903/102 Wells Street

Southbank VIC 3006

21 April 2016

Consumer Property Acts Review

Policy and Legislation Branch

Consumer Affairs Victoria

GPO Box 123

Melbourne VIC 3001

Dear CAV,

# Consumer Property Acts Review – Owners Corporation Act 2006

This is a personal submission. It is made on the basis of my experience as the owner of multiple strata title lots, and my involvement with an Owners Corporation Committee for a residential strata development.

I hope this submission provides information which is of use to the Department’s review.

Should you have any follow-up queries, I can contacted

* at the above address, or
* by email on lambertr@bigpond.net.au, or
* by telephone on 0407 992 447.

Yours sincerely,

Rod Lambert

# Functions and powers of owners corporation

1. **Are the current constraints on owners corporations’ power to commence legal proceedings appropriate?**

I believe significant constraints are required. There are a limited number of cases which suggest that a lack of constraints can be dangerous e.g. the case of Merrimac Heights in Queensland in which a Committee of 7 owners committed the Owners Corporation (OC) to an action which ultimately cost >$1 million in legal fees and associated costs (<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QSC/2011/336.html>.)

I believe the current constraints are adequate, but only after the provision of interim special resolutions is factored into the issue. To date the OCs I am involved in have never been able to achieve the 75% approval required for a special resolution, but have successfully achieved over 50% to approve an interim special resolution, which became final 29 days later.

1. **Are there any other issues relating to the power to commence legal proceedings?**

As the cost of a legal action can be high, most OC’s would be averse to taking action at VCAT, regardless of the strength of the case.

VCAT should be encouraged to exercise its discretion to award costs to losing parties more often.

1. **Should owners corporations be able to deal with water rights, including water that falls on common property?**

Yes, particularly for water that falls on common property. Disputes similar to those raised in the discussion paper could be minimised by appropriate constraints on OC decisions in this area e.g. via the requirement for a special resolution.

1. **Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?**

Yes – see response to Q.5 below.

1. **Do owners corporations need powers to deal with goods on the common property in breach of the owners corporation rules that a person who owns the goods has refused to move or has abandoned? If so, what safeguards should there be, and should there be different safeguards for emergency situations or for goods that are a serious obstruction?**

Yes, OCs need powers to deal with goods that a resident refuses to move, or has abandoned, but there needs to be appropriate safeguards.

One of the most common problems facing the OCs I am involved with is bicycles abandoned on the common property used for bicycle storage. About 60% of these inner city apartments are rental properties, and bicycles are often used by residents to travel into the CBD. When they move out, the bicycle may be left behind. The owner of the bicycle is rarely identifiable. Regardless of the lack of powers to do so, the OC has to run bi-annual bicycle ‘culls’ to ensure there is sufficient bicycle storage space available for the current resident population.

Yellow fluorescent stickers are attached to all bicycles, and notices distributed asking residents to remove the sticker if they own the bicycle. Bicycles with stickers that have not been removed after 28 days are removed and disposed of. About 3-5 bicycles are removed during each cull.

There has been one problem where a current resident did not respond to the notices, left the sticker in place, and the bicycle was removed. Formalising the OC’s powers to deal with goods on common property would help to deal with such problems.

There have also been problems of bicycles locked to, or blocking, fire services equipment such as hydrants and hose reels adjacent to the bicycle storage area. There is a need for powers to take immediate action in these instances.

Aside from bicycles, similar problems exist in the OCs I am involved with, for storage of other private goods on common property immediately adjacent to car spaces (in breach of the *Rules*.)

1. **Do the requirements for a common seal still serve a useful and legitimate purpose? If not, who should be able to sign contracts on behalf of the owners corporation, after the necessary resolutions and procedural steps have occurred?**

While it may be an outdated concept, I have not personally experienced any problems with the use of OC seals.

Regardless of the use of a seal, I believe the requirement that ANY two lot owners witness the seal is too loose. It should ideally be two OC officers (i.e. Chairperson and Secretary) or at least two Committee members who are also lot owners.

To provide flexibility, the OC should be allowed to delegate the powers and functions for witnessing the use of the seals, or signing contracts, to specific Committee members and alternates, with a requirement that at least two sign.

# Financial management of owners corporations

1. **What are your views about the operation of the benefit principle? What is the experience of your owners corporation in applying the benefit principle?**

The benefit principle has been a major source of additional disputes within the OCs I am involved in.

Where the benefit unambiguously accrues to a single lot owner, then there is little dispute, but where the benefit accrues to multiple lot owners, the extent of debate about the equitable allocation of costs is endless.

For example:

* If a lift is replaced or upgraded, should ground floor residents have to pay at all? Should residents on the top floor pay more than residents on the first floor because top floor residents effectively get more use of the lift?
* If common property gardens at the ground floor level are redeveloped or substantially improved, should the ground floor apartments pay more as there is a direct visual benefit for residents, and apartments higher up pay less as the visual benefit is indirect as best?
* Regardless of VCAT guidance on the issue, what is an equitable formula for the allocation of costs when the relative benefits accruing to different lot owners are subjective?

I do not believe that the VCAT guidance is specific enough to be very helpful e.g. how big an offset should be granted for how much larger fees?

