TISHER LINER FC LAW

Owners Corporations and Other Acts Amendment Bill 2019 (Vic) [Exposure Draft]

Submission by Nicole Wilde, Principal of Tisher Liner FC Law

Thank you for the opportunity to make this submission about the *Owners Corporations and Other Acts Amendment Bill* 2019 (Vic) Exposure Draft ("**the Draft Bill**").

This submission contains my observations and suggestions. It is based on my experience as a solicitor practising exclusively in the context of Owners Corporations for eight years in three states in Australia and also in New Zealand. Of those years, for the last five continuous years I have practised almost exclusively in the context of the *Owners Corporations Act 2006* (Vic).

References to 'sections' in this submission correspond with the sections referred to in the *Owners Corporations and Other Acts Amendment Bill 2019* (Vic) Exposure Draft.

Observations and Suggestions about the Draft Bill

Section 6: 10 Execution of documents

Suggestion: Include a requirement for the date that the Owners Corporation passed the resolution authorising itself to enter into the relevant document.

Section 9: 18 Power to commence legal proceeding

Observation to consider: The proposed amendment would appear to enable an Owners Corporation to be authorised by *ordinary* resolution (instead of *special* resolution) to commence legal proceedings against a domestic builder for building defects, as long as the damages sought are less than the civil jurisdiction of the Magistrates' Court (currently $100,000).

I generally support the amendment. However I query whether the damages threshold amount is appropriate. For example, is there a reasonable rationale for requiring an Owners Corporation who seeks damages *in excess of* the civil jurisdiction of the Magistrates' Court (for example, $100,001) to pass a *special* resolution?

Section 11: 23 Fees

Observation to consider: the proposed new wording is very broad and is likely to be open to significant variation in interpretation, and therefore increase the likelihood of disputes between lot owners and Owners Corporations about 'annual fees' that do/do not, fall into the proposed new category.

Suggestion: Section 31 of the *Unit Titles (Management) Act 2011* (A.C.T) may assist Owners Corporations in Victoria:-

> UNIT TITLES (MANAGEMENT) ACT 2011 - SECT 31
> Recovery of expenditure resulting from member or unit occupier's fault
> (1) This section applies if an Owners Corporation for a units plan has in carrying out its functions incurred an expense, or carried out work, that is necessary because of—
>
> a) a wilful or negligent act or omission of a member of the corporation, or an occupier of the member's unit; or
> b) a breach of its rules by a member of the corporation, or an occupier of the member's unit.
>
> (2) The amount spent or the cost of the work is recoverable by the Owners Corporation from the member as a debt.
>
> (3) If the Owners Corporation recovers an amount under subsection (2) from a member for an act, omission or breach of an occupier of the member's unit, the member may recover the amount from the occupier as a debt.
>
> (4) In this section:
>
> "expense", includes a reasonable legal expense reasonably incurred, including a legal expense relating to a proceeding in the ACAT.
>
> "work", carried out by an Owners Corporation, means maintenance or anything else the corporation is authorised under this Act to do.

<u>Section 17: 35 Audit of financial statements</u>

Suggestion: To avoid any confusion about what an auditor's role is, I have two practical suggestions to protect Owners Corporations' interests:

1. First, it should be express in the legislation that any mandatory audit of an Owners Corporation's financial statements is to be done in accordance with the Australian Auditing Standards;

2. Secondly, Owners Corporation managers should have a duty to provide the auditor with all requested Owners Corporation records that the auditor requests or requires in order to complete its audit, and that the auditor is to record in its audit report to the Owners Corporation, any records that were requested by the auditor, but not provided by the manager.

<u>Section 26: 50 When can an Owners Corporation authorise a person to enter a lot?</u>

Observation: This new provision creates a new practical statutory right for the Owners Corporation to authorise a person to enter a lot where 'necessary' to carry out repairs, maintenance or other works on the common property upon seven (7) days' notice.

I generally support this new right of access for Owners Corporations.

Suggestion: However, to balance the proposed new access right against a lot owner's right to quiet enjoyment of their private apartment, I suggest that there also be a new approved form, that requires the Owners Corporation to provide the lot owner with details of the common property land or building structure(s) that requires repair and maintenance, and deals with common issues like, what period access will be required for, whether the lot owner needs to move or remove any personal belongings to facilitate access, etc.

Section 28: 53A Disposal of goods abandoned

Observation: should this new provision be extended to include the ability to dispose of abandoned vehicles on common property?

Section 30: Public liability insurance

Observation: is there any data about the number of public liability insurance claims made against policies held by Owners Corporations? If so, does the data support the increase of the level of insurance cover by double, to $20 million? If there is no such data, then what is the policy reason for the proposed increase?

Section 35: 68(3) Initial owner

Suggestion: instead of using the words "*a lot to which is attached the majority of the lot entitlements*", our suggestion, for consistency, is to replicate the similar existing wording in section 83 and elsewhere in the *Owners Corporations Act 2006,* namely "*whose lot entitlements total at least* [50]*% of the total lot entitlements for the land affected by the Owners Corporation"*

Section 36: 77 Quorum

Observation: this clause changes the formula for calculating a 'quorum' for a general meeting, based on the proposed new definition of 'total number of occupiable lots'. In practical terms, this may cause more confusion and make it more difficult to calculate a quorum, because the registered plans and associated lot entitlement and liability schedules do not generally identify a lot by reference to whether it is 'occupiable' or not – leaving a risk that assumptions will be made about which lots are occupiable and which are not.

Section 40: 89A Chairperson casting vote

Observation: there should be no reason, in our view, for a Chairperson to hold a casting vote at a general meeting at which all lot owners are entitled to vote on proposed decisions in their capacity as lot owners. There is already the ability for a Chairperson of a Committee to casting vote in certain circumstances in respect of Committee resolutions where there is an equality of Committee votes.

