

Consumer Property Acts Review Issues Paper No. 2

## Owners corporations



# About the Consumer Property Law Review

On 21 August 2015, the Minister for Consumer Affairs, Gaming and Liquor Regulation, the Hon. Jane Garrett MP, announced the Consumer Property Acts Review (the review). The review is examining 4 key pieces of consumer property legislation: *Sale of Land Act 1962* (Sale of Land Act), *Estate Agents Act 1980* (Estate Agents Act), *Conveyancers Act 2006* (Conveyancers Act) and *Owners Corporations Act 2006* (Owners Corporations Act).

The review will:

- assess the 4 Acts to identify improvements that could be made to the legislation, having regard to the experiences of stakeholders and to developments that have taken place since each of the Acts came into operation
- examine the efficiency and effectiveness of the regulatory arrangements governing the conduct of licensed practitioners involved in the sale of land, real estate transactions and the management of owners corporations, and
- recommend necessary amendments to improve the operation of the legislative arrangements set in place by these Acts.

This review covers 2 Acts that have been in place for many years (the Sale of Land Act and the Estate Agents Act). Therefore, opportunities to modernise and improve the legislation will also be considered.

This is the second of 3 issues papers to be released by Consumer Affairs Victoria (CAV) between December 2015 and March 2016.

The first paper was released in December 2015, and covered issues relating to the licensing and conduct of estate agents, conveyancers and owners corporation managers and the institutional and regulatory arrangements that govern those licensing schemes. Submissions on the first issues paper close on 11 March 2016.

This second paper covers owners corporations, specifically issues identified with the Owners Corporations Act, with the exception of the conduct of owners corporation managers which formed part of the first paper (see Part B).

The third paper is scheduled for release in March 2016 and will cover sale of land and business, specifically issues identified with the Sale of Land Act, including pre-contractual issues and contracts of sale.

# About this issues paper

This issues paper is divided into 13 sections. Sections 1 to 12 are about the Owners Corporations Act, which provides for the management, powers and functions of owners corporations, and mechanisms to resolve disputes. However, this paper does not cover Parts 6 and 12 of that Act, which regulate owners corporation managers (these provisions were discussed in the first issues paper).

Section 13 explores issues regarding Part 5 of the *Subdivision Act 1988* (Subdivision Act), which provides for the creation of owners corporations, the vesting of and dealings in the common property, and the alteration of subdivisions.

This review looks at whether these Acts are achieving their purposes and, in doing so, whether they are also achieving their informal purpose of improving the 'liveability' of owners corporations communities.

Many of the issues in this paper have been raised by stakeholders during preliminary consultation on the review. Also, reference will be made to New South Wales' new *Strata Schemes Management Act 2015* and the *Strata Schemes Development Act 2015* (collectively, 'the New South Wales legislation') for comparison and illustration purposes.

Feedback from this issues paper will inform the development of an options paper on potential legislative changes which is scheduled for release in mid-2016. Submissions on the options paper will inform the government in determining the final suite of reforms.

This issues paper has been structured to assist readers in understanding the issues and making comments or providing submissions. Where an issue is complicated or where we are particularly keen to draw out from residents their experiences and the practical reality of using the legislation, discussion prompts have also been included to assist readers in responding to the issues.

Each section is structured in the following way:

## 1.1 *Topic for discussion*

*Text in this section sets out the law and various issues that have been identified or raised by stakeholders to date about the current law. You are encouraged to make a comment or submission about your views on the issues and to add any further issues you think may be relevant.*

### **Discussion prompts**

*Some sections also include a blue shaded box setting out example scenarios, which have been developed as prompts for further discussion. Discussion prompts have been included where a scenario may be useful to illustrate the issue further.*

*You are welcome to comment on the discussion prompts and use them to draw out similar and related issues and experiences in your owners corporation. You need not analyse the specific scenarios in depth but rather use them as a platform for discussion.*

***Consultation questions***

*These questions are intended to help guide you in developing a response. You need not answer all of the questions.*

# How to get involved?

We invite your views and comments, as well as your responses to the series of discussion prompts and questions posed throughout this issues paper as a guide to writing your submission.

