if they wish.

Some examples of conditions not found in the model by-laws include: restricting an animal's access to a building to a dedicated pets entrance, or requiring animals to be on a lead or carried through the common property.

Although the Act does not permit an owners corporation to refuse approval for an assistance animal, the owner of the animal may still be required to provide evidence of the animal's status, and conditions in by-laws may also apply to assistance animals.

⁷ AMA, above n 1, p. 27.

⁸ Power, E.R 2018, 'Restrictions on pet ownership in multi-owned properties', in Altmann E, Gabriel M (eds), *Multi-owned property in the Asia-Pacific region*, Palgrave Macmillan, London, p. 162.

4.3.2 Consultation

Submissions to the statutory review touched on several barriers to pet ownership. The barriers included: bias in the pet approval process, issues with the safety and suitability of buildings for small animals, and the imposition of onerous conditions by owners corporations. These issues were also reflected in responses to the pets in strata survey.

Few submissions raised concerns relating to assistance animals. Those that did generally discussed whether an owners corporation should be able to require proof of the animal's status. There were concerns that this infringed residents' privacy as it could lead to owners corporations requiring medical information as evidence of disability. Others felt that it was an appropriate requirement and noted that evidence of an assistance animal's status can be requested under the *Disability Discrimination Act 1992* (Cth).

Some also noted that the changes in section 137B would affect approval processes, including those for assistance animals. One submission suggested that the requirement to provide evidence should only remain where the animal would otherwise be deemed an unreasonable interference (for example, due to its breed).

The review does not make any recommendations about how the strata laws govern assistance animals, because that is being considered in the statutory review of the entire Act. The report on the statutory review is due to be tabled in Parliament in November 2021 and will include discussion of assistance animals.

Submissions also identified various vulnerable communities that were disproportionately affected by barriers to the keeping of animals, such as those in low income households. Several submissions raised concerns about the impact of barriers to persons trying to leave situations of family or domestic violence, or homelessness.

There was a high response rate to the question of barriers through the survey. 79% of respondents thought there were barriers to keeping an animal in a strata scheme. 1,178 respondents provided further feedback as to what those barriers were through Question 6 (**Q6**).

