Owners Corporation Update: Obtaining an order for unanimous consent just got harder

14 September 2021

Tony Greenaway, Partner, Melbourne Natalie McCabe, Special Counsel, Melbourne

The *Owners Corporations and Other Acts Amendment Act 2021* (Vic) (**the Amending Act**) which is due to commence on 1 December 2021 will significantly alter the circumstances in which a member of an owners corporation, or an owners corporation itself, have standing to apply to VCAT for orders under sections 32 or 33 of the *Subdivision Act 1988* (Vic) (**the Act**).

This article reviews the amendments to be made to section 34D of the Act by virtue of the Amending Act and also the recent Supreme Court of Victoria decision of Justice Richards in *Real Estate Victoria Pty Ltd* v *Owners Corporation No.1 PS 332430W* [1] (**REV Case**).

To best illustrate the impact of the change to section 34D of the Act we should consider a not uncommon situation when an application under section 34D is contemplated by a member or members of an owners corporation:

a. Members of an owners corporation are seeking amendments to the lot entitlement and / or lot liability under section 33 of the Act;

b. Pursuant to section 33 of the Act, a unanimous resolution of the owners corporation is required;

c. 98% of the members (based on lot entitlement) are in favour of the amendment (**the Disgruntled Majority**);

d. 2% of the members are refusing to consent (and therefore unanimous consent cannot be achieved).

Under the current legislation and following the precedent set by the REV Case, the Disgruntled Majority or the owners corporation could make an application under section 34D(1)(b) of the Act requesting an order from VCAT consenting to the proposed resolution on behalf of the members that are refusing consent. In considering such an application, VCAT must apply the requirements prescribed by section 34D(3)(c) of the Act as follows:

'The Victorian Civil and Administrative Tribunal must not make an order on an application under subsection (1)(b) unless it is satisfied that—

a. *the member or group of members cannot vote because the member is or the members are dead, out of Victoria, or cannot be found; or*

b. *for any other reason it is impracticable to obtain the vote of the member or members;*

c. ***the member has or members have refused to consent and:***

i. ***more than 50% of the members (based on lot entitlement) have consented to the proposed action; and***

ii. ***the purpose for which the action is taken is likely to bring economic and social benefits to the subdivision as a whole greater than the economic and social disadvantages to the members who did not consent to the action.****'*

Accordingly, the current legislation creates an opportunity for the Disgruntled Majority to make a successful application under section 34D(1)(b) if they can satisfy the test under section 34D(3)(c)(ii) (assuming sub-sections 34D(3)(a) and (b) are not applicable).

However the Amending Act has changed section 34D(3)(c) to read:

'**c.** ***the member has or the group of members have refused consent to the proposed action and—***

i. ***the member owns or the group of members own more than half of the total lot entitlement; and***

ii. ***all other members of the owners corporation consent to the proposed action; and***

iii. ***the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the member or the group of members who did not consent to the action.'***

This change to section 34D(3)(c) has totally altered the intention of the previous version of the section. The previous version allowed the Disgruntled Majority to make an application for an order in circumstances where a unanimous resolution was required but was not able to be obtained.

The Amending Act has twisted the requirements for an application to deal with a situation where a member or group of members hold more than 50% lot entitlement and the majority lot owner or owners have refused consent to a proposed action. If all other members have consented to the proposed action then the member or group of members in the minority can seek an order against the majority lot owner or owners. It is difficult to reconcile how often a scenario under the new section 34D(3)(c) will arise as compared to the dilemma faced by the Disgruntled Majority.

It appears the legislative intention behind the change was to remove the ability of a majority lot owner to prevent an application to VCAT for changes to the lot liability and lot entitlement of members in circumstances where all other lot owners have consented to the change.[2]

However, the impact of the change has arguably extended far beyond that intention and too far in the opposite direction as it is certainly not helpful to members of an owners corporation such as the Disgruntled Majority who have a clear mandate to request VCAT to make orders under section 32 or 33 of the Act but are being thwarted by a small minority of recalcitrant members.

Consideration also needs to be given to whether it is possible for the Disgruntled Majority to make a separate application under section 34D(1)(a) of the Act, which has not been altered by the Amending Act.

Justice Garde whilst sitting as President of VCAT in *Conroy* v *Owners Corporation Strata Plan 30438* [3] (***Conroy***) concluded that it was possible to make a separate application under section 34D(1)(a) of the Act.

He stated at paragraph 54 of the decision:

"As I have said, the powers conferred on the Tribunal by s 34D(1) are cumulative. Each is expressed in different language and has a different task to perform. It is up to applicants to identify in their application which one or more of the powers contained in s 34D(1)(a)-(d) and (6) they seek to enliven, and then to satisfy the Tribunal that they meet the requirements (if any) imposed by s 34D(2)-(6) on the exercise of that power, and that the Tribunal after having considered all relevant considerations should grant the desired relief."

However, the recent decision of Justice Richards in the REV Case distinguishes the decision in Conroy.

In the REV Case, Justice Richards concluded that section 34D(1)(a) of the Act did not, of itself, empower VCAT to make an order requiring an owners corporation to alter lot entitlement or lot liability in the absence of a unanimous resolution.

Her Honour concluded that when considering making an order under section 32 or 33 of the Act in the absence of a unanimous resolution, the applicant must apply for orders consenting to the proposed resolution on behalf of the non-consenting members pursuant to section 34D(1)(b) and accordingly, must take into account section 34(D)(3)(c) of the Act. After analysing two subsequent decisions of the High Court [4], and analysing principles of statutory construction, Justice Richards concluded that section 34D must be read as a whole and when considering whether to grant an order, in the absence of a unanimous resolution of the owners corporation, the purpose of section 34D(3) could not be undermined.

Thus, before the decision in the REV Case, it was considered that an application for an order in the absence of a unanimous resolution under section 34D(1)(a) could be used as an alternative to an application under section 34D(1)(b).

After the REV Case, which is not currently subject to appeal, a separate application under section 34D(1)(a) is not possible without application under section 34D(1)(b) and regard being given to section 34D(3)(c).

However, as the State Government has changed section 34D(3)(c), our Disgruntled Majority are left with no clear pathway to apply to VCAT under the Act. Our Disgruntled Majority have reason to be upset with the state of the law in Victoria. In New South Wales, provided there are 75% of lot owners in favour of such a resolution, the Disgruntled Majority could make an application to the Land and Environment Court seeking an order.

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Authored by:

Tony Greenaway, Partner
Nicholas McKenzie-McHarg, Partner
Natalie McCabe, Special Counsel

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[1] Real Estate Victoria Pty Ltd v Owners Corporation No.1 PS332430W [2021] VSC 373

[2] *Owners Corporations and Other Act Amendment Bill 2019*, Legislative Assembly, Second Reading Speech, 11 September 2019, p. 3217

[3] Conroy v Owners Corporation Strata Plan 30438 [2014] VCAT 550

[4] *Australian Building and Construction Commissioner* v *Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157 and *Mann* v *Paterson Constructions Pty Ltd* [2019] HCA 32; 267 CLR 560

Get in touch

(https://www.gadens.com/people/tony-greenaway/)

Tony Greenaway
Partner, Melbourne
+61 3 9612 8271
tony.greenaway@gadens.com (mailto:tony.greenaway@gadens.com)

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