

List of consultation questions

Regulation of owners corporation managers

- 1 What option do you support, and what are the features of that option that make it the most practical and cost effective way of improving the quality and conduct of owners corporation managers?
 - Option 1A.
 - It may not be the most practical nor cost effective way of improving the quality and conduct of owners corporation managers, however, Option 1A has much higher prospects of success than Option 1B in achieving the goal of improved quality and conduct of managers in Victoria.
- 2 What other eligibility criteria should be considered under Option 1A or Option 1B?
 - Disqualification and ineligibility for criminal convictions relating to fraud or violence. Fraud is relevant due to the management of funds integral to providing owners corporation management services. Violence convictions are relevant due to the integral nature of conducting meetings with lot owners (often onsite at the property and after-hours) and the nature of those meetings which can involve high tension and differing views amongst owners.
- 3 What other matters are important to consider for the transitional arrangements under Option 1A?
- 4 Which option, and why, would be more effective in ensuring the ongoing knowledge and skill of owners corporation managers?
- 5 What evidence is there of the benefits of continuing professional development for owners corporation managers, or for property occupations more generally, in Australia or overseas?
- 6 If continuing professional development is preferred, what steps could be taken to ensure the ongoing quality and appropriateness of the training, and to reduce the risk of exploitation by training organisations and participants?
- 7 What other options are there to support the ongoing maintenance of the knowledge and skills of owners corporation managers?
- 8 Which option is fairer to both parties and why?
- 9 Under option 3A, if certain terms are to be prohibited as unfair what types of terms should be prohibited and what types of terms should not be prohibited and why?
 - Option 3A.
 - Because the factual landscape in Victoria's owners corporation management industry has demonstrated that the listed categories of 'unfair' contractual terms are actually present in management contracts and in my experience, cause significant disputes. The prohibition of the listed categories of 'unfair' contractual terms cannot in my view impose any burden on the commercial interests of owners corporation managers. Rather, it removes any apparently unfair advantage that has been sought by some owners corporation managers to be obtained in the absence of regulation about the terms of management contracts.
- 10 Should 'reasonable' notice be quantified under Option 3B and, if so, for how long?
 - Yes.
 - 28 days.
- 11 What is the best and fairest way to exercise the termination right under Option 3B?

- In my view an Owners Corporation's right to terminate a contract without cause should be able to be exercised by ordinary resolution, not by special resolution. The current legislation already permits an Owners Corporation to impose restrictions on the decisions that its elected Committee can make by ordinary resolution. If it does not impose restrictions on its Committee (for example, a restriction on the Committee that prevents it from terminating the manager at Committee-level), then the Committee will have the power to make a decision to terminate the manager. In my view, the existing regime in this regard should not be interfered with.
- 12 Are the disclosure requirements proposed under Option 4A sufficient to address potential conflicts of interest for managers and, if not, what other measures are required?
- No.
 - In my view the proposed new section 122A that was prepared in the *Consumer Affairs Legislation Further Amendment Bill 2014* is a fair and reasonable option to deal with the issue of disclosure.
 - There appears to be trend towards owners corporation managers having related bodies corporates providing ancillary services to the manager's owners corporation clients, for example, facilities and asset management services, insurance services, debt recovery services and other ancillary services. If the owners corporation manager who is in effective control of the client's funds has the ability to pay related bodies corporate then the client should have this relationship disclosed to it both in the management contract for existing relationships, and ongoing as necessary from time to time during the period of management.
- 13 Is Option 4B sufficient to address the issues arising from the pooling of funds, or is the extra level of regulation under Option 4C required, and if so, why?
- If licensing of managers is implemented and training requirements include training in relation to management of client funds held on trust, then Option 4B may suffice.
 - However, if licensing is not implemented or do not include such training requirements, then Option 4C would provide a higher level of security. Whilst the Government may receive more participation from industry stakeholders in submissions to this options paper, as opposed to from consumers, the Government may wish to consider the following question; would the average lot owner affected by an owners corporation prefer that their manager holds their money in a trust account that is independently audited, or some lesser form of regulated manner?
- 14 What are the risks, if any, of unintended consequences arising with the measures proposed in Option 4B or Option 4C?

