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Consumer Property Law Review

Owners Corporations and Other Acts Amendment Bill

Exposure Draft Consultation

Submission in response from "We Live Here"

About "We Live Here"

We Live Here Ltd is a movement founded to advocate and lobby for persons in Victoria that own or reside in an Owners Corporation.

The movement aims to give a voice to, and protect the rights of, the owners and long-term residents in apartment buildings, and to generate changes to legislation to meet their needs as they live their daily lives in an Owners Corporation environment.

We Live Here Ltd was formed in December 2015 and has membership and representation from over 250 high-rise buildings in the Melbourne CBD, Docklands and inner suburbs.

"We Live Here" is now recognized as the peak body representing Owners and Owners Corporation Committees

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About Owners Corporations in Victoria

As of December 2018, there were approximately 1.6 million or 1 in 4 Victorians living in or affected by Owners Corporations.

Since the year 2000 strata schemes have grown faster in Victoria than anywhere else in Australia except for the ACT. The increase in Victoria was 47% compared to NSW 38% and Australia as a whole 42%. There is as yet no sign of a slow-down in construction of new apartment buildings in Victoria.

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1. Background

Since the Property Review was announced on 21 August 2015 which, for Owners Corporations, meant a review of the Owners Corporation Act 2006 (OC Act 2006), an Issues Paper was released in late 2015 followed by an Options Paper in March 2016.

The introduction to the Issues Paper noted that Sections (i.e. Parts) 1 to 5 and 7 to 11 of the OC Act which provide for the management, powers and functions of owners corporations, and mechanisms to resolve disputes would be covered in the review. Parts 6 and 12 were not included as they were to be reviewed elsewhere. There was no mention of any other exclusions. However on page 31 an additional exclusion appeared in Part 8, under the heading of Rules of the Owners Corporation.
It was stated that…..

One issue that is beyond the scope of this paper is whether owners corporations should be able to make rules prohibiting a certain use of a lot, within a particular council area where that use is permitted under the applicable planning instrument. Local planning schemes control the use, development and protection of land within a particular council area. Each of Victoria's local government areas has a planning scheme which has been developed to achieve particular policy objectives for that council area. Planning schemes apply to private and public land in Victoria and everyone is required to comply with the requirements of the relevant planning scheme. Therefore whether a particular land use is appropriate is a matter to be addressed in the planning scheme and not through rules made by an owners corporation……

This will be referred to again later in this submission.

A total of 56 questions were included for consideration in the issues paper many of which were raised by stakeholders during preliminary consultation on the review. The questions were divided into nine sections:

a. Functions and powers of owners corporations (6 questions)
b. Financial management of owners corporations (7 questions), and
c. Maintenance (13 questions).
d. Meetings and decisions of owners corporations (11 questions)
e. Committee (1 question)
f. Rights and duties of lot owners and occupiers (3 questions)
g. Rules of the owners corporation (7 questions)
h. Owners corporation records (4 questions)
i. Dispute resolution (two questions), and
j. Applications to VCAT (two questions).

The disparity in numbers within each category was somewhat odd raging from one question on committees to 13 on maintenance, and this will be referred to again later in the submission.

The responses to the questions in the Issues Paper provided the framework for the Options Paper which was very tedious to work through because of the complexity built into it. One wonders if this contributed to the delay of almost 18 months between the promised date of the release of the new draft bill and the actual release.

Notwithstanding the above, and having presented submissions to both the issues and options papers "We Live Here" is pleased to have the opportunity to review the Exposure Draft of the new OC Bill.

2. Introduction

The introduction to the Explanatory Memorandum accompanying the Owners Corporations and Other Acts Amendment Bill states:

….The proposals that have emerged from the review seek to make buildings governed by owners corporations better governed and more liveable taking into account experiences and industry developments since the Owners Corporation Act 2006 commenced in December 2007…..

