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YSP Podcast Transcript: Episode 136. Upgrading the common property to cater for disability

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Intro: Welcome to Your Strata Property. The podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello, and welcome. I'm Amanda Farmer, and this is Your Strata Property. As a partner at HWL Ebsworth in Melbourne, Tim Graham practices exclusively in the areas of strata and subdivision law, owners corporations, dispute resolution. Tim is one of Australia's pre-eminent strata lawyers. He is the president of the Australian College of Strata Lawyers and a fellow of the college. Tim has been named in Best Lawyers Australia for Real Property Law three times and has been recognised in Doyle's Guide as leading property and real estate lawyer. He is a council member of Strata Communities Australia.

Tim also has extensive experience in domestic and commercial construction law matters, providing contractual advice and appearing in building defects claims, insurance reviews, repair and maintenance, and Water Act cases in VCAT and the courts. Tim writes regularly for the Australian Property Law Bulletin, of which he is a member of the editorial committee and periodic publications of industry associations and strata management companies. He is a prolific presenter to most legal CPD providers, industry bodies, and universities on owners corporations and subdivision law topics.

Today, we are very lucky to have with you, and I am delighted to welcome, Tim Graham. Welcome, Tim.

Tim Graham: Amanda, thanks for the invitation, and can I add that, in my opinion, you are also one of Australia's pre-eminent strata lawyers.

Amanda Farmer: Yes. Yes. I have to say, I was giving Tim a bit of a dig about that before we went to air. Yes, what is there, two of us, pre-eminent lawyers in Australia, strata lawyers?

Tim Graham: We'll keep that between us, I think, Amanda. I might have a few knocks on the door.

Amanda Farmer: Indeed. Indeed. Well, we are lucky to have you today, you are a busy man and that is an impressive bio, that's for sure. And we're here today to talk about an interesting case that has recently been decided in Victoria, and there are some issues arising from that case relating to discrimination, disability access in our buildings, and we thought it was a bit of a hot topic to bring to our listeners.

The case is what I would call the Black Case, and I might start, Tim, by asking you to fill us in on that case. What was it about? What were the facts? And then we might get into what the court decided and what the impact of that might be on our communities.

Tim Graham: Sure, Amanda. Again, thanks for the opportunity.

It's an issue is not unknown. The facts of the case were that the respondent in the appeal, Ms. Black, moved into a dwelling loft and after moving in, developed a disability, which required her to use a wheelchair or a mobility scooter. And as a result of using the scooter or the wheelchair, she was unable to make use of a door and ramp to the car park at the main entry and the rubbish disposal and outdoor area.

So her access to most of them, I guess, means of access and egress to the building, as well as facilities, was precluded as a result of her disability.

She requested then modifications to those areas to allow her access and accommodate her reliance on her wheelchair and scooter, and the owners corporation refused the request.

It's not strictly a strata case as you and I would probably generally understand that nomenclature. The case proceeded as, well,



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pursuant to equal opportunity legislation, there's a few sections that are relevant, and I won't laboriously labour to the text of sections, but in brief, they could be summarised this way. There is a prohibition in the legislation against discrimination. Service providers are required to make reasonable adjustments for persons with a disability. And owners corporations are dealt with specifically, and they are required to make reasonable alterations to common property to accommodate persons with disability, subject to various listed requirements. And those requirements include that the person with the disability fund the cost of those alterations. So those are the relevant provisions.

Amanda Farmer: You've mentioned the obligation, Tim, on owners corporations to make reasonable alterations. Is that in the Equal Opportunity Laws?

Tim Graham: Yes, it is. So Section 56 requires an owners corporation to allow owners or occupiers with a disability to make reasonable alterations to common property subject to various requirements, including the funding of the alterations.

Amanda Farmer: Okay. And you've mentioned there as well that the court considered the owners corporations to be a service provider.

Tim Graham: Yes, it did, and I found that, respectfully, to be drawing a bit of a long bow.

You can come in that various ways. In terms of the definition of service in the equal opportunity legislation, while it's beneficial basic legislation and it's spread broadly as a result, but in the context of alterations to common property, and is the owners corporations service provider, I don't think the equal opportunity legislation helps that.

So you go to the Owners Corporation Act and the Subdivision Act and you look at the authorities and the position really ... well, firstly, the word 'service' appears 12 times in our Owners Corporations Act in Victoria, and it means something different each time.

