903/102 Wells Street

Southbank VIC 3006

10 March 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. The scope is the *Owners Corporation Act 2006* only. 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

# Part B – Conduct of owners corporation managers

Issues Paper No 1, Part B, states in its introduction: “In 2013-14, CAV conducted a public review of the regulation of owners corporation managers… This Part re-presents issues regarding the conduct of owners corporation managers and seeks feedback on whether those issues have changed since 2013-14. Views are also sought on whether new issues have emerged since that time that require examination…”

The issues have **not** changed since 2013-14, as no amendments to the Act or Regulations have been implemented. Attachment 1 provides a copy of the submission made in 2013-14, and all of the issues described are still relevant today.

## Registration and unsuitable managers

**64 Are there benefits in aligning the eligibility requirements for an owners corporation manager to the extent practical with those of estate agents?**

Yes and No:

There is a need for a mechanism in the *Owners Corporations Act* to disqualify applicants or cancel registrants where the relevant person has committed a criminal offence that would make them unsuitable for the financial and administrative responsibilities of an owners corporation (OC) manager.

However, I believe OC managers should be separately licensed and that the probity and professional requirements for owners corporations managers should be more stringent than those of estate agents.

**65 What are your views on whether owners corporation managers should be separately licensed or be part of an estate agent’s licence?**

See comments after the answer to Q.37 in Attachment 1.

As with AFS licensing, individuals (including employees acting as OC managers for larger company OC managers) should be licenced as OC managers, rather than the current approach of just registering OC management companies. As part of this, individual OC managers should successfully pass a Police Check before being authorised to act in the OC manager role.

Professional skill requirements which may be required by OC managers that may not be necessarily required by estate agents include:

* financial accounting, including GST accounting and BAS preparation for larger OCs,
* management of maintenance plans and maintenance fund accounts,
* preparing annual budgets, and managing operating accounts, including bank account reconciliation,
* maintaining OC-specific documentation, including the roll of Owners names and addresses, the Registers of the OCs, issuing OC certificates, and similar matters,
* management of the use of the common seal, including logging usage in a Common Seal Register, and providing the Register for inspection at each OC Committee meeting,
* keeping the records of the OC including notices, minutes and postal ballots,
* ensuring the requirements for Annual and Special General Meetings are met, and
* providing advice and guidance on the *Owners Corporations Act*, *Owners Corporation Regulations*, OC’s *Rules*, and similar legal requirements.

**66 Is it appropriate to extend the current regulatory criteria to include serious criminal offences?**

Yes. (See response to Q.65 above.)

**67 What would be the benefits and costs of placing requirements on owners corporation managers to hold professional indemnity insurance as a condition of practise?**

The benefits of requiring OC managers to hold professional indemnity insurance, at least as far as OC management clients are concerned, are obvious. However, whether the amount of professional indemnity cover is adequate is doubtful in some cases. (See the answer to Q.29 in Attachment 1.)

Our OC Manager is understood to manage about 100 building complexes, some of which have multiple OCs. If the $1.5 million prescribed cover is intended to represent a ‘per OC’ figure, our OC Manager would need well over $150 million in cover. It actually has only $15 million in cover, which it believes is enough. However, there is no real assurance that it is sufficient, and the OC Manager has a financial incentive to minimise cover in order to reduce premiums. A more specific requirement for OC Managers who manage multiple OCs is required.

## Conflicts of interest and other duties in procuring goods and services

Examples of kinds of conflicts of interest that can arise from structural arrangements in property management are provided in the introduction under *Managers’ conflicts of interest* in Attachment 1.

There are also clear conflicts of interest embedded in the standard SCA (Vic) contract, as shown in

* the answer to Q.17 in Attachment 1, which effectively makes the OC liable for the poor insurance negotiating skills of the insurance company, and
* in the OHS comments after the answer to Q.13 in Attachment 1, which makes the OC liable for any deficiencies in the OC Manager’s contractor management.

**68 In your experience what is the current practice of owners corporation managers in relation to disclosure of commissions?**

I do not believe our OC manager discloses the commissions it earns at all – either for insurance or any other matter. For example, they have refused to provide details of the benefits they receive from enrolling our OCs under StrataPay payment services, opening StrataCash accounts, etc.