Specifically, the amendments seek to:

a) Rationalise the regulation of owners' corporations;
b) Enhance protection for owners' corporations and expanding and improving developers' duties to the owners' corporations they create; and
c) Improve the governance and financial administration of and internal relations in, owners corporations.

This submission will not attempt to cover the whole of the proposed revisions to the OC Bill but will comment on some of the features we like, don't like, and what we think could be improved from each of Sections 2a and 2b above. It will also include comments on a number of other specific reforms.

3. Rationalise the regulation of owners corporations

One of the most significant features proposed in the new Bill is for four tiers of owners corporations to replace the "one size fits all" model which has been used since the beginning.
The current legislation fails to distinguish between 50-storey skyscrapers and suburban blocks with two units. The new legislation will allow for different regulatory requirements based on the number of occupiable lots.

Four tiers of owners corporations will be created:
Tier One with 51 or more occupiable lots, and not a services only owners corporation;
Tier Two with 10 to 50 occupiable lots, and not a services only owners corporation;
Tier Three with 3 to 9 occupiable lots and not a services only owners corporation; and
Tier Four a 2-lot subdivision or a services only owners corporation.

This is a huge step forward and one that "We Live Here" has campaigned for since the review of the legislation commenced in 2016.

The proof is in how it will it work in practice, and unfortunately a closer look at the marked-up version of the new Act is not encouraging.
Ideally, and as happens in some other jurisdictions overseas each tier should have its own legislation combining what is only relevant to that particular tier with what is common to all tiers. Instead it seems that most or all of the differences between the tiers are contained within the one clause making it very cumbersome to read and could cause much confusion for those trying to navigate their way around. A good example of this is Clause 35 relating to the Audit of Financial Statements of owners corporations which has been totally replaced in the new version with a new Clause 35 which separates the tiers but does so within the same clause and the result is almost incomprehensible.

Another observation is that some clauses of the new Act appear to be appropriate for all tiers but in fact are not; e.g. **Clause 138B Power to make rules regarding external alterations and other works affecting lot owners** is a brand-new clause which is not applicable for multistorey apartment buildings.

So whilst we applaud the decision to create four tiers to replace the one-size-fits-all model we fear that unless further amendments are made this will lead to more complexity for OCs to wade through.

4. Improve the quality of owners corporations managers and enhance protection for owners corporations

Limiting the powers of developers and owners corporations managers to determine how buildings operate is another long overdue but welcome reform. Proposed reforms we particularly like include:

- Developers
  That contracts entered into that relate to the owners corporation and benefits the applicant for registration of the plan of subdivision (i.e. the developer) must not exceed three years.
- Owners corporations managers
  That onerous and unfair terms in owners corporation management contracts to be prohibited and more power given to the Victorian Civil and Administrative Tribunal (VCAT) to rule generally whether other terms in owners corporations management contracts are unfair including the banning of:
  - procedural restrictions imposed on the revocation of the manager's appointment
  - managers renewing the contract of appointment at their option
  - automatic renewal of the contract of appointment if the owners corporation fails to give notice of its intention not to renew the contract
  - restricting the ability of an owners corporation to refuse consent to the assignment of contract of appointment to a person appointed as the manager

These proposed long-overdue reforms are very welcome but unfortunately only apply to **owners corporations manager contracts.**

Unfair **building management** and **facilities management contracts**, affecting thousands of Victorians, and which can include irrevocable terms up to 25 years, are not addressed at all.

'We Live Here' believes this must be addressed as a matter of urgency before the final version of the Bill is released.

5. The power to commence legal proceedings

New Clause 9 and 70 of Exposure Draft – reducing voting thresholds for certain matters to commence legal action

The requirement to pass a Special Resolution in order for the Owners Corporation to bring legal proceedings in its own name works well for developers, builders, owners corporation managers and building managers that are seeking to avoid their liability.

However, for Owners Corporations it is administratively burdensome, expensive and in some cases, infeasible and practically impossible to pass a special resolution of 75% of owners. The high threshold acts as a bar to Owners Corporations bringing proceedings and is not in the interests of justice. By way of comparison, a publicly listed company is not held to the same account as an Owners Corporation in this regard.

