

# What are your rights?

As the owner (but not occupier) of a strata-titled property, do you have any rights to the facilities you pay the fees for? **Caroline Gonzalez**

**F**ANCY a swim in the lap pool of your investment property? How about parking your car in the space outside your tenanted apartment down the road?

Bodies corporate can establish rules restricting or preventing investors from altogether accessing common property facilities of their tenanted properties. Yet the power of owners' corporations is limited – in most states and territories owners can't be fined for breaching body corporate by-laws.

In such a mixed environment it's best to find out what the case is in each state and territory.

## New South Wales

By-laws set up by owners' corporations can restrict investors from using common facilities, however in NSW owners can't be fined for breaching by-laws.

Stephen Raff, chief executive officer of Australia-wide ACE Body Corporate Management, says the state legislation has yet to be challenged in a test case between a body corporate and an owner-investor.

"Not allocating a security key or a swipe card (to an owner-investor) usually kills off the issue, however this has no legal basis," Raff says.

"The body corporate can't refuse an owner a key as it's an underlying property right of the owner."

## Victoria

Institute of Body Corporate Management Victoria general manager Rob Beck says the current legislation doesn't prohibit owner-investors from accessing the facilities of their strata-titled properties.

"This is somewhat of a problem, mainly in bodies corporate such as high-rise buildings and larger estates," Beck says.



Bodies corporate can enact by-laws regulating the use of facilities by non-residents.

Stephen Raff adds that when an owner-investor grants a lease, he or she signs away their rights to access body corporate facilities.

"Under contract law, there's a school of thought that when the owner signs a lease agreement, the owner forgoes their rights for the period of the lease," he says.

As with NSW, the area of law has never been tested in the Victorian court system, Raff says.

## Queensland

In Queensland, there are no rules preventing an owner and tenant from simultaneously making use of common property.

Queensland body corporate law specialist Phil Pennington says legislation prevents the body corporate from having different rules relating to whether a person is an owner or tenant.

"At present, the most direct restriction on a person acting so as to create a

nuisance, or restricting access or enjoyment of lots or common property, operates only in relation to occupiers, which is explicitly not a non-resident owner," Pennington says.

Pennington says he wouldn't be surprised if the Queensland Government acted in response to demand and created some restrictions on non-resident lot owners accessing common property features.

By-laws can be enacted to prevent use by investors but owners in breach of a body corporate by-law can't be fined, adds Stephen Raff.

## South Australia

The issue hasn't gained ground in South Australia.

Raff says owners' corporations can establish by-laws clearly indicating what is and what isn't allowed by owner-investors.

"The by-laws may state that the owners, as non-residents, may still have access on provision that they pay a fee," he says.

Penalties for breaching a by-law range from \$50 to \$500 depending on the body corporate rules.

### Tasmania

Strata corporations create their own by-laws to stop investors using common property. If an owner has broken a by-law, the body corporate can directly apply to the Resource Management Planning Appeal Tribunal for enforcement.

### Northern Territory

Lorelei Fong Lim from the Department of Justice says certain types of bodies corporate such as Cullen Bay, a residential area in Darwin, or estate and unit developments can all make by-laws to prevent owners from accessing common property.

For other unit developments, ordinary rules about trespassing apply in much the same way as uninvited guests who, for example, walk around the development's open space or play tennis on the court.

### Western Australia

Bodies corporate with specific by-laws preventing access to facilities can institute fines for breach of the rules and owner-investors can be penalised.

"However, in order to get the fine upheld, the body corporate needs to get an order from the tribunal for breach of the specific by-law," says Raff.

"A maximum fine of \$500 can be issued by the tribunal if you get an order for the breach and (can prove) that the

owner has wilfully and persistently breached the by-law."

Tenants have undivided interest in the common property and facilities, Raff says.

### Canberra

Peta Ribbens, director of Canberra Units Plan Services, says there's no specific legislation in the *Unit Titles Act* or *Residential Tenancy Act* which outlaws investors using common facilities.

She says the use of common property is taken as being the right of the

occupant and not the owner. Ribbens, who is also vice president of the territory's Strata Managers Institute, says she's come across one dispute over owners using common property in a residential and commercial development.

"One of the commercial owners... complained of not having use of the facilities while contributing to the maintenance. As a result the building manager provided the man and his staff with access keys to the facilities," she says. ■

## Investor-friendly body corporate communities

Melbourne property investor Steve Shoup recalls living in a friendly body corporate community in Hawaii where investors could take a dip in the pool without any hassle from residents.

Steve owned an apartment in the strata development, which happened to be ahead of its time in energy efficiency.

(In 1975, the body corporate replaced the gas hot water system with solar heating, saving US\$2500 a month in combined gas bills – and swapped light globes with the incandescent variety).

"We had a swimming pool there and no-one minded if an owner-investor showed up for a swim," he says.

Overseas-born Steve believes bodies corporate in Australia could take a similar approach to the Hawaiian example and consider strata developments as communities.

"Body corporate life is a community and the community does include the owner-investors," he says.

For example, members could be charged a small fee for the use of meeting rooms. Steve is permitted to use a meeting room for a nominal rate in the Gallery Tower in Melbourne's Southbank.

"I'm not saying there should be open slather because if you're renting then you have the right to access the property and all its facilities because you're paying for the lease.

"Bodies corporate should look at their whole community and create a mechanism: for example give a pass to an owner-investor to use the gym and charge a little extra in their body corporate contributions," he suggests.