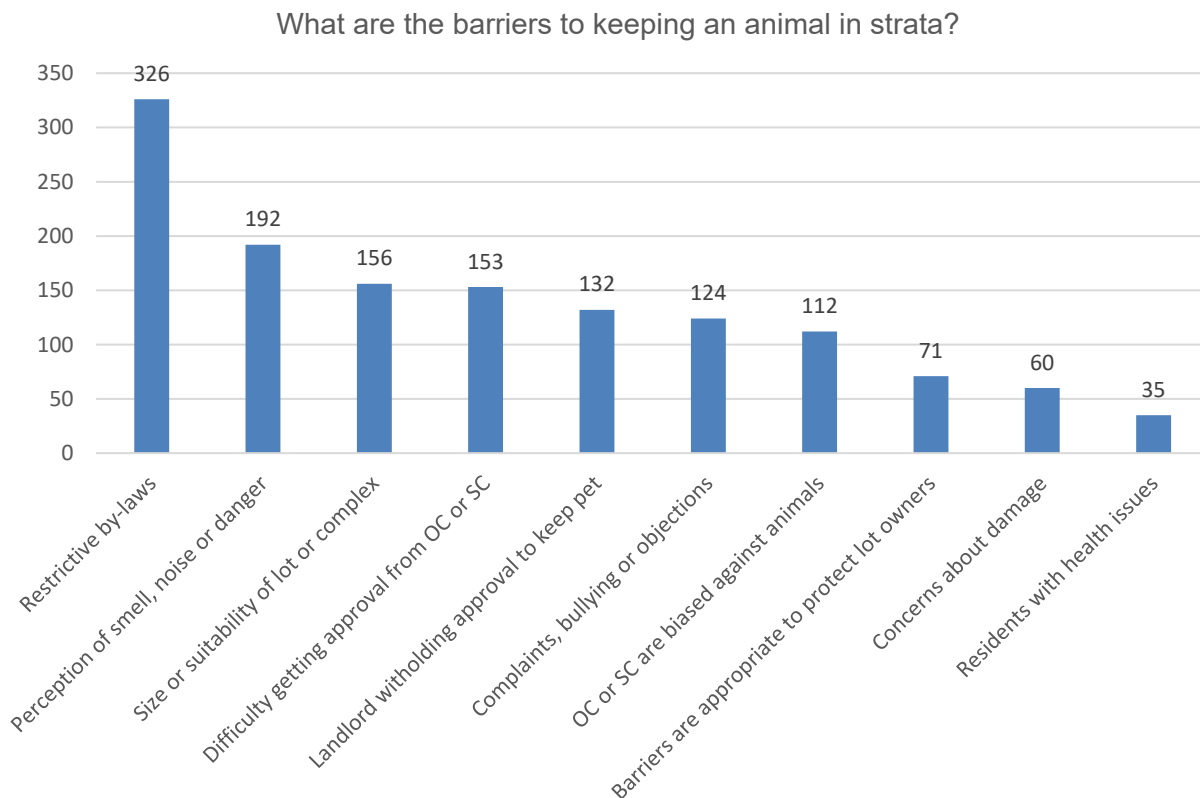


Figure 4 – Top ten responses to “You said there are barriers to keeping an animal in strata, please tell us more.”

Very few responses to the survey were specific to assistance animals. Two responses indicated that the obstacles faced by owners of assistance animals mostly came from the attitudes of or pressure from other residents.

Restrictive by-laws were the most prevalent barrier identified through the survey:

- 57% of restrictive by-laws banned pets altogether
- 23% of restrictive by-laws limited the size, weight, type or number of pets
- 11% of restrictive by-laws imposed onerous restrictions on pet owners
- 9% were unspecified.

The new provisions will reduce barriers to keeping animals

Section 137B of the Act will mean that owners corporations can only prohibit an animal if it unreasonably interferes with another occupant’s use and enjoyment of their lot or the common property. The regulations will specify a range of circumstances in which unreasonable interference occurs.

In practice, this will mean that blanket up-front bans on animals will not be able to be imposed. For the same reasons, section 137B of the Act will also limit by-laws which set specific criteria for animals permitted in the scheme, such as size or type.

These changes should also help alleviate difficulties faced by owners of assistance animals, by removing barriers such as 'no pets' by-laws. They may alleviate the community pressure faced by owners of assistance animals living in what was previously a 'no-pets' scheme.

Conditions may still be set for how an animal is kept in the scheme

Some barriers to keeping animals in strata schemes will remain.

Owners corporations will still be able to set reasonable conditions on the keeping of animals within the scheme. Allowing owners corporations to establish these by-laws is necessary as it enables them to manage reasonable concerns expressed by respondents about potential smell, noise and danger from animals. For example, by-laws may set conditions for managing hygiene, access to buildings, and the use of common property.

Some respondents raised concerns that an owners corporation may use conditions in by-laws that effectively prohibit all animals or certain types of animals from the scheme. An example might be the adoption of a by-law which strictly prohibits animals from entering or being on common property, when the only way for the animal to access their owner's lot is to pass through common property. Any such by-laws may contravene section 139(1) of the Act, which prohibits harsh, unconscionable, or oppressive by-laws, and there may be an argument that they contravene section 137B(1)(a) as effectively prohibiting the keeping of the animal.

Barriers to animal ownership have a greater impact on vulnerable people

There is an acknowledged benefit of animal companionship to both mental and physical health.⁹ Broadly speaking, barriers that reduce pet ownership will also reduce enjoyment of those benefits across the general population. However, there are portions of the population where this effect is particularly acute – low income households are one example. These households are often in older strata schemes, which may be less costly but also less likely to welcome animals.¹⁰ Nearly 60% of animal relinquishments due to housing restrictions are those from low income households. Other types of people more likely to be affected by barriers to the keeping of animals include tenants, and those living in apartments or in the inner-city.¹¹

Evidence also supports concerns raised in submissions to the review about the direct negative impact of barriers to the keeping of animals in strata schemes for persons escaping family or domestic violence. Research suggests animals are present in up to 70% of domestic violence

⁹ Young et al, above n 3; Wood, L, Giles-Corti, B, & Bulsara, M 2005, 'The pet connection: pets as a conduit for social capital?', *Social Science and Medicine*, vol. 61, pp. 1159-1173;

¹⁰ Stone W, Power E.R, Tually S, James A, Faulkner D, Goodall Z, and Buckle 2021, *Housing and housing assistance pathways with companion animals: risks, costs, benefits and opportunities*, AHURI Final Report No. 350, Australian Housing and Urban Research Institute (AHURI) Limited, Melbourne.