**69 Do commissions and discounts have an adverse impact on premiums for insurance, and if so, how does this manifest?**

OC managers need to derive an acceptable profit margin from their total operations. As mentioned in the *Issues Paper*, for any given margin, if managers derive income from insurance commissions on insurance premiums paid on behalf of OCs, this should mean lower fees for other services provided to the OCs. Whether this is true in reality is debateable.

**70 What are the non-regulatory approaches that could be considered to ensure commissions and other payments do not distort the market?**

I do not believe I am qualified to respond to this question competently.

## Unfair terms in management contracts

**71 What are the main concerns about unfair contract terms in management contracts?**

The main concerns about unfair contract terms go well beyond the two types of concerns described in the *Issues Paper* - see answers to Q.5-13 in Attachment 1, and the additional comments after the response to Q.13. They include

* terms that allow an owners corporation manager to renew the contract at its option,
* automatic renewals for a further term, where the owners corporation does not serve a non-renewal notice,
* automatic renewal combined with the standard SCA clause that, unless otherwise agreed, fees will be increase annually by the increase in the AWOTE index or 5% whichever is the greater, can result in excessive increases in fees,
* automatic renewals when combined with inappropriate scheduling of an AGM which is required under the contract for renewal,
* terms that require an excessive period of notice for the early termination of a management contract,
* terms that require an excessive period of notice for the early termination should be prohibited. A reasonable period of notice is 28 days,
* terms that require an unreasonable pre-determined amount to be paid to the manager on termination, and
* the standard SCA (Vic) contract terms relating to OHS compliance and contractor management.

**72 Are there other types of unfair terms that should be considered? If so, what are they and how common are they? Why might they be unfair?**

See answer to Q.71 above, and the descriptions of unfair terms in Attachment 1.

## Ending long-term management contracts

**73 Should any distinction be drawn between the required contractual terms for initial and subsequent management contracts? If so, why? How would such a distinction be drawn?**

See answer to Q.1 in Attachment 1.

**74 What is your view as to contractual terms for the renewal of management contracts? For example, should there be any rules about terms such as automatic renewals or renewals at the prerogative of the manager only?**

See answers to Q.71 above, and answers to Q.5-6 in Attachment 1.

**75 Are there other issues that require a regulatory response relating to long-term management contracts?**

Yes. I believe contract terms of greater than three years should be prohibited. The requirement to renew the contract should trigger appropriate due diligence by the OC Committee, and may generate beneficial outcomes such as improvements in services to the OC. This should occur at least once every three years.

## Managers conduct around voting

**76 How can concerns about managers’ influence on voting be addressed?**

One obvious solution may be to prohibit owners from allocating proxies to OC managers. Whether this may result in perverse outcomes is uncertain – see answers to Q.24-25 of Attachment 1.

## Financial transparency

**77 How can concerns about fraudulent financial conduct be addressed? Would it be preferable in the context of financial transparency and accountability to require separate owners corporation funds to be kept in separate accounts?**

Yes, separate owners corporation funds should be kept in separate accounts. Arguably, separate accounts should also be used for operating funds and maintenance funds within a single OC.

However it will require a great deal more than separation of accounts to address concerns about fraudulent financial conduct - see the responses to Q.32-33 of Attachment 1. Concerns include

* the use of cash accounting rather than accrual accounting,
* the failure to track fixed assets, and depreciate them, and
* the lack of financial standards specified in the OC Regulations, which means that no financial standards of any kind are applied to the preparation of OC financial reports.

Beyond this, our OC provides accounts which do not include GST i.e. there is a whole area of OC financials that the Committee is not tracking. There is no reconciliation of the GST collected by the OC, the GST paid to contractors by the OC, and the net outcome and any payment to the ATO by OC. BAS documentation is not provided to the Committee to enable monitoring of these issues.

**78 What proportion of managers still use pooled accounts, and what would be the realistic costs and time required to transition to the use of separate accounts? Where possible, include the basis for these estimates.**

See answer to Q.27 in Attachment 1. Beyond this, I do not have sufficient information to respond to this question competently.

# Attachment 1: Responses to 2013-14 Consultation Questions

## Management contracts

1. **Should there be more specific provisions in the Owners Corporations Act regarding the appropriate length of management contracts?**

Yes, there should be more specific provisions in the Act (or through the Act, in the Regulations) regarding the length of management contracts.