In my opinion, the benefits principle should only apply where the benefit unambiguously accrues solely to a single lot owner, or unambiguously and solely accrues equally across a specific group of lot owners. In all other cases, the plan of subdivision liability units should be used. Owners buy an apartment knowing what the liability units are, and should therefore be prepared to pay on this basis.

1. **Should an owners corporation be able to recover debt collection costs from defaulting lot owners where a matter does not proceed to a VCAT or court application, or for any costs incurred before an application is made?**

Yes. The general principle should be that the party whose actions are the root cause of the costs should pay the costs. There will need to appropriate exceptions e.g. where the default is due to a case of genuine hardship.

1. **If your owners corporation has won a debt recovery action at VCAT or a court, what was your experience in getting a costs order against the lot owner?**

I have no experience with this matter.

1. **Should owners corporations be able to apply a discount for the timely payment of fees or charges?**

I have no problem with providing an OC with the power to discount, provided it is approved by a special resolution, but I would prefer to see penalties for non-payment or late payment rather than discounts for early or timely payment.

1. **Should the internal dispute resolution process be completed before an owners corporation can send a final fee notice, or proceed to VCAT or a court?**

Yes. The internal dispute resolution process may reveal factors previously unknown to either party which may facilitate the resolution of the problem before any court action is taken. I think this is a desirable outcome.

1. **Are there any other issues relating to payment of fees or charges?**

Where fees are incorrectly levied, there can be real problems in correcting the error.

For example in my case, GST was inadvertently charged on fee invoices for an OC which was not registered for GST. It took 2-3 years before anyone picked this up. In the meantime ownership of lots had changed, and current contact details of previous owners were unknown in some cases, so reimbursement of the overpayment to all the parties affected was impractical.

(I don’t have an easy solution to this problem.)

1. **What is your experience with the fees or charges for goods or services provided by owners corporations to lot owners? For utility charges passed by the owners corporation, should recovery be linked to the actual amount charged?**

The lack of fees/ charges for services provided to lot owners by the OC has been a source of dispute:

The original spray irrigation system that was installed in the gardens during the development of the subdivision covered both the common area gardens and the private ground floor gardens. This was a low cost solution for the developers, but the lack of separation of irrigation for common property and private property has proved to be a problem for the OC.

* There were no meters installed to measure water provided by the OC to the private lots, so there was no basis for levying the owners for this water. As a result, all owners pay for the water as part of general OC fees.
* With the introduction of the OC Act, there was a need for a special resolution to support the provision of the services to these private gardens, and no such resolution had been passed.
* It was therefore proposed that the water to ground floor apartments be closed off, something that the related owners vehemently objected to. Some wanted the OC to provide private irrigations systems to replace the OC supported systems, but this represents even more services to lot owners that would require a special resolution.

The likely resolution is that the water will be closed off, but there is a strong sense of resentment from some ground floor owners.

# Maintenance

1. **Is there a continuing need to differentiate between smaller and larger owners corporations? If yes, what characteristics should an owners corporation possess in order to trigger additional financial and maintenance planning obligations as a prescribed owners corporation?**

There is a continuing need to differentiate between smaller and larger OCs.

The benefits generated by implementing some controls for smaller OCs would be lower than the costs, making the controls unjustifiable. Conversely, the generally greater risks associated with larger OCs would justify the costs of the controls.

Risk should be the primary characteristic which should trigger the additional obligations for a prescribed OC. Specialist strata insurance underwriters may be able to provide some guidelines on what the criteria used in the *OC Regulations* should be.

1. **What are your views on the adequacy of planning for maintenance that is currently undertaken by owners corporations? In your experience, are owners corporations turning their minds to the future maintenance needs and setting aside adequate funds?**

In my experience, planning for maintenance is generally inadequate.

In the case of the OCs I am involved with, contributions to the Maintenance Funds were generally far too low. The historic Committee strategy for financial management appears to have been to simply ‘keep fees down’. Based on industry comparisons, maintenance funding was only running at about half of the required level. This strategy backfired badly.

A number of major unexpected maintenance costs subsequently arose, including replacement of the lifts (not included in the 2005 *Maintenance Plan* at all), major works to address concrete cracking and spalling, and so on. As a consequence of the underfunding, maintenance contributions more than doubled for the following three years (causing a high level of complaint from owners), and major works had to be deferred until adequate funding was available.

Beyond this, the quality of past *Maintenance Plans* has been suspect. Some of the problems have included:

* The lack of an adequate *Assets Register* has meant that some assets were not identified for inclusion in the plans.
* The assessment of the status of assets has often been optimistic, so that they needed to be replaced far earlier than expected, and before adequate funding was available.
* Simple formulae were used e.g. [square metres] x [cost per square metre] = [cost estimate.] While based on quantity surveyor figures, some of the resulting estimates were very low when compared to actual quotes for the work e.g. because the costs associated with working at height had not been factored in.

Overall, there is a real need for improvement in this area.

1. **Should maintenance plans be mandatory for all owners corporations, or should there be a distinction between smaller and larger owners corporations in relation to maintenance planning and funds? If yes, where do you see the distinction being drawn?**

My OC has about 150 apartments, over 100 categories of assets, and almost 1,000 assets requiring management. Under these circumstances, a *Maintenance Plan* is an essential management tool.