So, that creates its own problems. But in terms of what most corporations' statutory purpose is, the supreme court's made a very clear statement about that in a rules case called Balcombe, which was a service department short term letting case, but in deciding whether rule was valid or not the court and tribunal within the court looked at what is the statutory purpose of an owners corporation. It basically said that to me is not a service provided in any deep ...

Tim Graham: I could take that would step further, I'll try and avoid labelling some legislation but I can say this, Section 12 of the Owners Corporation Act in Victoria allows an owners corporation, if permitted by a special resolution, to provide a service and the special resolution can also set out how that service is funded. So it's not an owners corporation fee, it's payment for a service and services are generally regarded as, an owners corporation's given powers and functions legislatively, with the mandate of a special resolution giving rise to a service, that's often taken as a vehicle by which the owners corporation can do things additional to those statutorily conferred powers and functions.

So, if you line up the linear logic on that, an owners corporation's statutory purpose is to manage administer common property, it's given certain functions and powers to do so. It can be invested of additional functions and powers by way or provisions of a service if authorised by a special resolution but that in itself seems to me that an owners corporation, within a framework of the Owners Corporation Act, is not a service provider.

Amanda Farmer: Yes, I have to say I agree with you and we'll close off this Black Case shortly and I might just mention a New South Wales case which was very similar The case of Hulena which dealt with that question of whether an owners corporation in New South Wales is providing a service because I find it hard to get my head around that characterisation of owners corporations as well.

Lets just close this out. What ended up happening in the Black Case? What orders were made once the court established that the owners corporation is a service provider and must make these reasonable alterations.

Publication Date: 30 October 2018

YSP Podcast Transcript: Episode 136. Upgrading the common property to cater for disability

Tim Graham: Well the Supreme Court granted leave for appeal but contemporaneously dismissed the appeal. It gave the term 'services' a wide reading as we've just discussed and the alterations, well the owners corporation was forced to accommodate the alterations proposed by the respondent to the appeal, Ms. Black.

Amanda Farmer: And is it the case that she had to pay for it? I think you said in the Equal Opportunities Act, it's for the users of that service to pay?

Tim Graham: Yes, that's my understanding. I have seen some other cases and I have heard comment from, I think it was the commonwealth commission, in any event some time ago, that they were of the view that the owners corporation needs to fund these adjustments or alterations to common property so as not to discriminate against a person with a characteristic but I think that is stretching the bar Amanda.

Amanda Farmer: So what's the fall out of this case in Victoria? I appreciate it's still early days but are buildings that you're working with, strata managers you're talking to, concerned about this? Are buildings now thinking they are going to have to be upgrading or permit upgrades to their common property because this is now been established by the courts there?

Tim Graham: That's the concern Amanda, yes. The default position of course is, in Victoria as all other jurisdictions as I understand it, that there would be rules in Victoria, by-laws elsewhere, prohibiting owners or occupiers from altering common property. In terms of building improvements on common property it's probably also a trespass law. So you've got the operation of rules or by-laws and the thought of trespass all set to militate against this happening but we've got this now statement from the Supreme Court which basically says if you come within the ambit of the equal opportunities legislation, then you can circumnavigate those laws and it can cause adjustments to be carried out and there may still be some discussion about who pays. The legislation does have the criteria, as we've discussed, but I have had it put to me that it's an owners corporation impost so there is probably still work to do there too.

Amanda Farmer: It seems to me, when we look at these cases that are relying on equal opportunities legislation, or what we would call in New South Wales, anti-discrimination legislation, that we're really digging into this question of whether our strata buildings are public or private spaces. And if they are public spaces then that kind of legislation comes into play, if they are private then we are within, and should remain I think, within the scope of our strata legislation and for our specialist tribunals to determine questions under that legislation.

This was an issue that came up in New South Wales back in 2009 in a case called Hulena, it's H-U-L-E-N-A and I'll put a link to that case in the show notes and that was a decision of what was then the administrative decisions tribunal in New South Wales, that's now been subsumed into NCAT and it was a question under the Anti Discrimination Act, that act prohibits discrimination on the basis of disability in the provision of goods and services and similar to your Black Case, the tribunal decided in that case that the owners corporation was, by providing entrances and exits to the building, this is kind of bizarre, providing a service.

Amanda Farmer: And because Ms. Hulena, who suffered from MS and was in a motorised wheelchair, needed, I think it was ramps or accessible entrances and exits, the owners corporation was obliged, as a provider of a service, to install those ramps.

The specific facts of this case meant that the order wasn't actually made against the owners corporation because it was found that the failing to provide that service was a failing of the developer and Ms. Hulena did not bring her application against the developer, she brought it against the owners corporation so a very interesting case but we had a similar fall out here in New South Wales when that first came out to say, this is kind of counter-intuitive.