There is a need for an OC Manager to negotiate terms which will provide a return on its investment in establishing services for an OC, as referenced by comments about ‘the first few years’ in the *Issues Paper*. Even for established OC Managers, this may include

* hiring additional OC management and/or clerical staff,
* the administrative cost of setting up facilities to service the OC e.g. in entering the OC’s details in OC management software, setting up financial accounts, setting up web site accounts for owners, etc.,
* engaging external contractors e.g. for Essential/Fire Services inspections, security monitoring, and
* similar activities.

However, there are significant imbalances within the relationship between the OC (including the OC Committee) and the OC Manager. While recognising that many OCs/Committees may not have the knowledge and skills to capitalise on the opportunity, requiring them to complete due diligence on the OC Manager on a regular basis, through the mechanism of contract renewal, is a desirable outcome.

A maximum term of three years may be reasonable for the first term, and possibly annual renewal thereafter. In all cases appropriate terms for termination for cause or convenience, including reasonable notice, should be included in the contract.

1. **If so, should management contracts entered into by the developer expire at the first annual general meeting?**

s.66 requires the first AGM to be held within 6 months of the registration of the plan of subdivision. I would think 6 months is too short a period. One to three years may be a better initial period (see answer to Q.1 above.)

Even if the first contract were to expire at the first AGM, it is likely that developer will still have the votes to renew the contract in any case i.e. expiry at the first AGM is likely to be ineffective as a control.

1. **Should subsequent management contracts have a maximum length? If so, what should that be?**

I would suggest annual renewal after the first contract term (which could be up to three years - see answer to Q.1 above.)

1. **Should the length of subsequent management contracts differ for large and small owners corporations? If so, how should ‘large’ and ‘small’ owners corporations be differentiated?**

No, the length of management contracts should not differ for large and small OCs.

The issue is not the length of contract, but what the OC does in response to the opportunity that contract renewal represents. Based on the level of apathy of most owners, which appears to permeate the industry, the opportunity is likely to be lost in most residential OCs.

For residential OCs, the Committee is made up of owners from all walks of life, and once one gets beyond a two lot subdivision, I doubt whether the skills and competencies of individual owners vary much with OC size. On this basis there is no reason to differentiate contract lengths.

1. **Should contract terms that allow an owners corporation manager to renew the contract at its option be prohibited?**

Yes, such contract terms should be prohibited. Contract renewal should remain solely in the hands of the OC.

1. **Should automatic renewals for a further term, where the owners corporation does not serve a non-renewal notice, be prohibited? If so, and if the contract expires without any agreement for renewal, should the Owners Corporations Act provide for a short-term rollover (for example, on a monthly basis)?**

Automatic renewal is not the problem alone, although it probably should be prohibited for the reasons described in the answer to Q.1. It is a combination of automatic renewal and other factors that lead to potential OC Manager abuses. For example:

* Automatic renewal when combined with the standard SCA clause that, unless otherwise agreed, fees will be increase annually by the increase in the AWOTE index or 5% whichever is the greater, can result in excessive increases in fees. If this practice hadn’t been stopped in the case of my OC, fees would have increased by 22.6% during a period when the CPI increased by only 12.1%.
* Automatic renewals when combined with the scheduling of an AGM which is required under the contract for renewal, can also result in abuses. In the example below, the contract expired on 29 November, so in order to give the 28 days notice required to avoid automatic renewal, the AGM would have to be held on 1 November at the latest. In reality the OC Manager scheduled the AGM in December, well after automatic renewal had already occurred.



If automatic renewal is prohibited, the Act should provide for a short term rollover.

1. **Should the obligation under section 68 of the Owners Corporations Act be extended to developers who maintain control of an owners corporation by holding a majority of the lot entitlements?**

Yes.

## Unfair terms of management contracts

1. **Should contract terms that require a step not required by the Owners Corporations Act be prohibited?**

Yes.

1. **Should terms that limit an owners corporation’s ability to prevent an unwanted assignment of the management contract be prohibited?**

Yes, such terms, as currently structured, should be prohibited, as they prevent the OC Committee from exercising its statutory duty of due care and diligence. However, the terms could be restructured to allow Committees to exercise these duties.