I believe a *Maintenance Plan* should be mandatory for all OCs. The smaller the OC, the simpler the plan (i.e. it should not be an onerous requirement for smaller OCs) but it should still be required.

For a 2-lot OC

* the number of assets requiring monitoring would be low,
* the two owners may be well aware of the maintenance requirements for the assets, and
* they should be able to agree on what needs to be done without a formal plan,

but this is not enough for any person who is trying to decide whether to buy one of the lots. They need a reasonable estimate of what the maintenance requirements are, and what the costs are likely to be.

1. **What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements?**

I don’t think there should be prescribed requirements (beyond what is already in the OC Act) for smaller OCs.

For smaller OCs, CAV already provides some templates. Even more useful would be a spreadsheet which includes the current balance of the Maintenance Fund, the annual expenditures for each asset in each year going forward for 10 years, and the required contributions to the Maintenance Fund each year to retain a positive balance in the fund over the period. This would help determine the annual maintenance fees required.

For prescribed OCs, I believe that as a minimum *Maintenance Plans* should

* be prepared by a qualified building quantity surveyor, registered and in good standing with the Victorian Building Authority and Australian Institute of Quantity Surveyors,
* be reviewed and updated annually, based on the direct experience of the OC e.g.
	+ actual quotes for work/ assets compared to surveyor estimates included in the plan,
	+ timing of actual failure of assets compared to surveyor estimates of year of replacement, etc.,
* include a contingency amount (e.g. 10%) for unexpected maintenance requirements, and
* that the adequacy of maintenance funding to support required maintenance on a year-by-year basis be the primary measure used for improving maintenance planning.

Beyond this, a prudent OC Committee should have a strategic plan, agreed to by lot owners at the AGM, which incorporates improvements and upgrades (beyond just maintenance and replacements of existing facilities.) Any agreed improvements and upgrades will need to be funded from, and included within, the *Maintenance Plan*.

1. **Should there be capacity for money to be paid out of maintenance funds for unplanned works and if yes, in what circumstances should this be allowed?**

Yes. See answer to Q.17 above where a 10% contingency amount is included. Payment for unexpected works should be solely at the Committee’s discretion, provided there is sufficient contingency funding in the Maintenance Fund to cover the expenditure.

1. **Should funds for implementing the maintenance plan come only from the maintenance fund?**

No. If there are excess funds in an OC’s operating account which are not likely to be required for operating expenses, it should be possible to transfer them from the Operating Fund to the Maintenance Fund.

The OC Act requires inclusion of major capital items in the Maintenance Plan i.e. lifts, air conditioning plant, heating plant, and items of a prescribed class (of which there are none.) However, a good Maintenance Plan goes well beyond these few items.

There is no clarity at all between what maintenance costs qualify for inclusion in the operating budget, and what maintenance costs qualify for inclusion in the Maintenance Plan.

The lack of any established financial standards for OC accounting only compounds the problem. (Such standards would hopefully clarify the issue.)

1. **What are your views about contingency funds, including:**
* **whether contingency funds are necessary**

I believe contingency amounts are required within maintenance funds (see answer to Q.17.)

* **what type of owners corporations should have them, and**

I believe all OCs should have contingency funds. Unexpected maintenance can occur in any OC, and the larger the OC, the higher the likely cost of the unexpected maintenance.

* **how they should be funded, the purposes that the funds can be used for, and how such purposes should be determined?**

They should be funded from within the maintenance fund (see answer to Q.17) and paid for through maintenance fees. There should be no prescribed purpose for these funds. They should be available for any unexpected expenditure, including an overrun in a planned maintenance expenditure. The OC Committee should have discretion on what they are used for.

1. **How should urgent and non-urgent repairs to the common property be dealt with where the owners corporation has failed or refused to do them?**

As an OC has a statutory responsibility to repair and maintain common property, the reason the OC has failed or refused to act should have a significant bearing on how the repairs are dealt with. Exceptional circumstances (e.g. OHS risks) may mean there is good reason not to proceed, and internal OC disputes may mean the failure or refusal to act cannot be objectively justified.

Under such varying circumstances, there are too many variables affecting the outcome for one simple solution to be possible for all cases. As shown in the table below, there are probably at least four different solutions to the problem that would need to be considered.

|  |  |  |
| --- | --- | --- |
| **Reason:** | **Exceptional circumstances (good reason not to deal with repairs)** | **Mischievous or malicious (no good reason not to deal with repairs)** |
| **Urgent repairs** | Allow the OC to implement a temporary work-around, and deal with the exceptional circumstances before implementing a permanent repair. | Allow affected lot owners, after notification to OC, to act jointly to implement repairs and recover costs (e.g. via dispute resolution or VCAT.) |
| **Non-urgent repairs** | Allow the OC to deal with the exceptional circumstances before repairs are implemented. Establish a reasonable deadline for action. | Allow affected owners to take appropriate action (e.g. via dispute resolution or VCAT) to force the OC to implement repairs. |

1. **What are your views about how to deal with lot owners or occupiers who cause damage to common property, or who want to alter the common property?**

The costs to repair damage to common property by lot owners or occupiers should be recovered from the lot owner or occupier who caused the damage in the first instance, or the owners of the property rented by the occupier who caused the damage if the occupier cannot be found (refer to chain of responsibility in answer to Q.43.)