Surely these, our strata communities and the common property in our strata schemes are private spaces and isn't it a bit of a stretch to say that by providing a front door, an entrance, an exit, we are providing a service and we're therefore captured by this anti-discrimination legislation? And as far as I'm aware that is still a bit of a grey area here in New South Wales, we haven't had any more guidance from superior courts on that but I've certainly been involved myself in communicating with lot owners and their lawyers who want to make alterations to common property because of wheelchairs and other access issues and generally I'm telling owners corporations, look you'd be well placed to make these alterations, considering that they are not too onerous

YSP Podcast Transcript: Episode 136. Upgrading the common property to cater for disability

because you do expose yourself to this kind of litigation.

Tim Graham: Yes, you've hit the nail absolutely on the head in distinguishing between private property and what might be regarded as a public space in my opinion. It's very rare for an owners corporation to have public space. You might have a community title or an estate development regarding community in these sorts of subdivisions that have roads and what have you but by and large your garden variety owners corporation is private property. I agree with you.

Amanda Farmer: Yes, and just on the point about cost, in the Hulena Case, although the order wasn't made, there was, I think, some comment from the tribunal members considering the case that if the order was going to be made then it would be that the owners corporation meet the costs. There are actually some figures in the case, something like \$17,000 or \$18,000 for that work to be done. So, look, interesting.

Tim Graham: It is. Look, I had one a couple of years ago where the proposition was that an elevator was to be installed on common property for several hundred of thousands of dollars and if that is a burden upon the lot owners, it's not tenable.

Amanda Farmer: Yes well that's the risk isn't it? When we have decisions like this coming out of our tribunals or our courts, that owners corporations are going to be exposed to that possibility and lot owners requesting those kinds of adjustments be made and again it's an example of this anathema to property law that is strata. These very unusual public/private questions and ...

Tim Graham: Yes that's right and look discrimination is obviously repugnant and abhorrent and nothing that we've discussed this morning in any way derogates from that but we are talking about fundamental proprietary interests. The legal understanding of discrimination is just so wide that it really seems that this might have well and truly opened doors for people to make all sorts of claims to carry out all sorts of adjustments to common property and that is a problem, it's contrary to rules and it's contrary to the notion of the owners corporation being the proprietor of common property and having the proprietary interest in it.

Amanda Farmer: And it introduces an unacceptable, I think, level of uncertainty for our owners corporations for those who are managing them for when we, I would say in New South Wales, our legislation, the cases coming out decided on that legislation, and as we see through anti-discrimination legislation are not so clear. It's unhelpful and I don't know, you perhaps have more clarity in Victoria, I don't know if you think there will be amendments to your legislation to deal with this issue? What do you think will be? I wonder if we will see buildings attempting to make rules about adjustments, modifications to modern property in relation to access for disability. And perhaps saying, no, that that is not permitted or it's only permitted to a certain extent or it has to be paid for by the occupier who requires it. I wonder if we will see the rules that will attempt to regulate from the inside, if you like, this issue.

Tim Graham: Yes, it will be interesting to see I think. Coming back to your question a moment ago Amanda in terms of legislative response, I haven't heard anything yet, it's all brand new of course and as it occurs we've been undergoing what's known as the 'Consumer Property Act Review' for about 2 years. We've got an election coming up so whether or not they get through before that occurs in November, I don't know, but that's where the attention, in this case, has been but candidly I don't know in the space of discrimination, equal opportunity and human rights if there's anything there but I can safely say that given the case is only 2 months old that I don't understand that it's on the agenda.

In terms of an owners corporation's ability to govern itself well it's an interesting question you make and without diverging from our primary topic this morning, again I mentioned a case with Belcombe earlier which was a service department case and in that case the Supreme Court said that an owners corporation doesn't have the power to pass a rule which prohibits an owner letting their lots run for a threshold period of whatever, 30 or 60 days and I was 70% on this fantastic paper, it's actually quite being known last year Amanda, so you're all across this, but anyway the bulk of cases, I mean the Supreme Court, in that case, said that an owners corporation doesn't have the sovereignty to make its own decisions about what laws govern leasing so that was a real circumscription of what probably had heretofore been regarded as an owners corporation's sovereign rights. It requires thought. I don't know the answer. It's new.