We understand that you may not wish to make a formal submission but may instead like to provide specific information about a particular issue. We welcome this feedback which can be made in the form of a comment directly to our email address. Any comments we receive will not be made publicly available but will be considered as part of the review.

We also welcome your suggestions for other questions or issues that should be considered leading up to the release of the options paper.

Until **29 April 2016** you can make a submission or comment:

**By mail:**

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

**By email:**

[consumerpropertylawreview@justice.vic.gov.au](mailto:consumerpropertylawreview@justice.vic.gov.au)

Unless you label your submission as confidential, your submission or its contents will be made publicly available in this and any subsequent review process. Submissions may be subject to Freedom of Information and other laws. CAV reserves the right to not publish information that could be seen to be defamatory or discriminatory.

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## 2 About owners corporations in Victoria

Owners corporations can be created for residential, commercial, retail, industrial and mix-use property developments. An owners corporation is automatically created when a plan of subdivision containing common property is registered at Land Victoria. There may be multiple owners corporations registered in respect of a plan of subdivision, with each owners corporation having different common property.

The common property is shown on the plan of subdivision and may include gardens, passages, walls, stairwells, pathways, driveways, lifts, foyers and fences. The owners corporation is responsible for managing and maintaining the common property. In addition to the common property, the plan of subdivision also shows the parcels of land that can be sold off separately. These are called lots. Lot owners are the members of the owners corporation. Therefore, you are likely to be a 'lot owner' and a member of an owners corporation if you own a flat, apartment or unit.

Victoria has been the dominant residential building market in Australia since the late 2000s for multi-unit apartment and townhouse construction. Victoria's share of the value of new multi-unit apartment constructions is approximately 31% currently, compared to 19% in 2007-08.

Currently, there are over 166,000 owners corporations in Victoria, registered in respect of over 72,000 plans of subdivision. Approximately three-quarters of Victorian owners corporations are small, with three lots or fewer.

**Table 1: Size of owners corporations in Victoria**

Number of lots in the owners corporation	Percentage of owners corporations in Victoria
<i>0 – 3 lots</i>	75.33%
<i>4 – 9 lots</i>	15.32%
<i>10 – 49 lots</i>	8.31%
<i>50 – 99 lots</i>	0.58%
<i>100 or more lots</i>	0.46%

The peak industry body for owners corporation managers, Strata Community Australia (Vic) (SCAV) estimates that owners corporations in Victoria manage property to the value of \$300 billion, and that approximately 1.5 million Victorians, or almost one in four, live in or are affected by owners corporations.

## 3 Functions and powers of owners corporations

The functions and powers of owners corporations are set out in Part 2 of the Owners Corporations Act and include:

- the obligations of an owners corporation to carry out its functions and exercise its powers honestly and in good faith, and with due care and diligence
- how an owners corporation must be managed, and to whom it can delegate its functions and powers, and
- the use of a common seal.

### 3.1 The power to commence legal proceedings

An owners corporation must not bring legal proceedings unless it is authorised to do so by special resolution, except for an application to the Victorian Civil and Administrative Tribunal (VCAT) to recover fees and other money or to enforce the rules of the owners corporation (section 18). Special resolutions are explained in section 5.2 and Table 2 of this paper.

Requiring a special resolution ensures that the decision to initiate legal proceedings is not made lightly, given the potential for significant costs to lot owners.

However, the exceptions also recognise that where the amount of fees or the rules of the owners corporation have been already been settled by the owners corporation, there should be a relatively quick and inexpensive way to ensure that an owners corporation can enforce its fees and its rules.

#### Issues

Various issues have been raised about the power to initiate proceedings, for example:

- special resolutions can be difficult to pass due to the apathy of lot owners, and can be blocked by a minority of lot owners, and
- owners corporations must pass a special resolution to pursue outstanding fees from a lot owner at the Magistrates Court, but not if they do so at VCAT. While taking an action to the Magistrates Court involves higher application fees than at VCAT, some owners corporations may prefer to take action in the Magistrates Court because the court will generally order the losing party to pay the legal costs of the winning party (unlike VCAT, where the parties usually pay their own costs). If actions in the Magistrates Court are not necessarily the more costly option for an owners corporation, this raises issues about whether it is necessary to require greater procedural hurdles than actions at VCAT.