No alteration should be made to common property by a lot owner or occupier other than through a special resolution of the OC.

1. **Are there any other issues relating to repairs to common property or services?**

Despite the requirement to exercise due diligence, in my experience some Committee members seems to have an ‘out of sight, out of mind’ attitude to maintenance and repairs. For example

* if they do not complete regular maintenance inspections, then required maintenance may not formally identified, providing an ‘I didn’t know’ defence for any lack of action, and
* if trees or shrubs are planted (or similar methods) to simply hide the defects identified rather than repairing them, then maintenance problems may escalate to serious levels before any action is taken.

Documented bi-annual maintenance inspections should be a requirement for all OCs. The outcomes should be linked to *Maintenance Plans*

1. **What are your views about the type and level of insurance cover that should be required?**

As shown in the answer to Q.16, the OC I am associated with has significant assets, and a significant proportion of these assets is represented by contents. Our current contents cover is in excess of $500,000. Contents insurance should be a mandatory requirement.

1. **Should lot owners be able to ‘opt out’ of the insurance policy taken out by the owners corporation when they take out their own insurance (and not, therefore, pay their portion of the owners corporation’s policy)?**

Allowing owners to opt out will increase the complexity of insurance arrangements, make it more difficult to establish the adequacy of insurance cover, and complicate claims management. In my opinion allowing owners to opt out is not appropriate.

1. **What are your views about lot owners’ responsibilities for any excesses or increased premium payable by the owners corporation?**

Where a claim is unambiguously attributable to an individual resident, then I believe the resident should pay the excess, or the relevant owner if the resident cannot be found. This is comparable to the benefits principle (see answer to Q.7.)

# Meetings and decisions of owners corporations

1. **What are your views about the appropriate obligations for developers who control owners corporations, including the:**
* **obligations concerning any contracts they cause the owners corporation to enter into**

Any contract entered into by the OC should be an arms length contract. All interests should be declared. Where the developer has an interest they should abstain from voting. Ideally, the contract should not be with a related party of the developer, but there may be situations where this is not practicable.

* **interests they must consider, and whether there are any matters they should be prohibited from voting upon, and**

I think some of the requirements and prohibitions established in other jurisdictions should be applied in Victoria. In particular,

* the Queensland requirement that developers must consider *future* members of the OC,
* the NSW requirement that parties related to the developer cannot be appointed as OC Manager for the first 10 years, and
* the NSW requirement that prohibits developers from voting on matters relating to building defects and their rectification.
* **duration of their obligations?**

I believe a better arrangement would be to apply restrictions on developers until they no longer hold a controlling interest (of votes or entitlements), rather than applying restrictions until a set time has passed. ‘Controlling interest’ should have a similar meaning to the definition used in corporations law.

1. **What other changes should be made to developers’ obligations?**

I live in a subdivision which is more than 20 years old and which is increasingly requiring maintenance. Problems include shifting foundations due to reactive soils, movement and cracking of beams due to normal building movement, cracking of slabs, concrete spalling, failed waterproofing of construction joints, etc. In many cases access to the as-built construction drawings, engineering drawings, and services drawings (hydraulic, electrical etc.,) is desirable to help understand the problem and determine appropriate solutions.

The developer is still in existence, but has shown little interest in responding to inquiries or providing such information. In general the requests are ignored. The council has misplaced the original drawings submitted in support of the building permit. Some of the other original organisations associated with the design of the subdivision no longer exist.

While my OC has managed to accumulate copies of most drawing after a diligent 3-year search, and at a cost of about $1,250 excluding volunteer effort, other OCs may not be able to.

In my opinion it should be a statutory requirement for the developer to provide the OC with copies of all as-built construction drawings, engineering drawings, and services drawings as soon as the developer no longer has a controlling interest in the OC.

1. **What is your experience of voting and the use of proxies within an owners corporation?**

Proxy farming has occurred within the OC I am associated with. I suspect that in at least one case an owner was effectively harassed into providing the proxy.

1. **Should there be restrictions placed on the appointment of proxies, and if yes, in what circumstances?**

I believe that contractual terms which attempt to limit the voting rights of a lot owner should be prohibited. All owners should have the right to vote in accordance with their entitlements, which should be set objectively, not by the developer (see answer to Q.61.)

1. **What are your views about the adequacy of the provisions that set out the Chairperson’s voting rights?**

As far as I am aware the only provision in the OC legislation or regulations dealing with conflict of interest is s.117 (c) which requires Committee members to not make “…improper use of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person.”

There are no specific provisions requiring the declaration of a Committee member’s interests, or to require abstaining from voting where a conflict of interest arises, or similar arrangements that are regarded as representative of good governance.

While it may be desirable for the Chairperson’s voting rights to be clarified (see also answer to Q.36), I believe it is equally desirable that all Committee members’ voting rights be clarified in the context of a conflict of interest.