Amanda Farmer: And specifically on the topic of short-term letting, which I know we are both committed to not getting into today,

Publication Date: 30 October 2018
YSP Podcast Transcript: Episode 136. Upgrading the common property to cater for disability

we do have some new legislation in Victoria, which by all media reports has been characterised as being very short term letting friendly and more friendly than our proposed, or our new legislation now in New South Wales when it commences which was a surprise to a lot of people.

Tim Graham: Yes, it's a very light touch. What it does is set out a list of behaviours that are referred to as prescribed behaviours and really there is perhaps some more specificity in their description than might otherwise appear in the rules but I think fundamentally one underpins those prescribed behaviours. It's really going to be a breach of the model rules as they stand or of an owners corporation's made and registered it's own special rules. It's tried to say that there's going to be rules against behaving anti-socially and creating noise and disturbance and what have you. I mean every owners corporation has that rule. The prescribed behaviours aren't really to gain anything.

I think there's going to be, there's likely to be too much caught by the new description of prescribed behaviours that wouldn't normally be a rule breach, frankly, and secondly there is probably some extended powers on the part of the tribunal which is going to be able to restrain the practice of short-term letting. I think it requires 3 complaints in 24 months and then there will be some temporal, probably ephemeral retract put on that. It can fine and it can make a compensation order now. Those are clearly stated powers as it stands, Section 165 of our act has a kind of, well it's an inclusive and non-exhaustive of orders that the tribunal can make. Arguably the tribunal can already do all those sorts of things although it's not explicitly stated. With the new legislation, well, at least we've got express fact that the tribunal has those powers. So it may be regarded that the tribunal has those powers, that's about it. I don't think that the behaviours really add anything.

It's a light touch, as you identified. I think you bucked that up, in New South Wales.

Amanda Farmer: Yes, very interesting what we've come up with in New South Wales. I'm actually going to jump on a Facebook Live shortly after our call and have a bit of a chat to some interested people about that but I'm still getting my head around that as well.

But look, New South Wales will be the same as Victoria, it will be wait and see, wait and see what building regulators do with the legislation and probably, as if you say Tim, if what's happened in Victoria is really just to reassert what the existing powers and duties and right are already there then perhaps not too much will change.

Tim Graham: That's right.

Amanda Farmer: Tim, you're on the podcast, you get the book question, what books have had the greatest impact on you and why?

Tim Graham: It's appropriate to give Cathy Sherry a plug, her book on multi-owned properties, it's really the apogee of recent texts in the area and I raise it not only to say g'day to Cathy but also to earmark that actually I made a point earlier about that public property and private property dichotomy and Cathy just put that so clearly and robustly I think that's it's a really calibration or recalibration for all strata laws to have a look at that so that would be that one and whilst I've never been to church I have read the bible out of interest, does that count?

Amanda Farmer: You have to be my first guest in two and a half years that has listed the bible. There we go.

Tim Graham: Is that right? Did you say what had the most, I wouldn't say it's had the most influence on me. I read rock and roll biographies, it's probably, you know, "No One Here Gets Out Alive" on the Doors or something, but anyway.

Amanda Farmer: I love it, I love it, thank you. Bringing all colours, all shapes and sizes and tastes to our podcast, that's what we like.

Tim Graham: Indeed.



Publication Date: 30 October 2018
YSP Podcast Transcript: Episode 136. Upgrading the common property to cater for disability

Amanda Farmer: Alrighty, anything else you want to ask Tim before we wrap up? I know that you're a man with many topics to discuss and a lot of value to bring so if there is anything that you wanted our listeners to be particularly aware of that's going on in Victoria when it comes to strata law, now's your chance.

Tim Graham: Well we did make a commitment to each other we weren't going to talk about service departments. We've already made light of that.

Amanda Farmer: Well you want to talk about cladding now?

Tim Graham: No, I don't, I'd rather now can we avoid that?

Amanda Farmer: Absolutely.

Tim Graham: Look, that's an issue here as it is everywhere obviously and that would warrant ... you've probably done it by now and I think it's going to need to keep getting done as things develop. It's a space that's moving very quickly so we're not going to deal with that today Amanda. Threshold with conditions in New South Wales is very interesting. Whilst we're only going this consumer property acts review in this state, my hunch is they're not going to touch that issue of termination of a strata scheme of a threshold less than unanimous. So I'll be interested to hear what you say about what's going on in New South but I did, about a month ago now, was successful in planning an order dissolving an owners corporation, which is the first time I believe it's ever been done in this state.

Amanda Farmer: Oh wow.