We Live Here Inc. supports the amendment of the legislation to require an **Ordinary Resolution** to be passed prior to the commencement of legal proceedings. This will bring Victoria in line with the Strata Schemes Management Act 2015 (NSW) and the Body Corporate and Community Management Act 1997 (QLD).

The requirement to pass an Ordinary Resolution would still mean that the decision to file legal proceedings would not be taken lightly or on a whim, and the requirement to convene a Special General Meeting and to pass an ordinary resolution would still provide members of Owners Corporation with the requisite opportunity to scrutinize and consider the prospective decision.

The proposed Exposure Draft in Clauses 9 and 70 proposes to introduce different voting thresholds for certain matters, by stating that legal proceedings may be commenced by ordinary resolution if the jurisdiction of the matter is within the Magistrate Court's limit of $100,000.

So if an Owners Corporation sought to:

- Bring a claim against a builder for installing flammable cladding;
- Bring a claim against a builder or developer to rectify building defects;
- Bring a claim against an owner for causing damage to common property, or to enforce an owner to repair lot property;
- Bring a claim to terminate an OC Managers Contract, or a Caretakers Contract, and if those Agreements had remaining value (including insurance commissions) in excess of $100,00,

All of these matters will still require a Special Resolution to be passed. It is noted that in no other state or territory in Australia requires this threshold. This requirement acts as a barrier to justice.

This keeping of the status quo only suits the Tier One Developers and Builders, and the Strata Management and Facilities Management sectors.

It is worth noting this is not the case in other States and Territories. For example, in NSW, only an ordinary resolution is required to commence such legal proceedings, and only then, the voting % is made up of those who actually attend the Meeting (i.e if the motion is passed by over 50% of those lot owners that actually turn up to the Meeting or send a proxy, then the motion is carried).

6. Part 8 Rules of the owners corporation.

In the introduction we noted that a part of section 8 relating to Rules was excluded from the review. There is no mention of this in the marked-up version so it would be helpful to know which clause is being referred to.

Clause 138B is a brand new clause regarding external alterations. It is not relevant, however for multi storey buildings, and it appears this was not considered in framing the new clause

Clause 140A
It would helpful to know why it was necessary to change the wording for **Clause 140A** from ….**unfairly discriminates against**….. to…… **oppressive to**, **unfairly prejudicial to** or **unfairly discriminates against……** Who will be the arbiter of what is oppressive or unfairly prejudicial?

Clause 141A
Occupier to ensure invitees comply with rules
This is a new rule and a bad rule particularly 141A (3) an occupier of a lot is not taken to be liable for the invitees breach if the occupier of the lot provides the invitee with a copy of the rules of the owners corporation.
This is a get-out-jail card for short-stay operators. All a short-stay business operator needs to do is provide the invited guests with a copy of the owners corporation rules - and just like magic, no more liability! Everything becomes the guests' fault. Then anyone affected has only one option - to chase the tourist who just flew back to the other side of the world!

7. Conclusions

One of the major problems with the current Act has been that it is one-size-fits-all.
"We Live Here " has been lobbying for change for some time so we are pleased to see the proposed reforms in this exposure draft.

However, while some obvious progress has been made through the creation of four tiers it suffers from the separate tiers being fitted into the old format making it very clunky.
An alternative and one that occurs in some international jurisdictions is for separate documents for each tier.
It also seems that the review process has suffered from a lack of focus starting with the Issues paper where excessive variability in the number of questions per subject, was compounded by the number of questions that were only relevant to small developments. And there was no indication of who were consulted.

However we believe the exposure draft is a good start and includes some really useful reforms, but it should be seen as a working model, with much still to be done with the right people providing input.

"We Live Here" wish to have extensive consultations and meetings with the key members of the Consumer Affairs' policy team as we believe we are best placed to represent committees and owners corporations of all sizes.

Thank you for giving us the opportunity to review the exposure draft.

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