1. **Should a contract of sale be able to limit the voting rights of lot owners?**

No. See answer to Q.30.

1. **What has been your experience of voting within an owners corporation?**

See answer to Q.29.

I have also observed voting when significant conflicts of interest were involved. For example, a Committee member who was aware of the terms and pricing of all competitive tenders, voting for the contract to be awarded to a related party, who was the last bidder to submit a quote.

1. **What are your views about the appropriateness of the voting thresholds for ordinary, special and unanimous resolutions, and arrangements for interim resolutions?**

The OCs I am associated with have never been able to achieve the required 75% support for a special resolution. They have always had to depend on getting above 50% for an interim special resolution which ultimately converts to a special resolution.

In this context I would support the introduction of an interim unanimous resolution where at least 75% of the total votes for all lots are in favour of the unanimous resolution, and no votes are against the unanimous resolution.

1. **What are your views about the adequacy of the provisions for convening meetings?**

I have not experienced any problems with the current arrangements, so I believe they are adequate.

1. **What has been your experience of annual general meetings and other owners corporation meetings that you have attended?**

Most of the problems I have experienced with AGMs and Committee meetings have been associated with the OC Manager chairing the AGM and/or the Committee meeting.

As stated in my previous submission, most Committee members work full time, and the knowledge requirements for Committee participation are significant, including management of cleaning, maintenance, security, complaints/ disputes, OH&S, contractors, insurance, property (including building integrity), facilities and services, compliance , fire protection, contracts negotiation, records (including registers and certificates), and much, much more. As a result, Committee members tend to look to those with knowledge, particularly the OC Manager, and in many cases the OC Manager controls the Committee agenda, chairs meetings, acts as Secretary etc., etc.

This means that OC governance is up-side down, as the Committee should manage the OC Manager. In this context, an OC Manager has an inherent conflict of interest, as typically most of their fees are fixed (although some services may be paid by transaction) and they may increase their profits by minimising issues/costs.

I have observed

* Committee meetings chaired by an OC Manager which rarely had any proactive agenda items of any substantive nature i.e. most items were largely reacting to incidents or maintenance problems.
* An OC Manager who failed to impartially chair an AGM e.g. she closed down discussion on an issue which represented a significant conflict of interest for the OC Manager, and refused to reopen the issue.
1. **How can the views of tenants be most effectively shared with the owners corporation?**

OCs should not have to bear the cost and effort of dealing with tenant communications directly. Formal communications from tenants should follow the legal chain of responsibility i.e. tenants should deal with their Managing Agent, or the owner if acting as a managing agent. (Managing Agents should forward relevant communications to the owner in any case.) All formal OC communications from tenants should be directed through the lot owner as a member of the OC.

Methods used for collecting the views of tenants in the OCs I am involved with have included conducting an online resident satisfaction survey (for both owners and tenants) to obtain feedback on common area facilities (tennis court, gym, swimming pool, BBQ, golf net, gardens etc.), and common services (power, gas, water, telephone, intercom, cable for TV, etc.)

# Committees

1. **What are your views about committees, including the threshold for and size of committees, who should be able to arrange a ballot, the chairperson’s role, and minutes?**

Having worked in Committees of 11-12, I think reducing the maximum size of a Committee to 7 is desirable.

In our OC, it is rare for there to be more than 12 nominations, so typically all who nominate automatically become Committee members, regardless of their competencies or ability to contribute constructively to Committee deliberations. Some Committee members are well-meaning but uninformed, and effectively act as distractions or a ‘dead weight’ on Committee deliberations.

If the maximum Committee size was reduced to 7, there would be a higher likelihood of the number of nominations exceeding the available places, and a higher likelihood of a ballot being required.

It would also be desirable to have competency requirement for Committee membership, or at least a mandatory requirement to

* have all candidates disclose relevant qualifications, knowledge and experience, and
* have all AGM ballots include ‘Yes’ and ‘No’ boxes against candidate names so that good candidates can be elected and poor candidates excluded.

Prohibiting an OC Manager from chairing OC Committee meetings or AGMs would be a positive step forward, as it would force at least one owner to better accept their OC responsibilities, and get better involved.

I think a ‘pull’ model i.e. making Committee papers and minutes available to those owners who are interested (e.g. via a web site), is preferable to a ‘push’ model which emails or mails Committee papers and minutes to all owners regardless of their interest in receiving them.

# Rights and duties of lot owners and occupiers

1. **In what circumstances should a lot owner be able to change the external appearance of their lot? Is there a need for agreement to be reached with other lot owners, and if yes, who should have a say?**

Changes to the external appearance of a lot could potentially have a significant impact on the overall appearance of an apartment complex. Our OCs have *Rules* covering this matter which at least require Committee approval of such changes.

Where the change represents a significant alteration, I believe the requirement should be the same as that required for significant alterations to common property i.e. a special resolution.

The major problem is the lack of definition of a ‘significant alteration’. I think this should be simply defined as “…an alteration that the Committee has determined to be significant.”

1. **Are there any other issues about the external appearance of lots? What has been your experience?**

Our OCs have experienced unapproved changes made to the external appearance of lots, which have necessitated the issuance of *Breach Notices*.