The current SCA standard contract states that the OC must approve the assignment if the assignee

* provides written evidence of registration as a OC Manager pursuant to Part 12 of the Act, and
* is a current member in good standing of SCA (Vic.)

This is inadequate, but could be extended to require the assignee to provide adequate information to allow the Committee to complete reasonable due diligence. For example,

* provision of proof that the proposed assignee has adequate professional indemnity insurance (not just the prescribed amount - see answer to Q.29),
* provision of audited financial accounts for the past 5 years to allow the Committee to confirm that the assignee is financially sound,
* provision of a list of clients so the Committee can complete some random reference checks on the adequacy and quality of OC Manager services provided,
* clarification of any proposed changes in the fees to be paid to the assignee (in comparison to the fees currently being paid to the incumbent OC Manager), and
* provision of such other information as the Committee may reasonably require for the completion of adequate due diligence.

If due diligence has been completed and the outcomes are positive, the requirement that the Committee not unreasonably withhold consent to the assignment is reasonable, and in the interests of the OC Manager, which should also be protected.

1. **If so, should an owners corporation be allowed to refuse consent to an assignment only on reasonable grounds? Should it prima facie be unreasonable to refuse consent to an assignee who is of good standing with an approved body, for instance, Strata Community Australia (Victorian Division)?**

Yes, an OC should only be allowed to refuse consent to an assignment on reasonable grounds, but membership in good standing with Strata Community Australia (Vic) is inadequate as a criterion – see Answer to Q.9 above, which requires adequate due diligence to be completed on the proposed assignee. If the assignee fails to pass a due diligence test it should be regarded as reasonable grounds for refusing consent.

1. **Should terms that require an excessive period of notice for the early termination of a management contract be prohibited? If so, what is a reasonable period of notice?**

Terms that require an excessive period of notice for the early termination should be prohibited. A reasonable period of notice is 28 days.

1. **Should terms that require a pre-determined amount to be paid to the manager on termination be prohibited?**

They should only be prohibited where they are not a genuine pre-estimate of the loss or damage an OC Manager may suffer from early termination.

1. **Should the Victoria Civil and Administrative Tribunal have a clear power to deal with unfair terms in management contracts, that is, without the need to show that there is a dispute ‘relating to the exercise of a function by a manager’?**

Yes.

**Other issues not covered by the questions above:**

In the context of repairs and maintenance, the standard SCA contract (clause 9.5.4) states that the OC is responsible for OHS Act compliance including

* ensuring that persons employed/engaged comply with OHS Act, and any directions, manuals, policies or rules set by the OC,
* assessing risks and hazards and eliminating them, or if they can’t be eliminated, controlling them, and
* ensuring that all persons employed/engaged are appropriately qualified, trained and supervised.

Clause 9.5.5. indemnifies the OC Manager against all claims for any loss or damage arising from any breach of the OHS Act.

The practical reality is that our OC Manager

* prequalifies contractors as suitable to complete the works in question,
* issues specifications for quoting (and as part of this should require contractors to perform a risk assessment/JSA/SWMS and include risk mitigation controls in their quotes), and
* issues purchase orders to successful bidders (and as part of this should assess their OHS systems as well as the other characteristics of their bid.)

The standard contract terms are unfair in that

* they do not reflect the practical reality of OC contractor management, and
* require an indemnity which is demonstrably unfair under the circumstances.

## Managers’ fees

1. **Is the problem of owners corporations entering into management contracts with excessive fees sufficiently addressed by appropriate controls on the length of management contracts?**

No, the problem goes beyond controls on the length of management contracts. It includes the issue of automatic renewal (see answer to Q.6.)

1. **If no, should an owners corporation be required to obtain at least two quotations before entering into a management contract?**

Yes. However, this will not be a complete solution, as

* explicit or implicit collusion between bidders is possible (even if it is not permitted by law),
* OC Committees may not have the skills and competencies to effectively manage a tender process, and
* in cases where OC Committees are totally reliant on the OC Manager, there would be significant concerns about any quotation process being conducted by the incumbent OC Manager.