Section 40: 89C Proxies

Observation: a logical consequence of the proposed new sub-section, which enables Elected Committee Member (Committee Member 1) to appoint another Elected Committee Member (Committee Member 2) to act as the proxy for Committee Member 1, is that Committee Member 2 will hold two votes on the Committee.

The proposed ability of a Committee Member to give its proxy to another Committee Member, appears to defeat the purpose of a democratic election of Committee Members by the members at the annual general meeting. It therefore has the potential to dilute the quality of independent discussion and decision making at the Committee level, by enabling a situation where one Committee Member, holds additional proxies (and therefore may cast additional vote/s) on Committee motions. Transparency for the benefit of all members should in our view dictate that the elected Committee Members either participate in Committee decisions by attending meetings in person or by telephone or by ballot vote, or, if they are unable to meet those commitments, then they should resign from the Committee and enable the remaining Committee Members to decide whether or not to fill the remaining casual vacancy left by the resigning Committee Member.

In our respectful submission, a non-lot owner manager, should be ineligible to be elected to the Committee. The conflict of interest situation caused by that kind of situation is of such a risk, that it is appropriate to prohibit it in the legislation. A manager generally controls the funds of the Owners Corporation, and therefore, although there is an express obligation on a manager proxy holder, to not vote on any matter that affects the manager directly, compliance with that obligation is largely self-regulated, and not in the best interests of Owners Corporations generally.

Section 40: 89H Term of contract of sale limiting voting rights void

Suggestion: A significant amount of further consultation with the legal industry dealing with off-the-plan sales on behalf of property developers should be completed in our view, before such a proposal to prohibit/void "*any term of a contract of sale of a lot that limits or controls the voting rights of the purchaser of the lot in relation to the Owners Corporation*".

Section 51: 122B Manager must disclose commission payment or other benefit

Suggestion: in practical terms, giving effective 'disclosure' to an Owners Corporation needs to be carefully thought through. It is proposed that the manager be required to give 'disclosure' by written notice to the chairperson of an Owners Corporation, of any commission, payment or other benefit to be received under the management contract between the Owners Corporation and the manager.

This method of 'disclosure' to one person (the chairperson) is very unlikely to amount to effective disclosure to the members of the Owners Corporation.

If the aim is to restrict disclosure, so that there is a high chance that not all members will receive such disclosure of commissions, payments or other benefits received by their manager, then the proposal to include a duty on the manager to make written disclosure only to the chairperson may remain.

However, if the aim is that each apartment owner should receive disclosure of commissions from the manager, then in our view, the disclosure should be required to be made in a document that actually is

required to be sent to all lot owners (for example, notice of annual general meeting or minutes of annual general meeting).

Section 55: Power to make rules regarding external alterations and other works affecting lot owners

Observations: Owners Corporations still have to pass a special resolution to authorise it to make new Owners Corporation rules, so I query the utility of the Owners Corporation being granted an express power to make rules about external alterations, in circumstances where the need for a special resolution makes it difficult for an Owners Corporation to actually make such a rule.

I note that the *Owners Corporations Regulations 2018* (Vic) that came into force on 2 December 2018, already made a new Model Rule governing the need for Owners Corporation consent for certain lot owner alterations.

Section 67: What orders can VCAT make?

I support the enactment of the proposed amendment to section 165(1)(ca) giving VCAT the express power to order a lot owner to pay the Owners Corporation's reasonable costs incurred by the Owners Corporation in recovering an unpaid amount from the lot owner.

Section 68: Penalty for breach of rules

I support the increase of the civil penalty for breaches of rules from $250 to $1,100. The current civil penalty of $250 is entirely ineffective at deterring lot owners and occupiers from breaching the Owners Corporation rules in light of the cost, time and resources involved in prosecuting breach of rule proceedings in VCAT.

I recommend the civil penalty be set even higher than $1,100 if it is to have an increased deterrent effect.

Alternatively, I suggest that if VCAT makes an order declaring that a lot owner has breached the rules, that there be a presumption that VCAT will award the Owners Corporation's costs of having to prosecute the enforcement proceedings against the lot owner.

Section 70: Lot owner may apply to VCAT to commence, prosecute, defend or discontinue any proceeding on behalf of an Owners Corporation

Observation: the proposed new Division 1B proposes to transfer the evidential burden of proof in certain circumstances, where a lot owner makes an application to VCAT for authorisation to prosecute, commence, defend or discontinue a legal claim on behalf of an Owners Corporation. Currently, an Owners Corporation must pass a special resolution to authorise itself to prosecute legal proceedings (except in certain circumstances). That is a high threshold.

I query whether the prosed transfer of the evidential burden proposed, is the appropriate mechanism to deal with the fact that sometimes, an Owners Corporation may struggle to successfully pass a special resolution authorising itself to prosecute legal proceedings.

Suggestion: perhaps thought could be given to whether it is more appropriate for an Owners Corporation who can pass an ordinary resolution, but not a special resolution, to be authorised by ordinary resolution to make an application to VCAT for an order enabling it to commence legal proceedings, despite not having a special resolution of its members. Factors relevant to whether such an order should be granted, could include, whether it is in the best interests of the Owners Corporation to be able to commence the relevant legal proceeding or not.

That would in our view, reduce the need for individual lot owners to 'step into the shoes' of an Owners Corporation to commence legal proceedings on its behalf (usually at the lot owner's own personal expense and risk and in circumstances where an Owners Corporation loses control over the way in which the claim is prosecuted and settled on its behalf.

Yours faithfully
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per:

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