I think the creation of an appropriately crafted *Model Rule* in this area would be desirable.

1. **What are your views about access by lot owners and occupiers to the common property or services? Should the rights and responsibilities of lots owners or occupiers be specifically provided for in the Owners Corporations Act or model rules?**

As an example of this problem, our OCs have ongoing problems with residents forcing the locks of electrical distribution boards in order to reset circuit breakers, despite signs asking residents not to do so.(The switchboards are locked with an 001 electrical industry key.)

The reason the locks are forced is that when a circuit breaker trips, residents want to immediately restore power, particularly if the problem occurs at night. In this case an expedient solution is to force the lock.

Ideally these circuit breakers should only be reset by a qualified electrician (who should have an 001 key) as there is a reason the circuit breaker has tripped, and having a resident simply reset the switch may put other residents in the apartment at risk.

The distribution boxes are also locked to prevent children inadvertently disrupting power to apartments while playing, or pranksters or intruders deliberately interfering with the power, or similar problems. In a worst case an intruder or person with malicious intent could gain access to a specific resident by turning off the power to the resident’s apartment, and waiting near the box.

I do not believe that owners or occupiers should be granted rights to access common services of this nature – the risks to owners or occupiers are too great. However, granting appropriate access to qualified tradespeople would be an acceptable outcome.

# Rules of the owners corporation

1. **Who should comply with, and be bound by, the rules? Should ignorance of the rules be a consideration?**

All owners are provided with a copy of the *Rules* in the vendor statement when they purchase the apartment. The OCs I am involved with have confirmed that the Managing Agents for rental properties provide a copy of the *Rules* with the lease agreement i.e. all residents should have a copy of the *Rules*. The specific *Rules* of the OCs I am involved with require the owner or occupier to accept the responsibility for compliance with the *Rules* by guests, visitors, and invitees.

In general ignorance is not an excuse under Australian law. While ignorance of the *Rules* is likely when owners and occupiers don’t do the right thing (e.g. we have had one owner argue that because she had not read the *Rules* when she bought the property she should not be bound by them) it should nevertheless not be an excuse. The *Rules* are there to ensure that one resident does not adversely affect the quiet enjoyment of other residents’ homes. The protections that the *Rules* provide should not be undermined by granting exceptions based on ‘I didn’t know’. Such claims are too easily made and cannot be proven. The reality of the arrangements described in the previous paragraph mean that the offender *should* know.

The OC Act should be amended to include a provision (similar to NSW) that all those bound by the rules are deemed to know them.

1. **Should a person bound by the rules (for example, an invitee) be the only person responsible for their own breaches, or should someone else (for example, the lot owner or lessee) also have responsibility? If someone else is also responsible, should that responsibility depend on whether the person ‘permitted’ the breach, and should there be any other limitations?**

The person who committed the breach should be responsible for the breach, but in the event that there is clear evidence that a breach was committed by a person present in a specific lot, and the person denies it, or cannot be found, there should be chain of legal responsibility that applies.

For example, if a breach by an invitee results in damage or another outcome with financial consequences, and the invitee denies it or cannot be found, the responsibility should pass up the chain to the occupier who invited the invitee. If the occupier denies that the breach was committed by an invitee, the responsibility should pass up the chain to the lot owner. Ultimately the OC should be able to use the evidence supporting the breach to claim against the responsible lot owner, who should then deal with the other parties involved.

Consistent with the principle that ‘ignorance is not an excuse’, this chain of responsibility should exist regardless of whether a person in the chain ‘permitted’ the breach or not. Ultimately the lot owner is responsible for the activities of the parties in the lot, and an occupier is responsible for the activities of the invitees that he/she invites. All parties should be aware of the *Rules*, and that their activities may be breaching them (see answer to Q.42.)

1. **Should there be Model Rules regarding pets and smoking? If so, should there be a choice of rules such as is allowed in New South Wales (with or without a default option)?**

I have no real preference for providing *Model Rules* in these areas or not. However, if a model rule is provided for pets it should definitely offer a choice of rules.

The OCs I am involved with have *Rules* that ban smoking on common property. This rule is regularly breached, particularly by tenants smoking in fire stairs and leaving the butts behind.

The *Rules* do not prohibit pets, but allow the OCs to issue notices to remove an animal that the OC resolves is causing a nuisance. The *Rules* prohibit residents from exercising animals on common property or allowing animals to roam freely on common property. (This latter rule is regularly breached, particularly by cats.) They also require residents to clean up after any animal and make good damage to any common property caused by an animal.

1. **Are there any other issues relating to the coverage of the Model Rules?**

In the context of the legal chain of responsibility described above, I think the *Models Rules* should start with something like the following:

**1. Who is bound by these Model Rules?**

* 1. The Owners Corporation, Owners, and Occupiers must comply with these Model Rules and the Owners Corporation’s own Rules (if any.)
	2. An Owner must make sure that an Occupier of its Lot complies with these Model Rules and the Owners Corporation’s own Rules (if any.)
	3. Owners must give a copy of these Model Rules and the Owners Corporation’s own Rules (if any) to all Occupiers of their Lots and must make it a term of any written agreement governing that occupation that the Occupiers must comply with these Model Rules and the Owners Corporation’s own Rules (if any.)
	4. Owners and Occupiers must make sure that their invitees and/or agents comply with these Model Rules and the Owners Corporation’s own Rules (if any) and if those invitees and/or agents do not do so, the Owners and Occupiers must take all reasonable steps to make sure that those invitees and/or agents leave the property.
1. **What are your views about owners corporation rules that prevent lot owners installing ‘sustainability’ items in or on their units?**

The OCs I am involved in have no such rules, and I would object to the Queensland restrictions.