### Discussion prompts

*Owners corporations may seek to commence legal proceedings for various reasons, and in differing circumstances, for example:*

- **Owners Corporation A** is considering taking a supplier to VCAT for defective repairs to common property. However, this owners corporation generally struggles to pass special resolutions. The majority of members take little interest in the affairs of the owners corporation, and do not attend meetings or wish to 'get involved'. Some of the owners also live overseas and rent out their lots.
- **Owners Corporation B** has a building defect, and although the majority of members want to take the developer to court, they cannot gain 75% support. Nevertheless, they see themselves as representing the democratic wishes of the owners corporation. Their special resolutions are blocked by the developer, together with a few other minority lot owners, who are concerned that not everyone can afford the litigation. They argue that such an expensive and disruptive step should not be taken lightly, or without a very high level of consensus.

### Questions

Considering the range of circumstances that owners corporations may have, and without limiting yourself to the discussion prompts above:

- 1 Are the current constraints on owners corporations' power to commence legal proceedings appropriate? No the inability of OC's to recover costs associated with recovery of unpaid fees costs owners money. If this means a change to allow OC Committees to allow OC Managers to go to the magistrates court and bypass VCAT I would welcome this change.
- 2 Are there any other issues relating to the power to commence legal proceedings?

## 3.2 Personal property and water rights

Section 16 of the Owners Corporations Act empowers owners corporations to acquire or lease personal property for the use of lot owners or other persons, and to deal with such personal property.

### Issue

An issue has been raised about whether the power of owners corporations to deal with personal property extends to powers to deal with water rights.

## Discussion prompts

*Owners corporations may need to consider water rights in a range of circumstances, for example:*

- **Owners Corporation A** does not have a water tank, but the owners corporation wants to install a tank to collect run-off water from the roof (which is common property) for use in watering the lawn in common areas. This proposal has wide support, and the committee believes that, if it can deal with water rights, this would be a fair way to use water for everyone's benefit, and avoid any future disputes about water rights.
- **Owners Corporation B** has a water tank that was installed by a lot owner at their own expense (and with permission), for their own use. That lot owner would be concerned if the owners corporation now claimed the right to own and distribute that water. Also, some of the other lot owners would be unhappy if the owners corporation decided to install an unsightly tank near or outside their lot.

## Questions

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the discussion prompts above:

- 3 Should owners corporations be able to deal with water rights, including water that falls on common property? [Yes](#)
- 4 Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property? [A problem that is being seen more and more is the abandonment of items, \(such as bicycles\) left by owners or renters who have moved on, in common areas needs to be addressed to ensure that OC committees are not loaded down with work performing searches to trace the ex-owner of the item before the item can be disposed of. This applies to para 3.3 as well.](#)

## 3.3 Goods abandoned on the common property

The functions of the owners corporation include managing, administering, repairing and maintaining the common property. However, there are no specific powers to deal with goods that may be left behind or abandoned on the common property.

In contrast, the New South Wales legislation allows for regulations to be made that confer powers on owners corporations to store or dispose of goods left on common property, with provision for the serving of notices on the owner or other relevant persons (no regulations have yet been made).

### Issues

Issues have been raised about how an owners corporation should deal with goods (including vehicles):

- that have been left on common property, in breach of the owners corporation rules, and
- which the owner refuses to remove, or has abandoned.

### **Question**

- 5 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?

## 3.4 The common seal of the owners corporation

Currently, section 28 of the Subdivision Act deems every owners corporation to have a common seal.

The Owners Corporations Act sets out various requirements for the common seal, and its use, including requirements for the seal to:

- include the name of the owners corporation, and the subdivision plan number, and
- be affixed to contracts entered into by the owners corporation, and to an owners corporation certificate (a document about the owners corporation that is provided to prospective purchasers).

Before the seal can be used on any document, the owners corporation must pass a resolution to authorise the use of the seal on that document. The affixing of the seal must be witnessed by at least two separate lot owners, who must:

- sign (as having witnessed the sealing)
- print their full name and address, and
- state that they are a lot owner.