¹¹ AMA, above n 1, p. 27.

cases in Australia.¹² People who wish to leave will often risk further violence by staying with the perpetrator because they would not be able to take their animal with them if they left. Difficulty finding alternative or crisis accommodation that allows animals prevents them from leaving, as leaving the animal behind may expose it to being harmed by the perpetrator.¹³

Similarly, people experiencing homelessness may not be able to access shelter if they have a companion animal and may forgo help that requires them to abandon the animal.

4.3.3 Findings (4, 5, 6)

4. The commencement of section 137B should address the most prevalent barriers to animal ownership identified through consultation.
5. Section 137B should also benefit owners of assistance animals. Owners may no longer need to disclose that their animal is an assistance animal in order to obtain approval, or if they do, their pathway to approval should be easier.
6. Barriers to the keeping of an animal in a strata scheme can create negative outcomes. This especially affects people who want to leave a situation of family or domestic violence with their pet and people experiencing homelessness with a companion animal.

4.4 The welfare of kept animals

Pets are becoming a part of the family and this has increased the level of consideration we give to the health and wellbeing of our pets.¹⁴ It is unsurprising then that concern for the wellbeing of companion animals was one of the foremost issues respondents raised throughout the survey. This concern was not just for the physical needs of an animal, but also included concern about whether and how their emotional wellbeing could be affected by strata living.

4.4.1 Context

While section 137B(2) will only allow owners corporations to prohibit an animal if it unreasonably interferes with other occupants' use and enjoyment of their lot or the common property, NSW has other legislation which specifically governs the welfare of animals. This includes the *Prevention of Cruelty to Animals Act 1979 (POCTAA)*, the *Prevention of Cruelty to Animals Regulation 2012*, and

¹² O'Connell, B 2014, 'Vets get checklist after pet abuse linked to Domestic Violence', *Herald Sun*, 18 August 2014, cited in joint submission by Women's Legal Service NSW, Tenants' Union NSW and Domestic Violence NSW.

¹³ Stone et al, above n 10; Dam, M & McCaskill, C 2020, *Animals and people experiencing domestic and family violence: how their safety and wellbeing are interconnected*, Domestic Violence NSW.

¹⁴ AMA, above n 1, pp. 22-24.

supporting codes and standards. This legislation is administered by the NSW Department of Primary Industries.

POCTAA protects the welfare of all animals, from dogs and horses to reptiles and fish. It promotes animal welfare by establishing that a person must not commit an act of cruelty upon an animal, and by placing obligations on the person in charge to care for the animal, treat the animal in a humane manner and ensure the welfare of the animal. POCTAA also sets out offences and powers to investigate animal cruelty.

Complaints or reports of animal cruelty, or a violation of POCTAA, can be made to the POCTAA enforcement agencies: the Royal Society for the Prevention of Cruelty to Animals NSW (**RSPCA NSW**), the Animal Welfare League NSW, or the NSW Police.

4.4.2 Consultation

Submissions to the statutory review of the Act that raised welfare concerns generally argued against the keeping of animals in strata. Such concerns were related to the animal's mental wellbeing, as living within a strata scheme would cause distress for an animal, either if it was left alone in the lot, unable to exercise or able to hear other animals within the scheme.

One submission suggested that frequent welfare checks should be required for animals living within strata complexes to ensure their health and wellbeing.

There were 1,568 responses to the survey question on the welfare of animals. Question 14 (**Q14**) asked respondents what should be considered to ensure an animal's welfare in a strata property. Respondents could choose one or more options from a list of four.

- 77% said whether the unit is suitable for the type of animal is important
- 73% said the type of animal is important
- 59% said the size of the unit is important
- 28% selected 'other'.