Nevertheless the requirement for two quotations

* will force OC Committees to define their service requirements sufficiently to support the tender, which is desirable in itself, and
* may result in a more competitive OC Manager industry.
1. **If so, should that only be if the cost of the engagement exceeds a pre-determined spending limit, in default, a limit set by the Act? If so, what should that statutory limit or formula be (for example, multiplying the number of lots by a certain dollar value)?**

I think setting dollar limits will be problematic, whether by limit or by formula. A simpler alternative may be to make it mandatory for prescribed OCs to obtain at least two quotes, and recommended for smaller OCs.

1. **Should Consumer Affairs Victoria have the power to investigate excessive commissions, as per the Estate Agents Act?**

Yes, CAV should have the power to investigate excessive commissions, as per the Estate Agents Act. This should include excessive outgoings. For example, the standard SCA Contract of Appointment states that “…if the insurance commission is less than 15% of the premium paid by the Owners Corporation, the Owners Corporation will pay to the OC Manager a fee being the difference between the commission received and 15% of the premium.” This type of contract structure may mean that a commission itself may not be excessive, but the resulting total amount paid to the OC Manager may be excessive.

## Managers’ conflicts of interest

The relationships between the OC Manager and its related entities for my OC is summarised below:



In this context, there are clear conflicts of interest embedded in the standard SCA (Vic) contract, as described in

* the answer to Q.17, which effectively makes the OC liable for the poor insurance negotiating skills of the insurance company, and
* in the OHS comments after the answer to Q.13 above, which makes the OC liable for any deficiencies in the OC Manager’s contractor management.

An example of the other kinds of issues that can arise from this structure is:

* We have a live in Building Manager who resides in an apartment leased by the OC. The real estate agency shown above is the managing agent for the overseas owners of this apartment. The lease renewal for the apartment was being routinely executed by the property company dealing with itself i.e. the real estate agency was executing it on behalf of the owner, and the OC Manager was executing it on behalf of the OC. There is no record in the Committee Minutes from previous years indicating any discussion or involvement of the Committee in this transaction. A recent review of the terms and conditions of the lease revealed a number of problems, most of which have now been corrected.

Conflicts of interest can arise from other structural problems:

* 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.
* Our OC Manager recently negotiated the use of an external package of services including OC management software, OC payment services, and OC cash management services. While the exact nature of any conflicts of interest arising are still unclear, the supplier of the services has declared that
	+ the OC manager receives commission on certain OC transactions, and interest up to the RBA Cash rate from some accounts opened for the OC, and
	+ depending on the amount of commissions and interest received, it offers software discounts to the related OC Manager.
1. **Is the power of the Victorian Civil and Administrative Tribunal, together with the existing obligations under the Owners Corporations Act, sufficient to deal with any problem?**

I do not have the background or experience to answer this question.

1. **If no, should there be express prohibitions on the receipt of commissions or on entering into transactions involving a conflict of interest?**

As a minimum, full disclosure of all conflicts of interest, and the **value** of all financial fees and commissions earned, to the OC/OC Committee, should be required.

1. **Should there be a presumption that where a manager receives a commission or awards a contract to itself or an associate, it has breached the section 122 obligation unless the owners corporation approves the transaction, after full disclosure by the manager?**

Yes. Full disclosure should include the **value** of all fees and commissions.

1. **Should there be some further, particular obligations on managers, to supplement section 122, such as:**
* **an obligation to provide prior written disclosure of any benefits to be received from contractors or of any relationship with a contractor; and/or**
* **an obligation to take reasonable steps to ensure goods and services they obtain or supply are at competitive prices?**

Yes.

1. **Should there be a mandatory tendering process for all contracts above a pre-determined limit; in default, above a limit set by the Owners Corporations Act?**

Yes, provided the limit is not too low. Tendering processes are costly, and the cost may exceed the benefit of the discounts achieved by competitive tendering.

## Managers’ conduct

There are fundamental problems in the relationship between the OC / OC Committee and the OC Manager, including

* asymmetric information (in that the OC Manager typically has more and better information than the OC/ OC Committee), and
* moral hazard (in that the OC Manager is often making decisions or arranging contracts using the OC’s money, so that there is little financial risk to the OC Manager, and little motivation to optimise OC expenditure.)
1. **Is the power of the Victorian Civil and Administrative Tribunal, together with the existing obligations under the Owners Corporations Act, sufficient to deal with any problem?**

I do not have the background or experience to answer this question.