Responsibilities of developers, occupiers and committee members

- 15 Are the enhanced general obligations under Option 5A sufficient or are the additional obligations under options 5B, 5C and 5D needed, and if so, why?
- 16 Are the 'further expanded' obligations under options 5B or 5C necessary or should the Queensland or New South Wales approach, as applicable, be adopted without change?
- 17 Why would the 'building defects' obligation be necessary?
- 18 If it is desirable to expand the rule-making power to include rules on smoke drift, renovations and access to common property:
- (a) should Model Rules also be made on those subjects, and if so
 - (b) are the proposed Model Rules based on reasonable presumptions about what most lot owners in owners corporation would regard as unobjectionable, and are they adequate?
- 19 Would a Model Rule on fire-safety advice to tenants, in principle, be unobjectionable, and if so, why?

- 20 Do all or only some of the options improve the position of owners corporations and why?
- 21 What additional justification, if any, is needed for the proposal for the joint and several liability of lot owners for breaches of owners corporation rules by their tenants and invitees?
- 22 Is it sufficient simply to expand on the existing duties of committee members to address the issue raised, or is a complete reformulation of committee members' duties, along the line of the Associations Incorporation Reform Act, necessary, and if so, why?
- 23 What risks or unintended consequences might arise with options 8A, 8B and 8C, which propose extending the powers of owners corporations to deal with community building, water rights and abandoned goods?
- 24 What is the best approach for dealing with abandoned goods on common property, and why?
- 25 What are the benefits and risks of the additional power proposed for goods that block access?

Decision-making within owners corporations

- 26 How might the limitations on proxy farming have negative consequences for the governance of inactive owners corporations?
- 27 Which approach to giving owners corporation managers decision-making powers in Option 9B is the more effective and why?
 - In my view, if Option 9B were to be implemented, it should only permit the manager to pass interim resolutions that relate to a small range of important issues affecting the immediate needs of the property, for example:
 - The renewal of mandatory insurance policies on same or similar terms and premium levels;
 - Approving a budget but only for the immediate needs of the property (there should be limitations on the amount);
 - In addition, Option 9B should not be included in a Model Rule. It should be included under a statutory provision in the Owners Corporations legislation that relates to annual general meetings where no lot owner attends either in person, by telephone or by proxy, commonly known in the industry as a 'No-Show Meeting'.
- 28 What are the risks of giving owners corporation managers decision-making powers in the absence of a licensing or enhanced registration scheme for managers?
 - Increased risk of potential abuse of power by a person who has in a position of perceived commercial conflict (from the interests of the owners corporation, given that the manager is a supplier to the owners corporation) and who often does not have any obligation (as a lot owner) to contribute towards any financial ramifications for the owners corporation caused by the exercise of such power.
- 29 Is further relaxation of the special resolution process required for inactive owners corporations and, if so, which alternative under Option 9C is preferable and why?
- 30 How might reducing the size of an owners corporation committee and providing for who can arrange a ballot improve its functioning?
 - There is in the current legislation an inconsistency between the process for decision making by Committees by ballot and by meetings. The procedure for Committee meetings is preferred because it enables decisions to be made according to total Committee Member participation (subject to a quorum being present). Contrastingly, Committee ballots require decisions to be made based upon the total number of elected Committee Members, as opposed to the total number of Committee Members who participate in making the decision (subject to a quorum).

- Determining Committee decisions by participation could reduce the ineffectiveness of some existing Committees, and encourage participation by non-participating elected Committee Members.

