

# Consumer Property Law Review

## Submission of a 100-unit Owners Corporation – March 2016

### **Are the current constraints on owners corporations' power to commence legal proceedings appropriate?**

It is difficult to balance the competing interests of efficient operation of the Owners Corporation (OC) and the need for appropriate levels of authorisation where legal costs and liability may be incurred. For example, if an OC needed to commence proceedings against its manager, it would likely require a ballot. In circumstances where a manager would usually run the ballot, this disincentive to actively manage the ballot places the manager in a clear conflict of interest. Further, there may be circumstances in which time is of the essence (for example when an OC needs to injunct one of its service providers (manager or otherwise)) when it isn't practical to seek a ballot of members.

It may be appropriate to delegate the power to commence legal proceedings to the OC committee in certain circumstances, including when the proposed proceedings involve a service provider or urgent action is required.

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

The Magistrates Court should be treated equally with VCAT as a venue for debt recovery, not least because it will increase efficiency by removing the need for OCs to seek authentication of VCAT orders in the Magistrates Court where enforcement is required.

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

Yes.

### **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?**

OCs desperately need the power to deal with goods on the common property, particularly in respect to abandoned goods. Such goods often pose a fire, health and safety and rodent risk. Our building currently has several cars and many bikes we suspect are abandoned, but because they are in car parking spaces (legitimately or otherwise) or chained to bike racks we are unable to have them removed. There are multiple lot owners who are in breach of body corporate rules in respect to storage of goods in car spaces. Different safeguards for goods that are obstructive or pose a hazard would certainly be appropriate, but the process for removal of goods that the owner refuses to move or has abandoned should be more streamlined and involve less red tape.

### **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?**

No. Seals are a redundant anachronism. OCs should be able to execute contracts on (a) the signature of two committee members, or (b) one committee member and the OC manager, with authorisation provided by resolution or ratification by the Committee.

### **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, as long as authorisation is provided by the Rules or a relevant AGM resolution. It is not fair or reasonable to expect non-defaulting owners to subsidise the costs of debt recovery of defaulting owners.

**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?**

No. The obligation of owners to pay is clearly apparent and internal dispute resolution will do nothing other than further delay the collection of monies already due and owing to the OC.

OCs should not have to provide hardship consideration beyond the scope of the current provisions. With constant upward pressure on costs, OCs work hard to maintain budgets and fees at reasonable levels and having to carry even a small number of defaulting owners can place significant pressure on the OC's budget and capacity to perform.

OCs should not have to effectively provide credit to defaulting owners, not least because it may trigger other regulatory responses in relation to the provision of credit.

In the circumstances, it is more appropriate and a better allotment of risk that defaulting owners seek assistance from other sources (such as family or credit providers) rather than shift the burden to OCs.

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

The process of collecting late fees is onerous and can lead to significant financial uncertainty for larger owners corporations. At one stage our building had hundreds of thousands of dollars in unpaid fees, leading to higher fees in general and a high degree of difficulty in budgeting and other day-to-day financial management. Because of the costs involved in pursuing arrears through VCAT and the courts, our experience has been that we need to allow owners to be in arrears up to \$5000 (or approximately one year) before it is worthwhile pursuing legal action. By the time action is complete, this figure might have increased significantly.

Even when a tribunal/court order is granted, there is very limited scope for recovery under the existing scheme. A warrant for the possession of goods in our experience is entirely ineffective at realising the debt. In reality, bankruptcy is the often the only means available to an OC to recover large debts from defaulting owners. This is an expensive and time-consuming process.

A far superior model is the one adopted in other States whereby OCs can require payment of an order for outstanding fees and associated costs from a mortgagee of the lot, and the value of the demand is treated as a debt owing to the mortgagor. Banks are better able to carry the risk and associated cost than OCs.

**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?**

In a time of extreme upward pressure on OC budgets, OCs should have at their discretion the capacity to raise funds through a variety of sources without limitation, including through the supply of electricity via an embedded network. In this frame work it is entirely fair and equitable that OCs should be able to recover a margin in addition to the cost of provision. Income forgone from services would need to be recovered from fees which increases costs for owners and tenants (in the form of increased rents) alike.

The appropriate avenue for owners or tenants to seek review of such arrangements is via the OC committee. A regulatory response would unnecessarily act to curtail free enterprise with minimal correspondence benefit to tenants.

**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?**

Our experience suggests the current model of differentiation is working adequately; however we have little basis for comparison with smaller OCs. There might be a need for greater maintenance planning obligations in smaller buildings; certainly there should be no decrease in the obligations for larger buildings.

**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?**

The adequacy of maintenance planning is intrinsically linked to the competence, knowledge and diligence of a building's committee of management, its strata manager and its building manager (where relevant). The importance placed on maintenance planning probably increases with a committee's tenure, as new committee members might be unaware of issues that require financial consideration.

**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?**

Bearing in mind our limited experience of smaller lot, a distinction between smaller and larger OCs is probably beneficial when it comes to maintenance. Lots with consideration beyond a shared driveway or wall might benefit from maintenance planning for the peace of mind of owners as much as any potential financial burden.

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

Maintenance plans should be lodged with audits to ensure at least a roughly appropriate sum is being budgeted for major financial outlays such as lift replacement.

**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?**

Capacity for unplanned works should be allowed in emergency situations if the works relate to a maintenance item and such expenditure can avoid the imposition of a special levy. This would naturally require contributions to the maintenance fund to be adjusted in future years.

**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?**

Any proposed amendments to the current regime should exclude prescribed OCs.

**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?**

It is important to separate owners or occupiers who cause damage from owners who want to alter common property. Damage to common property should be recoverable by the OC through fee notices, with support from VCAT and the courts if necessary. Alterations to common property may require consensus approval from lot owners. New ways of thinking may be confronting for an owners corporation but are not necessarily wrong when considering use of common property. In any event, OCs should have the power to require an alternation be authorised by the OC, and appropriate sanctions for any unauthorised works.