1. **If not, should managers be prohibited from attempting to influence the outcome of a vote or election? If so, should that be an outright prohibition or only a prohibition on unfairly attempting to influence the outcome of a vote or election or on exerting pressure to influence the outcome of a vote or election?**

This is an almost impossible question to answer. If the OC Manager has more and better information than the OC/ OC Committee, then

* if it is working in the best interests of the OC, then the prohibition should not be put in place, but
* if it is working in its own self-interest, which is not in the interests of the OC, then the prohibition should be put in place.

Any provisions in the Act to address this issue would need to cover both eventualities.

1. **Should there be a specific restriction on proxies held by the manager where the manager has an interest in the outcome of the vote, for example, should a manager be excluded from holding proxies unless the proxy specifies how the manager holding the proxy is to vote?**

OC Managers should be prohibited from voting any proxies on any outcome in which they have an interest. In many cases the OC Manager will be involved in conducting the vote, and total independence is a minimum requirement. Where a vote is to be conducted in which the OC Manager has an interest, all proxies should be directed to the Secretary or Chairperson of the Committee.

1. **Would any problem better be addressed, at least for larger owners corporations, by requiring them to engage only professional managers?**

There are problems with the quality of OC Managers across the total industry. Even the most professional have significant deficiencies in the quality of some services, including those which claim ISO 9000 quality certification.

While it may be better than using a volunteer OC Manager, requiring the engagement of professional managers may not be the panacea CAV thinks it is.

1. **Should pooled accounts be prohibited and managers required to keep separate accounts for each owners corporation they manage?**

Yes. However the implications for payments processing should be considered. In many cases funds pass through pooled clearing accounts before they finally reach an individual OC’s accounts.

1. **Should the Owners Corporations Act require managers to contribute to a Fidelity Fund to compensate owners corporations for managers’ fraud?**

In the legal industry, the purpose of a fidelity fund is to pay the difference between an indemnity provided by an insurer to an individual solicitor, and the amount of a claim made against the solicitor. I have no information with which to assess whether most claims against OC Managers would exceed the cover provided by Professional Indemnity insurance, so I cannot comment on this question, other than to suggest that any fidelity fund is likely to increase the costs of OC Managers, and the fees OCs will have to pay the OC Managers.

1. **Is the current prescribed minimum cover of $1.5 million for any professional indemnity claim sufficient?**

The requirement for Professional Indemnity insurance which is sufficient to meet claims of up to $1.5 million in any one year may be adequate for an OC Manager who manages a single OC, but it does not cover the instance of an OC Manager which manages many OCs.

Our OC Manager is understood to manage about 70 building complexes, some of which have multiple OCs. If the $1.5 million is intended to represent a ‘per OC’ figure, our OC Manager would need well over $100 million in cover. It actually has only $15 million in cover, which it believes is enough. However, there is no real assurance that it is sufficient, and the OC Manager has a financial incentive to minimise cover in order to reduce premiums.

A more specific requirement for OC Managers who manage multiple OCs is required.

## Managers’ record keeping

1. **Is the power of the Victorian Civil and Administrative Tribunal, together with the existing obligations under the Owners Corporations Act, sufficient to deal with any problem?**

I do not have the background or experience to answer this question.

1. **If not, should managers have the same record keeping obligations as the owners corporation?**

Yes, see answer to Q.32 below.

1. **Should they simply have an obligation to record all receipts and expenditure of owners corporation money?**

No, OC Managers should not simply have an obligation to record all receipts and expenditure of OC money. Under s.33 (1) of the Act an OC must keep proper accounts that cover all income and expenditure, all assets and liabilities, and provide a true and fair view of its financial position. In many cases the OC Manager is delegated this accounting function.

In the context of fixed assets, CAV recommends use of an Asset Register and related depreciation schedules. However, this is not prescribed in the Act or Regulations. In the case of my OC, when the Asset Register was reviewed this year, it had been last updated in 2009, and only listed 17 items, when hundreds of assets were clearly visible when walking around the property, and the replacement value of contents was >$500,000. There were no depreciation schedules, and we have been advised that in general the software used in the OC Manager industry does not support depreciation.