Dispute resolution and legal proceedings

- 31 How well do options 11A and 11B address the issues raised about the role of owners corporations in dispute resolution and the procedures under Model Rule 6?
- 32 What are the benefits and risks of increasing the amount of the civil penalties for breaches of the rules?
- In my experience in the industry, civil penalties are rarely imposed by VCAT.
 - Increasing the civil penalty is supported. However, in the absence of imposing the civil penalties and publishing records of the same, it is likely to have a negligible effect on behaviour within strata schemes.
- 33 Which option for reforming the imposition and payment of civil penalties achieves the best balance between fairness and effectiveness, and why?
- Option 12C.
 - However, it is recommended that there should be a statutory presumption that an offending lot owner who is determined by VCAT to have breached an Owners Corporation Rule, must pay a civil penalty. A presumption of a penalty is more likely to deter offenders. The penalty should be payable to the Owners Corporation.
- 34 Which option, and why, best balances the need for owners corporations to be able to commence legal actions with protection for those lot owners opposed to an action?
- There does not appear to be any basis for Option 13C.
 - Option 13B is likely to confuse given that it does not correlate to any other kind of resolution threshold in the legislation.
 - Option 13A is preferred but subject to the following comments:
 - The current requirement for an Owners Corporation to pass a special resolution to authorise the commencement of legal proceedings (except proceedings to recover levies through VCAT or enforce rules) can deter Owners Corporations from commencing defect litigation against builders under the Domestic Building Contracts Act.
 - The financial impact of litigation fees on lot owners can be addressed in other ways. For example, in the *Unit Titles (Management) Act 2011* (A.C.T) there is a regulatory threshold set for what amount of legal fees, per lot owner, can be raised by the Executive Committee, above which any further fees must be approved at a general meeting. This kind of method could replace the current blanket requirement for a special resolution to be passed before commencing legal proceedings. Careful drafting would be required to approve on the A.C.T position.
- 35 If Option 13A was adopted, would the current provision of the Owners Corporations Act that empowers VCAT to authorise a lot owner to commence proceedings on behalf of an owners corporation still be necessary?
- Yes, it is likely that s.165(1)(ba) would still be required.
 - The situation where a lot owner will want to 'stand in the shoes' of an Owners Corporation to pursue another lot owner or occupier for breaching a rule will still likely exist. There are instances of Owners Corporations deciding not to take a rule breach issue due to a range of factors. If that occurs, a complainant lot owner should still be able to decide whether to pursue the matter on behalf of the Owners Corporation as

long as there is a proper basis. Otherwise, it would increase the likelihood that complainant lot owner will sue the Owners Corporation for its decision not to take further action. That type of action against an Owners Corporation does not address the core issue faced by the complainant lot owner (as their core issue is usually an alleged breach of rules by another lot owner or occupier).

- 36 If Option 13B was considered appropriate but the 66 per cent threshold was considered insufficient to overcome the problems identified, would a further reduction to 60 per cent be appropriate?

Differential regulation of different sized owners corporations

- 37 Which option, and why, represents the most appropriate way to differentiate the level of regulation of owners corporations according to their size?

- Would recommend review of academic research in the strata industry to see whether there is any factual basis for this proposed distinction. Significant important strata research is being carried out by academics across Australia. Their academic research and findings should be reviewed and considered before making distinctions in the regulation based on factors such as size. Until the same is conducted a distinction based solely upon size is not supported.

- 38 Is the size of owners corporations in each tier appropriate for the requirements imposed on them and, if not, what should be the size requirement for each tier?

Finances, insurance and maintenance

- 39 What other options could be considered to enable owners corporations to recover debts?

- As a legal service provider providing debt / levy recovery services to Owners Corporations in Victoria through the Victorian Civil and Administrative Tribunal, Consumer Affairs is invited to discuss with us the existing process and common issues faced by our owners corporation clients. We are able to provide more detailed information about the existing levy recovery landscape in Victoria through VCAT and provide more insight relevant to the apparent presumption in Options Paper 1 that the use of solicitors in recovering owners corporation levies may generally not be cost effective or may be undesirable for reasons that appear to relate to the preference for 'informality' or related to perceived financial impacts.
- The primary concern that our owners corporation clients have is to ensure that the Victorian Civil and Administrative Tribunal requires a lot owner who is proven on the balance of probabilities to have breached their obligations to pay their fees immediately upon being serviced with a Final Fee Notice, to reimburse 100% of the owners corporation's VCAT Filing Fee, title search disbursements and legal fees for commencing and prosecuting the levy recovery proceeding. At present, the Tribunal's decision whether to order a defaulting lot owner to pay the owners corporation's costs and the amount of any costs order is discretionary without a mandatory presumption or relevant factors to consider. Rather than imposing a schedule of costs akin to the Magistrates' Court, another option in order to not infringe greatly upon the Tribunal's existing discretion may be to impose a presumption that the defaulting lot owner will pay the owners corporation's reasonable costs.