However, to assist in the efficient provision of owners corporation certificates, the registered manager or chairperson of the owners corporation may witness the sealing on an owners corporation certificate.

### Issues

An issue has been raised about whether the requirements to have, and to use, a common seal on contracts and owners corporation certificates are outdated, noting that companies have not been required by the *Corporations Act 2001* for some time to have a common seal.

Companies may execute a contract if the document is signed by two directors of the company, or a director and the company secretary.

### Question

- 6 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? [A totally outdated concept. The delegation of powers enables the OC committee to decide who can and cannot sign contracts on behalf of the OC. The OC committee also decides how many signatures are required for each level of expenditure.](#)

## 4 Financial management of owners corporations

Part 3 of the Owners Corporations Act covers deals with financial management and provides for:

- the powers of owners corporations to levy and recover fees and charges, to borrow and invest, and to require lot owners to carry out works on their lots
- the liability of lot owners for fees and charges, and
- the obligations of owners corporations regarding accounts and audits, maintenance plans and funds, repair and maintenance of the common property and services, changes to common property, and insurance.

### 4.1 Levying of fees and charges – the ‘benefit principle’

An owners corporation can only levy annual fees (covering general administration, maintenance and repairs, and other recurrent obligations of the owners corporation) on the basis of ‘lot liability’.

Lot liability is specified on the plan of subdivision, and sets out the proportion of general and administrative expenses to be paid by the owner of the lot. Often, but not necessarily, the lot liability is proportionate to the size or value of a lot, relative to the other lots.

The levying of fees on the basis of lot liability is generally considered to be administratively convenient, and easy to determine.

However, this general rule does not apply to the levying of special fees and charges under sections 24(2A), 28(3), 49 and 53 of the Act, where the repairs, maintenance or other works are undertaken for the benefit of one or some, but not all of the lots. In these circumstances, lot owners may be levied according to the principle that lot owners who benefit more should pay more (‘the benefit principle’).

The Act does not specify how owners corporations should work out the amount to be paid by each lot owner under the benefit principle. However, VCAT has recently provided some guidance on how to apply the benefit principle (see *Mashane Pty Ltd v Owners Corporation RN328577* [2013] VCAT 118).

VCAT noted that:

- the assessment is ‘a matter of judgement, not science’ and need only be ‘within a range of what would be reasonable’, and
- an owners corporation could apply the benefit principle, and still end up with a fee or charge that is effectively based on lot liability where:
  - a lot owner benefits more, but this is offset by their larger annual fees, or
  - work on one lot directly benefits the owner of that lot, but the other lots also benefit indirectly (for example, through enhancements to the value of the building, or reduced possibility of legal actions against the owners corporation).

#### Issues

It has been suggested that despite the guidance provided by VCAT about how to apply the ‘benefit principle’ (i.e. who benefits more, should pay more) for special fees and charges, the lack of guidance in the Owners Corporations Act creates a level of uncertainty for owners corporations and lot owners.

## Discussion prompts

*Owners corporations can face a range of different circumstances when determining who should pay for special levies and charges, for example:*

- **Owners Corporation A** incurs costs as a result of water leaking from an unsealed shower inside a lot, which damages common property (the area between the floor of that lot, and the ceiling of the lot beneath it). The owners corporation seeks to raise a special levy to share the costs of fixing and cleaning that damage among all owners (according to lot liability), because this is easy to calculate, and less burdensome for any one owner. However, some lot owners suggest that the costs should be split between the two lot owners who benefit from the work done. However, the two owners are unhappy about this suggestion, and if the costs must be split between them, the owner of the lower lot cannot see why they should have to pay as much as the owner who has the leaky shower.
- **Owners Corporation B** has an old tree on the common property that an arborist says will fall sooner or later, perhaps onto the fence with the neighbouring (and entirely separate) property, but most likely onto A's lot. Some lot owners want a special levy requiring A to pay most of the cost of removing the tree, noting that that most of them have larger lot liability and contribute more in annual fees already. Lot owner A notes that the tree is everyone's responsibility, and that everyone benefits from the reduced likelihood of legal action (and more expensive insurance), if someone is hurt or the neighbour's property is damaged. Lot owner A also notes that while the owners of larger lots pay more in annual fees, they chose to buy those larger lots, which (in any case) absorb more of the owners corporation's overall expenses, and services.