Question 15 (**Q15**) sought further feedback from respondents who selected 'other'. The written responses to Q15 identified a broad range of factors that may impact an animal's welfare:

- the number of animals already in the lot
- the amount of time the animal would spend alone in the lot
- whether the animal would be exercised or trained
- the availability of outdoor spaces for the animal (whether on the lot or on common property)
- the hygiene arrangements or requirements that would be in place (including waste disposal, vaccination, registration and pest protection)
- the suitability of the animal's owner for keeping an animal
- the suitability of the animal's breed or size for strata living
- the animal's individual characteristics, such as its age or personality
- the proximity or presence of other animals in the scheme, or of noises that could disturb the animal

- specific considerations about whether the unit is suitable for the type of animal, including ventilation, temperature, access to buildings, and safety measures such as netting or enclosures.

There was also strong feedback to Q15 that strata committees or owners corporations should not be made to consider the welfare of an animal when evaluating an approval application.

Respondents stated that since owners corporations and strata committee members weren't required to have expertise in assessing animal welfare, it was not in the interests of the animal to have them make such an assessment.

Concerns about cruelty to or suffering of animals merely because they live in a strata lot are not supported by evidence

A popular concern expressed in the survey was whether a strata lot could be an appropriate or comfortable home for an animal, particularly for dogs. These concerns were mostly related to the limited size of units or apartments, the lack of outdoor space available as part of a lot or on the common property, the need to exercise the animal and the potential for time spent alone in the lot.

POCTAA imposes no limitations on what type of home or environment animals may be kept in. Instead, there are general protections relating to an animal's shelter and how an animal may be confined in a cage.

Under POCTAA, animals are:

- to be given proper and sufficient shelter,
- not to be confined without adequate exercise or in an inappropriately sized cage, and
- not to be tethered for an unreasonable length of time or with an unreasonably heavy or short tether.

Nothing in POCTAA suggests it would be an act of animal cruelty for an animal to live in an apartment that is suitable for a person to inhabit. Animal welfare organisations such as the RSPCA recommend cats in particular as companions suitable for an indoor-only life¹⁵. The RSPCA also provides guidance about apartment living with dogs.¹⁶

It is also worth noting that an animal can equally be left alone or without sufficient exercise whether they are kept in a house or in a strata lot – it depends on the owner and their circumstances. There is no evidence to suggest that an animal in a strata lot is more likely to be left alone or unexercised

¹⁵ RSPCA 2021, *Is it okay to keep my cat at home all of the time?*

<<https://kb.rspca.org.au/knowledge-base/is-it-okay-to-keep-my-cat-at-home-all-of-the-time/>>;

Cat Protection Society of NSW, *Factsheet – indoor cats*,

<<https://catprotection.org.au/cat-care-factsheets/factsheet-indoor-cats/>>.

¹⁶ RSPCA 2018, *What to consider before you bring a dog home to an apartment*,

<<https://www.rspcansw.org.au/blog/animal-care-information/apartment-living-dogs/>>.

than in other types of accommodation. Therefore, limiting the ability of strata residents to own an animal based on these welfare concerns is not supported.¹⁷

As noted in section 4.4.1, where residents may have genuine concerns about the welfare of an animal residing within the scheme, these concerns should be reported to the POCTAA enforcement agencies for investigation. The NSW Government has significantly increased penalties for animal cruelty offences, and they are now among the highest in Australia. The *Prevention of Cruelty to Animals Amendment Act 2021* passed NSW Parliament in June 2021 and ensures penalties for the most common animal welfare offences reflect the severity of the offence, meet community expectations, and provide an effective deterrent to animal cruelty.

Consideration of animal welfare should not be mandated in the Act

The review also found that it would not be appropriate to place animal welfare protections or mandate considerations of animal welfare in the Act. The aims of the Act and Regulation are to provide for the governance of a strata scheme. As safeguards for animal welfare are already in a separate legislative regime, it would not be appropriate to duplicate these measures and create legislative confusion or overlap.

Furthermore, appointment or membership of a strata committee or participation in an owners corporation does not require any prerequisite expertise in how to assess animal welfare. It is not appropriate for strata committees or owners corporations to be required to assess animal welfare in deciding an application. Assessments of animal welfare should be carried out by authorised officers or veterinarians.

4.4.3 Findings (7, 8, 9, 10)

7. The evidence does not support assertions that it is harmful to an animal's welfare to allow them to live in strata schemes.
8. There are appropriate channels in place to report concerns about animal cruelty or neglect.
9. The Act is not the appropriate legislative mechanism to set requirements for consideration of animal welfare.
10. Owners corporations and strata committees do not have expertise in assessing animal welfare and therefore should not be required to make such assessments.