- 40 Should the amount of any fee bond be left to owners corporations to set and, if so why?

- 41 Should a maximum amount be set out in the Act and, if so, what should that amount be?

- No. We repeat the above invitation to Consumer Affairs to discuss our existing levy recovery practice through VCAT.

- 42 Would it be more efficient if fee bonds were held by the owners corporation itself, the owners corporation manager or the RTBA?
- If there was substantial industry or academic evidence that the existing levy recovery process through VCAT was ineffective then there may be a basis for implementing a bond procedure. However, in the absence of such evidence, there appears to be no need for the implementation of a bond procedure.
 - In our view, the existing Victorian Civil and Administrative Tribunal process for levy recovery is functional and currently achieves a fair balancing of relevant stakeholders' interests, subject to our comments about regarding costs orders against defaulting lot owners.
- 43 Should owners corporations be able to recover costs that exceed the debt or should they be capped at level of the debt?
- 44 Which of the 'litigation costs' options better achieves a balance between financial equity for lot owners, encouraging alternative dispute resolution and discouraging unnecessary use of lawyers?
- 45 What would be the cost of increasing the minimum public liability insurance amount to \$20, \$30 and \$50 million?
- 46 How might the equity achieved by the powers proposed under Option 16B outweigh the potential problems?
- 47 In relation to the proposal under Option 16B for differential levies for insurance policy premiums (where a particular use of a lot increases the risk) should owners corporations be:
- (a) required to apply to VCAT for the appropriate order, or
 - (b) permitted under the Act to apply the appropriate levy as of right, leaving it to an aggrieved lot owner to apply to VCAT for any remedial order?
- 48 Which option or options do you prefer for maintenance plans and funds, and how does the option or options address the issue?
- 49 Should a general obligation be imposed to deposit in a fund the amount necessary to implement the relevant plan, leaving it to individual owners corporations to resolve on the appropriate part of annual fees or should some fixed proportion of fees be set in the Owners Corporations Act?
- 50 If a general obligation, should the resolution as to the amount to be set aside be an ordinary or special resolution and should it also be stipulated in the Act that the designated part of the fees must be adequate to fund the plan?
- 51 If a fixed proportion of fees, what should that be for both types of fund?
- 52 Where an owners corporation needs to make an assessment of how much of its general repair and maintenance costs arise from a particular use of a lot, what criteria or principles should it apply in making the assessment?

Part 5 of the Subdivision Act

- 53 What, if any, risks arise from removing the requirement for owners corporations to have and use a common seal?
- 54 How much should developers' property rights regarding initial settings of lot liability and entitlement give way to considerations of fairness?
- 55 If developers' rights should give way to fairness, which of options 20C to 20E for the initial setting of lot liability and entitlement best ensures fairness, and why?
- 56 Under what circumstances could options 20B to 20D be implemented by the developer rather than a licensed surveyor (which would be cheaper and quicker)?

- 57 To what extent should the surveyor (or developer) be required to set out how the criteria were applied in achieving the settings?
- 58 Under Option 20E, is 30 days a reasonable time for an owners corporation to notify Land Victoria of changes to lot liability and entitlement?
- 59 How might the proposal to reform the process for VCAT applications be sufficient to balance the rights of the majority of lot owners against those of a holder of the majority lot entitlement?
- 60 Which option, and why, is the best and fairest way to provide for a more flexible process to sell buildings governed by owners corporations?
- 61 Under Option 21D, which voting thresholds and VCAT processes are preferable, and why?
- 62 Under Option 21E, which sub-alternative is preferable, and why?
- 63 If the 'less restrictive' sub-alternative, should the special resolution be 75 per cent of lot entitlement only and should the burden of proof be on the applicant rather than the respondents?
- 64 To what extent do the options to reform the Subdivision Act improve decision-making processes within owners corporations?

Retirement villages with owners corporations

- 65 Which option, and why, better achieves the aim of ensuring that the operation of owners corporations in retirement villages conforms with both the Owners Corporations Act and the Retirement Villages Act?
- 66 If Option 22A, which sub-alternative, and why, better resolves the problems involved in the combining of annual meetings for owners corporations and retirement villages?