## Question

Considering the range of circumstances that owners corporations may have, and without limiting yourself to the prompts above:

- 7 What are your views about the operation of the benefit principle? What is the experience of your owners corporation in applying the benefit principle? Damage resulting from inside a lot owners property is by its very nature the responsibility of the lot owner. If this damage results in a cost for a second or further owner, the liability is passed back to the first or original owner and should be covered by his or her insurance or the OC's building insurance. Damage occurring in common areas is the same except in this case the original owner in the OC. Modifications to or enhancements of the building instigated by the OC committee should always be by lot allocation.

## 4.2 Late payment of fees and charges

Section 29 of the Owners Corporations Act allows owners corporations to impose penalty interest on late payments of fees or charges, if authorised by a resolution at a general meeting.

Section 31 sets out the process for serving a fee notice, including that the fee notice must have details of the dispute resolution process that applies under the owners corporation's rules in respect of disputed fees and charges. Section 32 sets out the process for serving a final fee notice, which must be complied with before proceeding to VCAT or a court.

### Issues

Where a lot owner is late with their payment, the Act does not currently allow owners corporations to:

- charge that lot owner any additional fee to cover the administration and other costs of collecting arrears, or to make rules to require such a lot owner to pay such costs, or
- recover from that lot owner the difference between the costs awarded against them by VCAT or the court, and the actual costs of undertaking debt recovery proceedings. The usual outcome at court is for the losing party to pay the winning party's costs, according to the court's scale of costs (which covers some, but not all, the costs). At VCAT, parties will usually pay their own litigation costs, although VCAT has discretion to order the losing party to pay the winning party's costs.

This means that owners corporation must either recoup unrecovered costs through a special levy on lot owners based on lot liability, or absorb them.

Another issue is that the Act requires the owners corporation to have a dispute resolution process, but does not specify that the process should be completed before the owners corporation can commence a debt recovery matter at VCAT or court.

### Discussion prompts

*Owners corporations may need to recover late costs in a range of circumstances, for example:*

- **Owners Corporation A** is trying to generate enough funds for maintenance work, but has two lot owners who are late in paying their annual fees. One of these owners experiences financial hardship, has limited English, and is too embarrassed to discuss their circumstances. The other owner disputes the fee, but the owners corporation says that the owner is using the internal dispute resolution to re-open old grievances about the common property, which had been dealt with in a previous dispute resolution process. The owners corporation eventually takes the lot owners to VCAT and wins the case, with VCAT ordering the lot owners to pay the costs of the VCAT action, but not the pre-VCAT legal costs. Some of the owners who pay on time feel that only the defaulting owners should pay these costs.
- **Owners Corporation B** has a number of lot owners who are consistently late in paying fees, and are difficult to contact. Under the contract between the owners corporation and its manager, the manager can recover administration costs for the time spent in contacting owners in arrears, and negotiating payment. These costs are not (and currently cannot be) passed on to the defaulting owners. Some of the lot owners (who pay on time) are unhappy because this 'wastes' owners corporation funds that could be spent elsewhere. However, this owners corporation is already authorised to impose penalty interest on late fees, and some of the other owners who pay on time would be concerned by any 'intrusive' and 'excessive' powers allowing owners corporations to 'fine' people.

## Questions

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

- 8 Should an owners corporations 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? [See my comments earlier in this document](#)
- 9 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? [Our experience was positive even to the point of charging interest on the late paid costs.](#)
- 10 Should owners corporations be able to apply a discount for the timely payment of fees or charges? [No. Discounts influence the budget to be levied. If discounts are applied the OC committee has to artificially increase the budget to allow for projected discounts. This will inevitably lead to a hidden cash stash.](#)
- 11 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](#)
- 12 Are there any other issues relating to payment of fees or charges?\_

## 4.3 Charges for services provided by owners corporations

The Owners Corporations Act does not regulate the fees and charges for the provision of any goods or services by owners corporations to their members or to residents.