I think the existing *Rules* of the OCs I am involved with can cope with ‘sustainability’ items adequately. Any such item should not be allowed to adversely affect the appearance of the property or interfere with the quiet enjoyment of other residents’ homes.

The protocols used by the OCs for air conditioning units on balconies is an appropriate model for sustainability items i.e. air conditioning units are approved by the OC if the colour of the unit/system and associated pipe and electrical connections are in keeping with the finishes of the building, the noise of the unit/ system meets noise limitations specified by the OC, condensate drainage is installed in a manner that prevents water falling on neighbouring apartments and/or common property, etc., etc.

I see no reason why sustainability items should not meet comparable requirements.

1. **What are your views about civil penalties for breaches of owners corporation rules?**

The current Victorian civil penalty for breaches of the rules is hopelessly inadequate. The level of fees set by NSW is far more appropriate.

The SA model where OC’s can impose penalties within a prescribed maximum amount should be adopted in Victoria. In my experience OC’s are averse to incurring the cost of VCAT actions, and residents ignore rules because they correctly believe they can get away with non-compliance.

1. **Are there any other issues relating to the rules of owners corporations?**

The registered rules of the OCs I am involved with have significant problems. For example:

* They were created in 1996, and are well out of date. Despite the transitional arrangements of the OC Act, the references to ‘Body Corporate’, Subdivision Act 1988, etc., are confusing for many residents.
* Some rules are unenforceable, and others are not being enforced.
* In some cases the OC is issuing notices to residents which conflict with the rules.
* Some rules are poorly crafted and have loop holes.
* The protocols used by the OC for approval of storage units, air conditioning units on balconies, wooden floors in apartments, etc., are not explicitly mentioned in the rules.
* Important OHS issues not covered, e.g. the need for residents to supervise children in swimming pools, gymnasiums, near driveways and stairwells, etc.
* The rules do not cover all the areas covered by the Model Rules, so some Model Rules apply. These are effectively ‘hidden’ rules’ that most residents are not aware of.

The OCs have attempted to resolve these problems, but have been unable to get sufficient support to make the changes required. The primary problem is that individual owners have different views on individual rules, and getting agreement to a compromise is difficult, particularly when the views are opposing (e.g. smoking versus non-smoking.)

When the difficulty on gaining agreement on individual rules is extended out to agreement on all rules, the likelihood of getting the 50% approval required for an interim special resolution is low. This difficulty in getting the rules changed has had some perverse consequences. Past Committees have allowed invalid ‘informal rules’ to be posted on the OC web site which included removal of the ban on smoking (vehemently objected to by non-smoking residents), removal of the ban on storage of bicycles in non-designated areas, changes to the rules for the use of the tennis courts, changes to the rules on rubbish, etc. There is no legal basis for any of these changes, some of them have caused disputes, and arguably the Committees who allowed the informal changes have encouraged breaches of the registered rules.

# Owners corporation records

1. **What are your views about owners corporations’ and managers’ obligations regarding availability of records and about limitation on lot owners’ inspection rights?**

I have not experienced any problems in the area of access to OC records by lot owners, mortgagees of lots, purchasers of lots, or their representatives.

1. **Are there any other issues relating to owners corporation records you wish to raise?**

I think the problem of availability of records goes well beyond the restrictions on lot owners’ access to OC records. I think it also involves limitations on OCs accessing their own records.

For example, as Secretary of an OC Committee, I asked an OC Manager to provide contact details for all members i.e. name, postal address, lot number, and email address (if any.) The various positions adopted in response to this request are summarised in the table below:

|  |  |
| --- | --- |
| **Position** | **Issues from an OC Perspective** |
| We will provide a copy of the Roll which includes owners’ names and addresses. We cannot provide other contact details for privacy reasons. | The OC Manager is contracted to provide services to the OC, and is an agent of the OC. The records belongs to the OC, not the OC Manager. Email addresses are provided by owners for the purpose of communicating with the OC (not the OC Manager.) The OC is responsible for protecting the privacy of email addresses. Any OC Manager privacy responsibilities are as agent of the OC. Refusing to provide the OC with the email addresses of its own members on the basis of privacy is incorrect. |
| We will provide the Register which includes names and addresses. By legislation, it does not include emails and phone numbers. | The records prescribed by Part 9, Division 1 and 2, of the OC Act are the legislatively required records. The full records of the OC go well beyond those prescribed in the Act. All of these records are owned by the OC, and are collected for use by the OC. There are no legislative restrictions of any kind on the OC accessing its own records.In regard to emails, the OC completed an online survey of owners/residents in 2013 and asked respondents to provide email addresses and indicate whether they were happy to communicate by email in the future. These emails were passed to the OC Manager to include in the OC’s records. Denying access to them is inappropriate. |
| The OC Act provides no express provisions to enable on OC officer greater access to the records than a Lot Owner. | The OC Act doesn’t have to provide such express provisions. Access of any legal entity to its own records is unrestricted – something that has nothing to do with the OC Act. The Secretary is not asking for access to the records as a Lot Owner, but as an officer of the OC (s.99.)If the OC had not engaged an OC Manager, and was managing its own records, the issues raised by the OC Manager of denying access due to privacy, and legislative restrictions on access, would simply not apply. |

The net outcome is that the OC Manager has persisted in refusing to provide email addresses.

