



29 April 2016

Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

Melbourne Office:
Level 2
4 Bank Place
Melbourne VIC 3000

PO Box 16043
Collins Street West VIC 8007

Telephone 613 9602 5800
Facsimile 613 8576 8855

www.brandpartners.com.au

BY EMAIL: consumerpropertylawreview@justice.vic.gov.au

Dear Sir / Madam,

Re: Submission to Consumer Property Acts Review Issues Paper No. 2 – Owners Corporations

Brand Partners Commercial Lawyers is pleased to make this submission to Consumer Affairs Victoria in respect of the *Consumer Property Acts Review Issues Paper No. 2 – Owners Corporations (Issues Paper)*.

We do not intend to address every subject raised in the Issues Paper. Instead, our submission focuses on issues that Brand Partners has observed through our involvement in acting for owners corporations, owners corporation managers and lot owners.

For ease of reference, we have maintained the numbering as per the Issues Paper, and provide our comments on the topics set out below as follows:

2.1 The Power to Commence Legal Proceedings

- Consider if an Owners Corporation may issue proceedings without a special resolution in certain circumstances with leave of VCAT – this would allow an Owners Corporation to commence proceedings where a special resolution is being unreasonably blocked, but only under the supervision of VCAT.
- Alternatively, consider whether large Owners Corporations who are unable to pass a resolution due to lack of participation in the voting should be allowed instead to issue proceedings based on a unanimous vote of the committee.

- There is an inconsistency in the commencement and settlement of proceedings. Owners Corporations must vote to start proceedings, but a committee can make decisions on whether to settle a proceeding and the terms on which it will do so. It is impractical to consider obtaining a special resolution to settle a proceeding, however committees should be required to consider the issue of costs incurred by “innocent bystander” Owners Corporation members when considering settlement.
- Consider if VCAT should be given power a broader power to order where lot owners fail to comply with rules and pay fees when due – this would assist in having Owners Corporations matters predominantly (if not exclusively) dealt with by VCAT, and alleviate the workload of the Magistrates’ Court.
- Alternatively, consider whether Owners Corporation rules should be allowed to provide that an unsuccessful litigant must pay the Owners Corporation’s costs even in the absence of a VCAT order. This could be limited to debt collection matters.
- Consider whether an “offending” lot owner should be prevented from voting in any resolution about the commencement of proceedings against them. This may not be an issue where the breach has resulted in the offending lot owner’s voting rights being suspended, but in other cases the offending owner retains its voting rights. In some Owners Corporations the offending lot owner may hold enough voting rights to veto any proposed Court action against them – leaving the Owners Corporation at a stalemate. Allowing VCAT to grant leave to issue proceedings may also resolve this issue.

2.3 Goods Abandoned on Common Property

- Consider granting Owners Corporations the power to deal with goods left on common property, potentially in the same manner that landlords are able to deal with goods left by tenants. For instance, Owners Corporation Managers / Committee should be able to send a notice to remove items and a failure to comply with the notice (or consistent breaches) should allow the Owners Corporation to remove the offending item and store for a limited time – at the cost of the offending lot owner. Failure to claim the item within 30 days will entitle the Owners Corporation to sell/destroy/throw out the item.

- Obstructions should be able to be removed in emergency situations – Owners Corporations should only have to provide short notice (depending upon urgency of situation), which could be by phone and email, and the offender is liable for costs.

2.4 The Common Seal of the Owners Corporation

- The requirement of a common seal is outdated and an unnecessary burden on Owners Corporations, particularly in light of the fact that companies no longer are required to have a common seal.
- Documents could be signed by 2 members of a committee (or if no committee, 2 members of the Owners Corporation) with powers to sign documents such as Owners Corporation Certificates delegated to the Owners Corporation Manager.

3.1 Levying of fees and charges – the ‘benefit principle’

- Codifying certain considerations and factors to be taken into account when applying the ‘benefit principle’ would be helpful – as it would make clear to lot owners the basis of decisions made by Owners Corporations which result in some lot owners contributing more than others.
- Consider also if Owners Corporations should be required to provide written reasons and basis of decisions affecting lot owners, which address all the required considerations and factors. Lot owners may be less likely to challenge decisions if full reasons are provided.

3.2 Late payment of fees and charges

- Set costs per fee notice should be allowed – this will act as an added incentive for on time payments as well as reduce the administrative fees that may otherwise be payable by the Owners Corporation. Often, the default interest paid is less than the administrative costs that the Owners Corporation manager charges for the production of the notice.
- The cost of debt recovery proceedings should be paid by the debtor (including the gap between VCAT orders and actual costs).
- Owners Corporations should not be able to apply a discount for timely payment – fees are calculated on a set budget and allowing ‘discounts’ would either result

in a deficit in the budget (if the discount is not accounted for in the budget) or in lot owners paying fees that would not otherwise need to be paid (if the discount is considered in the budget). It is more appropriate to penalise late payers.