Tim Graham: But it doesn't, it's stepped towards an order for termination which is not legislated, well it sits on ... the owner's resolution has jurisdiction to make those orders. What happened in that case, very briefly was, it was a lateral estate of several hundred blocks. There were two parcels of common property. One was just near the gated entrance and I think there's a sign or such there and then there was this amphitheatre in the centre of the estate which was marketed beautifully but functionally, unfortunately, it's been a place where gangs hang out and tend to get up to nefarious activity and there's vandalism and violence and owners corporation is just indefinitely chasing its tail to fund repairs and maintenance, to trials, security and all that sort of stuff.

Anyway, it decided it could do without the amphitheatre and that it would be better of disposing of common property and dissolving the owners corporation so we didn't seek or obtain an owners resolution, we went straight to the tribunal. We made the arguments, the tribunal was satisfied that it was in the owners corps best interest to order the dissolution of it.

Tim Graham: So the owners corp disposes of that, front parcel goes to council and will be a reserve. The middle part will be sold to a developer for not less than the threshold amount and the developer can then develop it. The owners corporation then will have no common property. The roads under the road safety act are certainly not common property. There will be an arm, an that's an estate so the owners corporation doesn't need to exist. It's obviously limit to its facts. Those facts and scenarios wouldn't apply to vertical towers and the other thing of course, of note, is whilst the owners corporation has effectively been terminated, no one was deprived, there wasn't a compulsory acquisition if you like if somebody's that person holding out of their lot.

So I think the next generation of arguments is going to be, if the tribunals made one order dissolving one OC, it's got power to dissolve that means and includes disenfranchising someone from their lot. Obviously, there's arguments the other way, there is no express power for the tribunal to do that so I think that's next generation but I would be interested to hear from you how your termination laws are going. I think there's a few before the courts as we speak?

Amanda Farmer: There are a few before the courts and there have been some interlocutory decisions that have been published about things like how to do devaluations and we don't yet have a final decision at the time that we're recording this, where a scheme has been terminated and that order's been made, that final order's been made by the Land and Environment Court for the sale or the redevelopment of the scheme.

Publication Date: 30 October 2018
YSP Podcast Transcript: Episode 136. Upgrading the common property to cater for disability

Amanda Farmer: I have a couple on my books at the moment and the interesting thing that I'm seeing is the interplay between the developers, the real estate agents, the owners who have been told that, if they were to seel in one line they will all get above market value for their lots and the arrangements that have been put in place in terms of option deeds while the developers do their research, get their ducks in a row, get their council approvals. And a lot of owners not understanding what all of that is about. Why is a real estate owner talking to me, asking me to sign this contract and pay me this option fee and what does that mean? Will I be forced? They're telling me that if I don't sign this then it ends up in court then I am going to get less.

I'm doing a bit of work around that, just advising owners on those kinds of documents in those kinds of situations so that's a really interesting practical impact I think of this legislation which maybe wasn't foreseen but will be interesting to see when those cases do get determined and we have some principles established for how exactly how this process is to run.

Tim Graham: Yes, indeed, look they are very smart, developers aren't they? I think that discussion about compulsory termination has been going for as long as I've been around, about 20 years and it's been urgent for about 20 years and I think it's a lot of, you know, up your way, the buildings in the Eastern suburbs, the Northern Beaches and what have you that are past their use by date but they are forking out a lot of money just to eek out another year of amenity and it's just false economy. But that's where it started.

Amanda Farmer: Yes.

Tim Graham: It took about five minutes I think for developers to see a commercial opportunity. I think you're going to be very busy with it.

Amanda Farmer: Yes, yes indeed. Well, I have to say in Victoria they are very lucky to have your hard-working brain down there with those very interesting cases and thank you again for giving us your time. I've taken up more of your time than I intended to. I'm going to ask you time to let us know how our listeners can find out more about you. So where do they go to get in touch if they want to? And then we'll wrap up.

Tim Graham: So the firm is HWL Ebsworth Lawyers. So it's HWL Ebsworth and my email is tgraham@hwle.com.au.

Amanda Farmer: Excellent and I will make sure that there are links to the cases that we've talked about and your contact details in the show notes for this episode which is over at yourstrataproperty.com.au and that's about it from me Tim, I'll look forward to catching up with you in person sometime soon.

Tim Graham: We'll do that Amanda, thank you so much again for the opportunity, great to chat with you.

Amanda Farmer: You too.

Outro: Thank you for listening to Your Strata Property, the podcast that consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comment section which Amanda will answer in her upcoming episodes. How can Amanda help you today?