¹⁷ Lifestyle and home environment is the largest barrier to owning a companion animal, according to the *Pets in Australia* report. This suggests that many Australians are aware of how their home or lifestyle can impact the welfare of their pet and will prevent themselves from owning an animal based on this judgement. See above n 1, p. 27.

4.5 How to limit any adverse impacts of kept animals, including the adequacy of existing laws

The reality that more animals will be permitted in strata schemes following the commencement of section 137B makes it necessary to consider how to limit any adverse impacts of those animals.

The main adverse impact of kept animals identified through public consultation was the potential negative impact on the common property or neighbouring strata lots. Respondents were mostly concerned about an animal urinating or defecating on the common property, damaging the common property (for example by digging up gardens), and animals trespassing on or damaging neighbouring lots.

The pets in strata survey asked “Some owners corporations and residents are concerned about the impacts that animals may have on the common property. Please share any ideas you have about how this could be resolved.”

Responses to this question overwhelmingly agreed that adverse impacts of animals in strata schemes could be mitigated by imposing reasonable conditions on the keeping of animals.

Most respondents argued that adverse impacts could be limited by requiring, through legislation, by-laws or otherwise, that the owner of the animal take proper responsibility for their pet. This may include requiring the owner to clean up after the animal, pick up its mess, and pay for remediation of damage caused by the animal.

The most common conditions suggested by respondents include:

- The animal must be on a leash
- Having a designated pet area or pet free zones in the scheme
- Requiring the animal to be carried when in the common area
- Requiring the animal to be supervised
- Requiring the animal to be trained.

Other recommendations included:

- Penalties for non-compliance with reasonable conditions
- A complaints system for repeat offenders
- Surveillance cameras installed on common property
- A probation period for new animals
- Providing more bins and cleaning facilities.

In addition to the reasonable conditions above, many respondents looked to the existing provisions in the Act to address nuisance animals. These include the duty of the owners corporation to rectify damage to the common property (section 106), and Division 3 of Part 8, which allows the owners corporation to apply to the Tribunal for an order to remove an animal.

As previously stated at 4.2.1, an owners corporation should have the ability to impose reasonable conditions on the keeping of animals, to reduce the impact of kept animals on other occupants' use

and enjoyment of their lot or the common property. Reasonable conditions could include requiring animals to be supervised or kept on a leash, requiring animals to be carried when in the lobby or elevator, or simply requiring occupants to clean up after their animal.

Reasonable conditions do not extend to rules that would operate as a blanket ban by another name.

The regulation of animals in strata schemes under section 137B of the Act will operate in tandem with the existing provisions about the types of by-laws that an owners corporation can make and the process for the enforcement of those by-laws. It is therefore not necessary to create a new regulatory framework under the Act for the regulation of pets in strata schemes. Owners corporations are encouraged to establish an internal complaints and dispute resolution process for occupants who repeatedly breach by-laws, and should follow the existing provisions in the Act for the enforcement of those by-laws.

The *Cooper* decision recognises that by-laws which restrict an occupant's use and enjoyment of their property, and the common areas without connection to the effect on other occupants' use and enjoyment of their lot or common property, may be held to be oppressive. This restriction means that by-laws about the keeping of animals should be limited to those that are necessary to ensure that other lot owners can use and enjoy their lots and the common property.