While I accept that an OC Manager may be in possession of information that does not form part of the OCs’ records, and is therefore unavailable to the OCs (*Pekar v Owners Corporation No SP 34630W*) the thought that the OC Act can be used in a perverse way by an OC Manager to restrict an OC’s access to information that is part of an OC’s records beggars belief. I believe the OC Act should be amended to clarify that

* OC records include records well beyond those prescribed by the OC Act,
* the records of an OC are owned by the OC, even when the records are managed by or in the custody of an OC Manager, and
* the provisions of the OC Act are not intended to restrict in any way the access of an OC to its own records.
1. **What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?**

I believe OC certificates should include sufficient information to enable the purchaser to make an informed decision. As the status of short stays apartments in the complex is important to some purchasers, information on short stays accommodation should be included in the certificate.

I think the information provided should not just include whether the planning instrument allows short stays, but whether any short stays apartments are currently in operation in the complex, and which lots are being used for this purpose.

1. **Are there any other issues relating to owners corporation certificates?**

None that I am aware of.

# Dispute resolution

1. **What are your views about recourse to the dispute resolution process when an owners corporation is acting on its own initiative in pursuing a breach?**

Despite the requirement for due diligence, I am not confident that an OC Committee or OC Manager is always in possession of all the facts when it decides to act on a breach.

Dispute resolution requires the parties to meet and discuss the breach, and I think this is highly desirable regardless of whether the OC is acting on its own initiative or not.

1. **Are there any other issues relating to dispute resolution?**

None that I am aware of.

# Applications to VCAT

1. **What factors should VCAT consider in determining disputes about the validity of an owners corporation rule?**

I have no relevant experience on this issue.

1. **Are there any other issues relating to applications to VCAT?**

I have no relevant experience on this issue.

# Owners corporations in retirement villages

1. **What are your views about how annual meetings under the Owners Corporations Act and under the Retirement Villages Act should be conducted in retirement villages with an owners corporation?**

I have no relevant experience on this issue.

1. **What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?**

I have no relevant experience on this issue.

1. **How can the views of retirement village residents who do not own their units be taken into account in managing common property within the owners corporation?**

I have no relevant experience on this issue.

# Part 5 of the Subdivision Act

1. **What are your views about the process for the sale/development of apartment buildings?**

I believe it is appropriate to move away from a requirement for a unanimous resolution to enable redevelopment of an apartment building.

Given the NSW research finding that the threshold should be no lower than 80%, I believe adopting a scheme similar to the NT approach is desirable.

The SCA (Vic) recommendation that a 75% threshold should apply for buildings which are over 25 years old should be rejected.

1. **What are your views about:**
* **who should set the initial lot liability and entitlement, and any criteria that should be followed**

The lot liability should ideally be set by a qualified independent building quantity surveyor, registered and in good standing with the Victorian Building Authority and Australian Institute of Quantity Surveyors.

The lot entitlement should ideally be set by a qualified independent Certified Practising Valuer, certified and in good standing with the Australian Property Institute.

The general criteria specified in s.33 of the Subdivision Act are appropriate, but there will be many factors affecting the outcome, which only qualified professionals can determine adequately for the specific plan of subdivision in question. I believe that trying to specify the criteria in more detail in legislation or regulation would not be desirable.

* **how lot liability and entitlement should be changed, and**

I do not believe that changing lot liability/ entitlement is a practical option in the absence of a significant change to the plan of subdivision that justifies the change in lot liability/ entitlement.

Purchasers of lots have done so in the full knowledge of their lot liability/ entitlement, and trying to change this after the fact is too late in the process.

Lot liabilities and entitlements are essentially zero sum games. If there are winners that reduce their liability, there must also be losers who have their liability increased. Getting a unanimous resolution passed under such circumstances is highly improbable. Going to VCAT with support of 50% of owners is a more practicable option, but whether it is viable or not will depend on the exact circumstances of the relevant OC.

In my opinion it is critical to get the liability/ entitlement correct in the first place (see answer to the bullet point immediately above) rather than attempting to change it later.

* **any time limits for registering changes to the plans of subdivision with Land Victoria.**

I have no relevant experience on this issue.

1. **In the absence of a unanimous resolution, what requirements should be met before VCAT can be empowered to change the lot liability and lot entitlement on a plan of subdivision?**

I have no relevant experience on this issue.

1. **Are there any other issues relating to Part 5 of the Subdivision Act?**

None that I am aware of.