The financial accounts presented to the AGM have the format provided below, which is basically ‘cash accounting’, with no accounting for fixed assets.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **ASSETS** |  |  | **LIABILITIES** |  |  |
| **Operating fund** |  | Contributions in advance | $ nn,nnn |
|  | Cash at bank | $ nn,nnn |  | GST | $ nn,nnn |
|  | Term deposit | $ nn,nnn |  | Accruals | $ nn,nnn |
|  |  | $ nn,nnn |  | Income tax liabilities | $ nn,nnn |
| **Maintenance fund** |  |  |  |  |
|  | Cash at bank | $ nn,nnn |  |  |  |
|  | Term deposit | $ nn,nnn |  |  |  |
|  |  | $ nn,nnn |  |  |  |
|  | Amounts owing | $ nn,nnn |  |  |  |
|  | Prepayments | $ nn,nnn |  |  |  |
| **TOTAL ASSETS** | $ nn,nnn | **TOTAL LIABILITIES** | $ nn,nnn |
|  |  | **NET ASSETS** |  | $ nn,nnn |

Under normal accounting standards, if new equipment is purchased for cash for $500, Cash at Bank falls by $500, Fixed Assets increase by $500 so that the Balance Sheet continues to balance, and the equipment is subsequently depreciated. In the case of our OC, if new equipment is purchased for cash for $500, Cash at Bank simply falls by $500, with no other record in the formal accounts of what it was spent on, and Net Assets falls by $500. This opens the door to relatively easy fraudulent activity.

Under s.34 (2) of the Act accounts must be prepared in accordance with the financial standards specified in the OC Regulations. However, there are no standards specified in the OC Regulations. The Statement of Significant Accounting Policies provided for our OC states:



A more transparent statement would be to say: “No financial standards of any kind have been applied to the preparation of this financial report.”

The issue of including financial standards in the OC Regulations needs to be urgently addressed.

1. **Should owners corporations have the power to require managers to provide inspection of whatever accounts are kept by the manager, including providing copies?**

Yes, OCs should have the power to require OC Managers to provide inspection of whatever accounts are kept by the OC Manager, including providing copies. However, effective auditing of an OC Managers’ delegated financial powers and functions is almost impossible as there are too many areas where the Owners Corporation Act 2006 does not provide sufficient guidance. For example:

* Prescribed OCs are required to have a maintenance plan and maintenance fund, which are to encompass major capital items, but there is no guidance (other than s.37 (2), which is far too limited) as to what constitutes a major item. As a consequence, it is unclear what maintenance should be paid from the Operating Fund, and what should be paid from the Maintenance Fund.
* There are no applicable financial standards to audit the OC Manager against (see answer to Q.32 above.)

## Unsuitable managers

1. **Should managers be required to keep a record of each exercise of a delegated function and serve a copy on the owners corporation?**

Yes, in the absence of the financial standards referred to in the answer to Q.32.

1. **Should there be a criminal record check for managers, including officers or employees?**

Yes.

1. **If so, should the test reflect that in the Estate Agents Act? If not, what are appropriate disqualification provisions?**

Yes, the Estate Agents Act provisions are a good starting point.

1. **Should the test extend to voluntary as well as professional managers?**

Definitely. Criminality is just as likely in either case, and there is every reason to believe that volunteer OC Managers will be screened less effectively than professionals.

**Other issues not covered by the questions above:**

There are significant issues associated with unsuitable OC Managers that have not been canvassed on the questions CAV has posed.

Both OC Committees and OC Managers are required to exercise due care and diligence in exercising their powers and functions, but CAV does not appear to be required to do the same when it comes to the registration of OC Managers (see extract from The Age below.)



Source: The Age, <http://www.theage.com.au/national/rip-off-body-corporate-managers-stay-registered-20130205-2dwj0.html>

I believe CAV needs to take stronger action on this matter than it has to date, and it needs to be accountable for the quality and integrity of the OC Managers it registers.

Appropriate information CAV should be obtaining from applicants for registration, and in each annual renewal report, is provided in the answer to Q.9. The information should be analysed each year to establish the suitability of the applicant, or the ongoing suitability of each OC Manager.