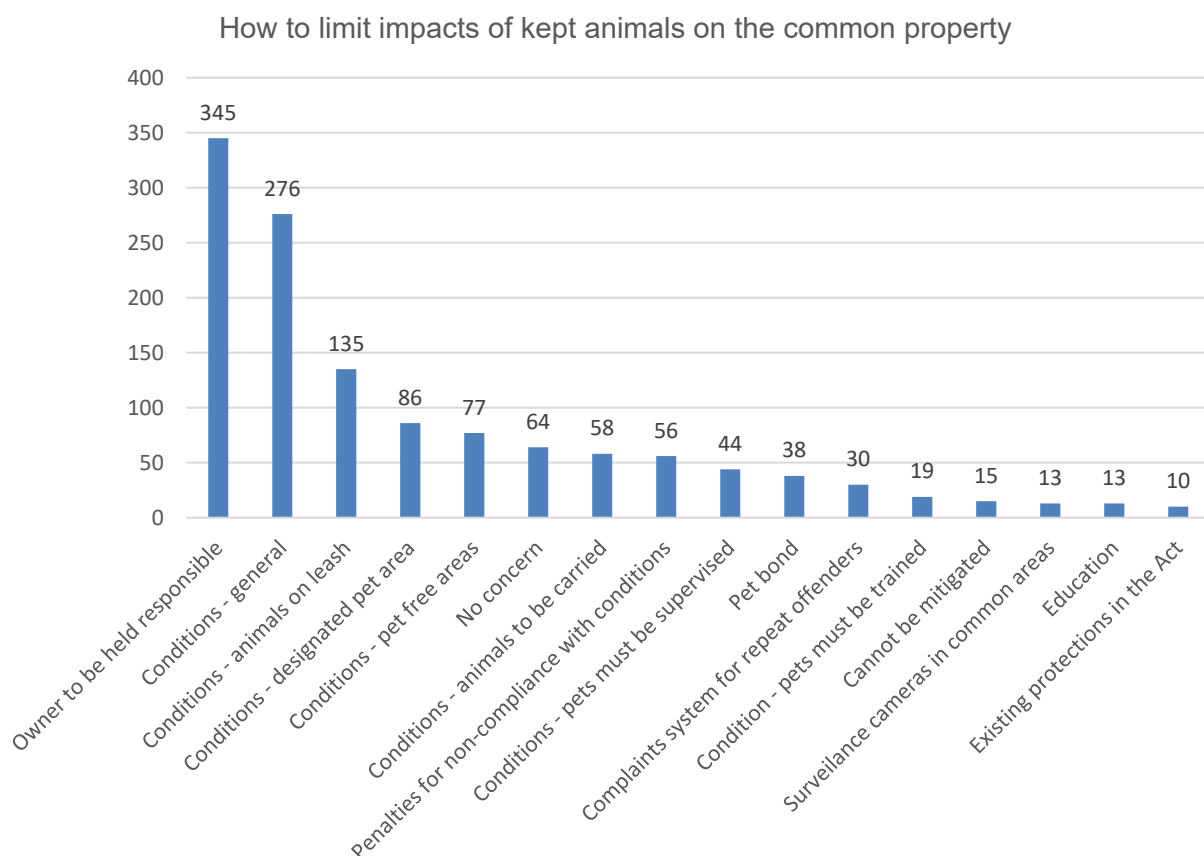


Figure 5 – Responses to “Some owners corporations and residents are concerned about the impacts that animals may have on the common property. Please share any ideas you have about how this could be resolved”

4.5.1 Findings (11, 12)

- 11.** Section 137B of the Act will operate alongside and complement the existing provisions of the Act that regulate the types of by-laws that an owners corporation can make and the process for enforcement of by-laws. The existing provisions in the Act, including the new section 137B, should be adequate to address the impact of kept animals on the common property. It is not necessary to create a further additional regulatory framework under the Act for the regulation of pets in strata schemes.
- 12.** The ongoing statutory review of the Act should evaluate how the parts of the Act that regulate by-laws are performing and whether any further changes are necessary.

4.6 How to resolve disputes about the keeping of animals

Residents in strata complexes not only share common property but also often live in much closer proximity to one another than people living in houses. Disputes can be exacerbated by this proximity¹⁸ and the inescapable closeness arising from shared walls, floors, ceilings and entranceways. As pets are potentially the most emotive topic for strata disputes¹⁹, there is a clear need for adequate processes to help resolve any disagreements.

4.6.1 Context

Currently, the Act outlines a hierarchical dispute resolution process. This commences with the strata scheme’s own internal dispute resolution and may escalate externally to the NSW Civil and Administrative Tribunal, if necessary. This process is outlined in Part 12 of the Act.

The process may officially begin through an owners corporation’s internal dispute resolution process, if they have one. Under section 216 of the Act, it is optional for an owners corporation to adopt a process to resolve disputes, and participation in the process is voluntary for the parties

¹⁸ Levin, I & Arthurson, K 2020, ‘Living closely: residents’ health and wellbeing in small multi-owned residential buildings’, *Property Management*, vol. 38, no. 3, pp. 345-363.