4.2 Maintenance plans and maintenance funds

- Some smaller sized Owners Corporations are not turning their minds to the future needs of the Owners Corporation, and operate on an ad-hoc basis, only raising funds to fix the problems as they arise.
- Mandatory maintenance plans for all Owners Corporations (as is the case in New South Wales and Queensland) would be of benefit to all lot owners. The size and scope of each maintenance plan would depend upon the size and number of lots involved.
- Consider if an Owners Corporation should be required within 6 months of being created, to obtain an independent expert report of the defects (if any) of the building and common areas, so that the Owners Corporation is aware of any future issues which could arise and can allow for any action which needs to be taken against developers / builders and repair costs.

4.5 Repairs and alterations to common property and services

- There is often a need or desire for a lot owner to make alterations to common property for their own benefit. This can arise for example in multi-level apartment buildings where a lot owner of two adjoining lots wishes to join their lots by demolishing the wall between the lots.
- Although the Act deals with alterations by the Owners Corporation, it does not specifically deal with changes by a lot owner – although section 130 provides that a lot owner must not use common property in a manner likely to cause damage or deterioration.
- Any changes to common property proposed by a lot owner which requires a building or planning permit, would require the Owners Corporation to be a joint applicant on that permit as the works involves property belonging to both the Owners Corporation and the lot owner.
- A process and mechanism for lot owners to make changes to the common property should be provided for. As any change to common property may affect

the rights and interests of other lot owners, a process for involvement of other lot owners should be included – such as a special resolution.

- Similar to NSW, there should also be a provision allowing an Owners Corporation to seek compensation or rectification for works done by a lot owner which damages common property.
- If an Owners Corporation has been made aware of repairs required to common property and does not act on those repairs - or confirm in writing its belief that no repairs are necessary in a reasonable time - a lot owner should be able to undertake the repairs and seek reimbursement from the Owners Corporation.

5.2 Proxies – Proxy Farming

- Proxy farming is an issue which does happen and should be addressed. Brand Partners is aware of a situation where a single lot owner attended an Annual General Meeting with 21 proxies which enabled that lot owner to determine the entire composition of the Committee.
- Consider if lot owners should be limited as to the number of proxies that a lot owner may hold at any particular meeting.

5.3 Resolutions

Unanimous resolutions are sometimes impossible to get – the larger the Owners Corporation, the more difficult, often simply due to the apathy of owners. There should be an interim resolution process for unanimous votes to avoid the Owners Corporation being left in an impasse – e.g. 90% in favour and no votes against. This would maintain the high threshold at the same time as allowing the resolution a chance to pass without chasing down all absentee owners.

6.1 Requirements for a committee

Consider if a mechanism should be included (for example – a power vested in VCAT) for the removal of a committee member who is not acting in the interests of the Owners Corporation as a whole (for example, acting oppressively against minority lot owners), but is unable to be removed at a meeting because of a lack of majority.

8.1 Visitors and Guests

This issue is most notable with respect to lot owners using their lots for short-term stays – such as Airbnb. The suggestion that a lot owner is liable for breaches of the Act and rules by short-stay users has some merit.

8.2 Model Rules: pets and smoke drift

The approach adopted by NSW in relation to pets and smoke-drift seems appropriate. A prospective purchaser of a lot may intend on having a pet and would need to know prior to purchasing if having a pet would be permitted.

9.1 Owners Corporations Records

Owners Corporations sometimes experience difficulties obtaining current contact information of all lot owners, which can waste time and money. Consider if purchasers of lots should be legally obliged to provide a Notice of Acquisition (or similar) to Owners Corporations after settlement, with a penalty for failure to do so.

9.2 Owners corporation certificates – short stay accommodation

- A Vendor Statement under section 32 of the *Sale of Land Act 1962* already requires disclosure relating to land use and planning restrictions. Unless short-stay accommodation is specifically regulated under the rules of that Owners Corporation (which it is currently not permitted to do), then it may be difficult for an Owners Corporation to determine if and how many lots are being used for short-stay accommodation purposes.
- If short-stay accommodation is to become specifically regulated by an Owners Corporation under its rules, then disclosure of the current level of short-stay use in an Owners Corporation certificate may be relevant to prospective purchasers.

Please contact Ms Tammie Moorhouse or Mr Adam Cooke if you have any questions about our submission.

Yours faithfully
BRAND PARTNERS



TAMMIE MOORHOUSE
Senior Associate

Yours faithfully
BRAND PARTNERS



ADAM COOKE
Senior Lawyer