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

Minimum insurance required should be the cost of replacing a building if it were completely destroyed.

**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)?**

No. Many individual owners do not take out appropriate insurance to cover the building's insurance policy. Underinsurance is already a significant problem in Victoria and allowing owners to opt out of building insurance would compound this issue.

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

If an individual lot owner is demonstrably responsible for an incident that has caused an excess or increase to the building's insurance, this should be recoverable through OC fees.

**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**
- **interests they must consider, and whether there are any matters they should be prohibited from voting upon, and**
- **duration of their obligations?**

The NSW legislative framework as detailed in the discussion paper should be adopted in Victoria. It is imperative that steps be taken to regulate developers given the significant power imbalance that exists between developers and owners.

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

Proxies have not proven to be a problem in our building as few votes are required and we attempt to make resolutions by consensus rather than formal vote.

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

As previously stated, our committee attempts to make resolutions by consensus. We rarely require votes as members engage in robust discussion where required to convince counterparts of their relevant arguments.

A process for interim unanimous resolutions should be introduced into the act.

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

As a rule, the annual general meeting is poorly attended. The owners who attend usually have an issue they wish to raise, unaware that they are able to do so outside of the AGM.

**How can the views of tenants be most effectively shared with the owners corporation?**

This is a question our OC committee has been attempting to answer. As residents of the building tenants should feel engaged and empowered, as this is likely to be beneficial to the amenity of any building. However, tenants' views can be affected by the effectiveness and level of interest shown by their respective owners. In our building we use noticeboards to communicate directly with residents, including the circulation of a regular newsletter and any relevant notices on security and services. Email is the preferred form of contact for owners.

**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?**

The minimum size of committees cannot possibly be any lower. The maximum size of 12 could become unwieldy and dysfunctional depending on the individual OC. Our OC has operated at the minimum end of the spectrum and with numbers up to 10. Our recommendation would be for a maximum number of between seven and nine committee members depending on the size of the building to ensure voting does not become unwieldy.

**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?**

External changes to a lot should be considered by the OC committee, with a majority vote required. Changes should be allowed if they are unlikely to be detrimental to property values within the building as a whole.

**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?**

Access to common property should be determined by a building's OC committee. Our building has a number of common areas with different access options and requirements. The gym and pool are accessible using a security fob from 5am-11pm. The car park is accessible at all hours. The rooftop terrace must be booked and a deposit paid due to the greater likelihood of damage when visitors are potentially affected by alcohol and the impact on residents of the building's top floor.

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

Anyone in the building, including residents and their guests, should be bound by the rules. We agree with the NSW legislation that includes a provision that has the effect that all those bound by the rules are deemed to know them, meaning that ignorance of the rules is no defence to a breach.

**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 lot owner or lessee must also bear some degree of responsibility for the conduct of visitors or guests. It is naïve to assume that a visitor to the building will be able to be compelled to make reparations if property is damaged or other rules breached.

**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)?**

Model rules with options should cover pets and smoking. Smoking should not be allowed to affect residents' health and enjoyment of their properties. Our building has introduced a pet request form that we hope will lead to better relationships between the OC and pet owners and encourage greater responsibility from pet owners for their animals' potential impacts on other residents. We were aware that a significant number of residents had pets (in breach of building rules) who then simply denied having animals if said animals put them into conflict with another resident. By allowing pets with approval from the OC we are aiming to ensure such situations are easier to manage. We also believe having a process for approving pets (including ahead of purchase by prospective owner) will make our building a more attractive prospect for buyers assessing our building against a building with a no-pets policy. This has anecdotally influenced several buyers to choose our building since the rules changed.

**What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?**

Sustainability items should not be prohibited on the basis of appearance only. Our building has retrofitted a number of sustainability measures to reduce energy consumption and water use and continues to look for ways to improve our environmental footprint. However, as with other alterations or additions, any installations should require pre-approval by the OC committee.

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

An OC is unlikely to bother pursuing rule breaches through this method when the penalty is paid to the public purse, while the minor nature of the penalty is hardly likely to have a deterrent effect. OCs should be able to receive penalty payments if they have gone to the effort to prove the breach. The judicial system is capable of ensuring an OC does not abuse this power, which is already unlikely to be abused due to the time and effort involved in pursuing a breach.

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

We believe the current structure is acceptable in relation to the requirement to allow inspection of documents and the option of providing copies. OC managers should only be able to bill the OC for providing such access (a) if their contract permits it, and (b) if the amount of time it takes to provide requested access is deemed unreasonable.

**What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?**

Information on short-stay accommodation is certainly relevant to prospective purchasers and indeed to owners corporations. Our building has several occasional listings on AirBnB that have not proven problematic so far; however, this is an issue of some concern to many larger-scale OCs in Victoria. We encourage detailed

consideration of the impact of short-stay accommodation (both positive and negative) by appropriate legislative bodies.

**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?**

The dispute resolution is unlikely to prove useful in many instances when an OC is pursuing a breach. In our experience the party in breach rarely attends the scheduled dispute resolution, resulting in a waste of time and money for the OC. Serious breaches should be able to taken directly to VCAT or CAV.

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

The dispute resolution process can be confronting and traumatic for parties involved in ongoing disputes. A resident who has experienced aggravated conflict with a neighbour is often reluctant to pursue complaints to their conclusion if it requires sitting opposite someone who has intimidated or threatened them.

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

VCAT should consider whether the OC has acted in good faith in creating and enforcing rules; whether the party in dispute has shown care for the building and/or its residents; whether the aggrieved party is being reasonable.