¹⁹ Cradduck, L 2013, ‘Parking, parties and pets: disputes – the dark side of community living’, in Higgins, D (ed), *Proceedings from the PRRES Conference – 2013: 19th Annual Pacific Rim Real Estate Society Conference*, Melbourne, 13-16 January 2013, Pacific Rim Real Estate Society, p. 6.

involved. The issues that can be considered by an owners corporation's dispute resolution process include by-law breaches, inappropriate use of common property, repairs and maintenance and concerns about strata managing agents.

If the owners corporation has not adopted its own internal dispute resolution process, or if it has not resulted in an acceptable outcome, then residents with a dispute can seek mediation by applying to the Commissioner for Fair Trading (referred to as the 'Secretary' in the Act). This process is outlined in sections 217 - 225 of the Act and clauses 57 - 61 of the Regulation.

If the dispute is not resolved through mediation, the parties can apply to the Tribunal for resolution. Section 227 of the Act requires the Tribunal Registrar not to accept an application if it has not gone through mediation unless it meets certain conditions. The Tribunal has the power to make a range of orders, including an order permitting an animal on a lot or ordering the removal of an animal from a lot (sections 156 - 159). Section 150 of the Act also allows the Tribunal to make an order that a by-law is invalid, either because the owners corporation did not have the power to make that by-law or because the by-law is harsh, unconscionable or oppressive.

A party to proceedings can apply for an appeal against the Tribunal's order. Appeals are governed by the *Civil and Administrative Tribunal Act 2013 (NCAT Act)*. The NCAT Act also allows appeals to be made beyond the Tribunal to either the District Court or the Supreme Court, based on certain conditions.

4.6.2 Consultation

Feedback in submissions to the statutory review about processes for animal disputes was minimal. This may be because the questions in the Discussion Paper related to the keeping of animals did not focus on the dispute resolution process.

One submission suggested developing a model internal dispute resolution process specific to animals. The review received broader feedback on areas of the dispute resolution process which will be evaluated as part of the statutory review of the entire Act.

Feedback to the pets survey was specific to animal disputes. The survey asked two questions in relation to the resolution of disputes about the keeping of animals.

Question 19 (**Q19**) asked respondents how disputes about animals in strata schemes should be resolved. Respondents could select only one of the four options provided, and there were 1,585 responses.²⁰ The responses to Q19 indicate the following as the preferred method for dispute resolution:

- 38% selected the owners corporation's internal dispute resolution

²⁰ The percentage points do not add up to 100 due to rounding.

- 33% selected mediation conducted by Fair Trading
- 17% selected the Tribunal
- 13% selected 'other'.

Question 20 (Q20) asked respondents who had selected 'other' to provide their suggestions. 208 respondents provided a written response. The suggested methods of dispute resolution fell into the following categories:

- discussions between strata residents
- the creation of a new body to resolve pet disputes, such as a new office within NSW Fair Trading, a specialist Tribunal or an expert panel
- monetary penalties or compensation through the application of fines or use of a pet bond
- use of an independent mediator with expertise in or authority over animal care, such as the RSPCA
- the courts
- existing animal dispute resolution processes with local councils
- the Tribunal
- NSW Fair Trading
- the owners corporation's internal dispute resolution process.

Many responses to Q20 indicated that the dispute resolution process should not consist of only one option. Instead, responses supported escalating stages of dispute resolution.

The consistent feedback across both Q19 and Q20 showed that the preference was for disputes to be resolved within the owners corporation where possible. From there, dispute resolution could be escalated and progress to mediation by NSW Fair Trading, and then to the Tribunal if need be. This is consistent with the current method of dispute resolution outlined in the Act.

Data obtained from Fair Trading's mediation of strata disputes between 1 September 2018 and 31 December 2020 shows that 235 requests for mediation specifically related to the keeping of animals were received during this period. Of those, the vast majority – 77% – were about requesting or acquiring permission to keep an animal.

4.6.3 Findings (13)

13. The dispute resolution regime currently outlined in the Act is consistent with respondents' preferred dispute resolution options, including the use of escalating tiers. Disputes can begin with a process internal to the strata scheme in which they occur. Following this, disputes can be brought to NSW Fair Trading for mediation. If unresolved, they may then be taken to the Tribunal to seek an order.