By way of contrast, under section 56 of the *Residential Tenancies Act 1997* (Residential Tenancies Act):

- the landlord of separately-metered rented premises cannot seek payment or reimbursement for a cost or charge that is more than the amount that the relevant supplier of the utility would have charged the tenant, and
- if the relevant supplier of the utility has issued an account to the landlord, the landlord cannot recover from the tenant an amount which includes any amount that could have been claimed as a concession or rebate by or on behalf of the tenant from the relevant supplier of the utility.

### Issues

Some owners corporations arrange for embedded utility networks in their buildings to enable them to supply utility services and to charge residents accordingly. The Owners Corporations Act does not require, for example, that any such charges be reasonable, or not excessive.

It has been suggested that charges for utility services provided by the owners corporation should be controlled or limited in a similar way to the Residential Tenancies Act.

### Question

- 13 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 OC committee is elected by the Owners to act in their best interests. If a charge is considered to be excessive the OC committee will be questioned and asked for justification at the AGM and if considered to be unjustifiable will be changed accordingly.

# 5 Maintenance

Part 3 of the Owners Corporations Act deals with maintenance plans and maintenance funds. While the provisions are not mandatory for all owners corporations, they are mandatory for 'prescribed owners corporations'.

## 5.1 'Prescribed owners corporations'

A 'prescribed owners corporation' is one that levies annual fees of more than \$200,000 a year, or has more than 100 lots. Strata Community Australia (Vic) (SCAV) estimates that the current definition captures about 27% of all lots in owners corporations in Victoria or 1.2% of all owners corporations.

As well as requirements to have a maintenance plan, and to establish a maintenance fund to implement an approved maintenance plan, prescribed owners corporations must:

- prepare financial statements in accordance with prescribed standards (section 34(2))
- have those statements audited (section 35(2)), and
- obtain at least 5-yearly valuations of the buildings they are required to insure (section 65).

By making some requirements mandatory for 'prescribed owners corporations', but not for all owners corporations, the Owners Corporations Act seeks to create a balance between:

- giving owners corporations a high degree of self-management and flexibility, and
- protecting lot owners (and future lot owners, in particular) of large or multi-storey buildings, where the consequences of previous neglect or unforeseen events may be disastrous.

### Issues

It has been suggested that the current definition of prescribed owners corporation does not sufficiently capture the full range of large and multi-storey buildings that should be subject to additional obligations to make them engage in future maintenance planning.

#### Question

- 14 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? No, there is no justification. All OC committees should be obliged to have a maintenance plan, budget and schedule. In this day and age we cannot allow buildings to go into maintenance meltdown just because they are small.

## 5.2 Maintenance plans and maintenance funds

Section 36 of the Owners Corporations Act requires 'prescribed owners corporations' to prepare a maintenance plan in relation to the major capital items (including lifts, and air conditioning and heating plants) that are expected to require repair and replacement within the next 10 years.

Section 38 states that the maintenance plan does not have any effect until it is approved by the owners corporation, but there is no set time by which this must be done.

Where such a plan has been approved, section 40 requires the owners corporation to establish a maintenance fund for the purposes of implementing the plan. Under section 43, certain moneys are permitted to be paid into the fund, such as any part of the annual fees designated for maintenance.

## Issues

Given that the neglect of a building can have serious financial and personal consequences for the residents, issues have been raised about whether maintenance plans should be mandatory for all owners corporations (not only prescribed owners corporations), as is the case under legislation in New South Wales and Queensland.

It has been suggested that smaller owners corporations should also be planning for maintenance particularly in older properties, and that many of these owners corporations are not doing so.

It has also been noted that although prescribed owners corporations are obliged to draft a maintenance plan, the Act does not require the plan to be effectively implemented. This is because, the obligation to establish a maintenance fund is only triggered once the maintenance plan is approved by the owners corporation. Even where a fund is established, there is no obligation to direct any money into the fund.