4.7 The effects of a change to the by-laws of a scheme

In 2020 there were reports in the media about a strata resident in Sydney who moved into a pet-friendly strata building with his dog, only for the by-laws to later be changed to ban animals.²¹ The man was told he would need to remove his dog from the building, despite him having purchased and entered into the scheme on the basis that his dog would be allowed.

Although the owners corporation ultimately agreed to the dog remaining in the scheme without the need for further action, the incident demonstrated the uncertainty in the NSW community about the effect of such a reversal of by-laws.

4.7.1 Context

Under section 141(2) of the Act, a change to a by-law has no effect until the owners corporation has lodged a notification with the Registrar-General, and the Registrar-General has recorded the change. A by-law cannot be enforced, nor a notice of breach of a by-law issued, prior to this being completed. Although by-laws can change the rules within a scheme, a by-law cannot be unjust: all by-laws are subject to the restriction under section 139(1) that they must not be harsh, unconscionable or oppressive.

A by-law that, without good reason, bans an animal that lawfully resided in the scheme prior to the by-law's commencement could be considered unjust and challenged as a contravention of section 139(1) of the Act.

Once section 137B of the Act commences, any by-law that unreasonably prohibits the keeping of any animal in the scheme will not be valid. Should an owners corporation unreasonably prohibit an animal from entering the scheme, which contravenes section 137B(1)(a) of the Act, it will instead be taken to have approved the animal.

4.7.2 Consultation

In the survey, question 21 (**Q21**) asked respondents what an owner should be required to do with a previously allowed animal if their by-laws change to prohibit the keeping of animals. Respondents were presented with four options, of which they could select only one.²² The results in response to Q21 are as follows:

- 76% thought the owner should be allowed to continue to keep the animal in the lot
- 13% thought the owner should be given a certain amount of time to remove the animal

²¹ Koziol, M 2020, 'Nail in the coffin of democracy': it's D-day for Sydney's prize dog fight', *The Sydney Morning Herald*, 13 September.

²² The percentage points do not add up to 100 due to rounding.

- 1% thought the owner should be required to remove the animal immediately
- 9% selected 'other'.

Of the 1,589 respondents, the majority overwhelmingly preferred that the animal be allowed to remain. This was further supported by some of the respondents who had selected 'other'. Question 22 (Q22) asked what other arrangements should be made. Of 147 responses, 10% thought the animal should be allowed to remain and had provided their reasoning in the written response. Reasons included the emotional distress caused by separating an animal from their owner, and that the change would be unjust if it applied to owners who had bought the property on the understanding that their animals were allowed.

Thirty-six per cent of respondents to Q22 suggested that the animal should be allowed to remain, provided it be subject to conditions, with the most popular being that the animal could stay until it died, but no replacement animal could be introduced. A further 20% thought the permission to stay should be context dependent or made on a case-by-case basis.

Twenty-seven per cent of Q22 respondents noted that section 137B would no longer allow blanket prohibitions on animals to be introduced, and the respondents felt the question was therefore unnecessary.

The feedback obtained through the survey was firmly in favour of allowing residents to continue to keep an animal that is lawfully living in a strata scheme, even after a change to prohibit animals.

Should the by-law stand, survey respondents' preferences indicate the animal should be allowed to stay within the scheme, but any new animals entering the scheme must comply with the amended by-law.

The commencement of section 137B of the Act will mean that owners corporations will no longer be able to prohibit an animal unless it unreasonably interferes with other occupants. This will limit those situations where an animal was previously allowed but will no longer be allowed. Owners corporations that move to prohibit an animal that was previously allowed should be careful to act reasonably and explore options that would enable the animal to remain. This is particularly so in light of the prohibition in section 139(1) on by-laws being 'harsh, unconscionable or oppressive'.

4.7.3 Findings (14, 15)

- 14.** Survey respondents' preferred option is for previously approved animals to be allowed to stay in a scheme that changes its by-laws to ban animals.
- 15.** The commencement of section 137B will limit those situations where an animal was previously allowed but will no longer be allowed. Owners corporations that move to prohibit an animal that was previously allowed will only be able to do so if there is unreasonable interference with other occupants. Owners corporations should be careful to act reasonably and explore options that would enable the animal to remain, especially in light of the prohibition in section 139(1) on by-laws being 'harsh, unconscionable or oppressive'.

END OF REPORT