### Questions

- 15 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? [See my previous comments.](#)
- 16 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? [See my previous comments.](#)
- 17 What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements? [Add the relevant wording into the Act and monitor in the same way as the Act is monitored now.](#)

## 5.3 Payments from the maintenance fund

Section 41 of the Owners Corporation Act states that the maintenance fund must be used to implement the maintenance plan, and section 43 says that payments out of the fund for this purpose are to be authorised by an ordinary resolution. Section 44 of the Act says that money may also be paid out of the maintenance fund for other works by special resolution.

The Supreme Court has interpreted section 44 to indicate that, in most circumstances, there must be some genuine connection between the works that are subject to the special resolution, and the works foreshadowed in the maintenance plan (see *Mashane P/L v Owners Corporation RN 328577* [2013] VSC 417). However, the works that are the subject of a special resolution need not be strictly in accordance with the maintenance plan.

## Issues

There is a lack of clarity about the purposes for which payments can be made from the maintenance fund by a special resolution under section 44.

Further, there is a lack of clarity about whether funds for implementing the maintenance plan must come only from the maintenance fund or whether they can also come from a special levy.

### Questions

- 18 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? Certainly, if for example, the building was built before photovoltaic cells were even thought of limiting funding only to existing maintenance items would rule out any improvements.
- 19 Should funds for implementing the maintenance plan come only from the maintenance fund? No, it should be allowable to fund maintenance via bank loans or mortgages.

## 5.4 Contingency funds

Unplanned maintenance or repair costs are not the only unforeseen costs for owners corporations; for example, legal bills can arise from unforeseen litigation involving the owners corporation.

The Owners Corporations Act does not require owners corporations to set aside any moneys for such contingencies.

### Issues

Issues have been raised about whether it is desirable and feasible for owners corporations to have contingency funds. It has been suggested that the need for contingency funds is 'most keenly felt' in owners corporations that:

- are smaller and newer, and have not established a 'workable and realistic account balance'
- have ongoing problems with owners being in arrears with their fee payments, resulting in accounts with 'zero or extremely low balances', and
- where some or all the owners place 'extreme pressure' on managers and other owners to 'slash budgets to an unrealistically low level'.

### Discussion prompts

*Owners corporations may find themselves facing unexpected fees in a range of circumstances, for example:*

- **Owners Corporation A** is sued by a visitor who has been injured on the common property. The owners corporation tries to impose a special levy to pay for legal fees associated with the claim, to avoid borrowing money and paying interest. However, the special levy is blocked by some owners, who have not budgeted for any additional levy this quarter. The owners corporation is now running out of time to seek a loan before the legal bills are due to avoid paying interest on the overdue bills.
- **Owners Corporation B** is a small and new owners corporation with a few units. It wants to keep fees low because there is not much common property. The owners do not object to any simple means to deal with future unexpected bills, but are concerned about doing anything 'too complex' and 'burdensome'.

## Question

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

20 What are your views about contingency funds, including:

- whether contingency funds are necessary Necessary and a mandatory part of the budget. Otherwise they become hidden items in the budget and immune from review.
- what type of owners corporations should have them, and All
- how they should be funded, the purposes that the funds can be used for, and how such purposes should be determined? From the annual fees, managed by the OC committee.

## 5.5 Repairs and alterations to common property and services

The Owners Corporations Act requires owners corporations to repair and maintain:

- the common property and the goods, fixtures, fittings and services related to the common property (section 46), and
- a service in, or relating to, a lot that is for the benefit of more than one lot and the common property (section 47).

Except in certain circumstances, section 52 of the Owners Corporations Act requires a special resolution before an owners corporation can make significant alterations to the common property, unless there are reasonable grounds to believe an immediate alteration is necessary to ensure safety, or prevent significant loss or damage.

However, the Act does not expressly require a special resolution to authorise a lot owner to alter the common property. Nor is there any express requirement for lot owners to obtain the owners corporation's consent to alter the common property, whether significant or otherwise.

Where work done by or on behalf of a lot owner or occupier damages common property, the owners corporation can seek to recover its loss through taking the owner or occupier to VCAT. VCAT has general and discretionary powers to order that a party to do, or refrain from doing something, and to make an order for the payment of money.

### Issues

Currently, the Act does not specifically deal with how lot owners can gain consent to make alterations to common property (for example, whether a special resolution is required), or alter common property in emergency circumstances, or where the owners corporation has not attended to an issue in a timely manner.

By way of contrast, under the *Residential Tenancies Act 1997*, there is a regime for tenants to:

- undertake urgent repairs on the rented premises or seek an order from VCAT requiring the urgent repairs to be done by the landlord, or
- apply to VCAT for an order requiring the landlord to carry out non-urgent repairs.

Further, if any works or activities undertaken by a lot owner or occupier damage the common property, there is no specific provision for owners corporations to seek rectification or compensation from the lot owner or occupier.

The New South Wales legislation, on the other hand, specifically empowers its tribunal to order the owner or occupier to:

- undertake specified works to repair the damage, or
- compensate the owners corporation for the damage or cost of repairs, and any associated costs (such as insurance and legal costs).

It has also been suggested that owners corporations should be able to impose extraordinary fees on lot owners to cover any damage to the common property by a lot owner or occupier.

### Discussion prompts

*Lot owners may wish to seek repairs or alterations to common property and services in a range of circumstances, for example:*

- **Owners Corporation A** has a balcony that needs retiling. The owner of the lot that has access to the balcony has waited for months for the owners corporation to call a meeting to discuss his request. The owner wants to hire someone to do the work and seek reimbursement from the owners corporation. The committee acknowledges that it has been difficult to organise meetings and votes lately, but is concerned by a growing trend of works done without permission, including 'DIY' jobs that, if not done well, could damage or devalue the common property. Sometimes, the owners have not even realised that they were doing work on common property.
- **Owners Corporation B** has a burst pipe causing water to flow into a common area and one of the lots. The owner of that lot immediately calls a plumber, and later that day, a cleaner. The owner does not make any enquiries about prices, but believes that the companies called are well-known and reputable. Although the tradespeople expect to be paid on the day, the owner tells them that he is not the customer, so they need to send bills directly to the owners corporation. This causes confusion between the committee, owner and tradespeople about who was meant to pay the tradespeople.

## Questions

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

- 21 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? The OC committee already has obligations to repair common property. Surely your examples show a lack of clarity between common and non common areas. That lack of clarity needs resolution not additional non pertinent rules.
- 22 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? Damage to common property by lot owners or their renters or their visitors becomes the responsibility of the lot owner. How this is arranged down the line from the lot owner is his/her responsibility. Where damage has been done to common property and can be allocated to a particular lot owner, his/her renter or his/her visitor the building management has responsibility to repair the damage and recoup the costs from the lot owner
- 23 Are there any other issues relating to repairs to common property or services? There needs to be wording to cover repairs versus enhancements. If the common areas need to be revamped or modernised is this a repair (covered by the maintenance fund) or an enhancement (not covered by the maintenance fund).

## 5.6 Insurance

The insurance requirements for owners corporations are set out in sections 54 to 65 of the Owners Corporations Act. The main requirements are that owners corporations, except those in two-lot subdivisions, must take out:

- reinstatement and replacement insurance for the common property, including the owners corporation's portion of any shared services, and
- public liability insurance for the common property to a minimum liability of \$10 million for any one claim.

Owners corporations in multi-level buildings must take out such insurance for all lots in the plan of subdivision. Additionally, prescribed owners corporations (with more than 100 lots, or levying more than \$200,000 in annual fees a year) must obtain a valuation of the buildings they are liable to insure at least every five years.

Officers or committee members of owners corporations have certain duties under section 117 of the Owners Corporations Act, namely, to act honestly and in good faith, to exercise due care and diligence and not to make improper use of their position for gain.

However, under section 118, officers and committee members are not personally liable for a breach of a duty if they acted in good faith; instead, any liability for which an officer or committee member has immunity attaches to the owners corporation.

## Issues

### Types and level of insurance cover

Various issues have been raised about the type and level of mandatory insurance cover, including:

- whether the minimum level of public liability insurance for the common property (\$10 million for any one claim) remains adequate

- whether valuations of the buildings should continue to be taken every five years, and what type of valuation should occur (for example, whether the first valuation of the building must be a 'full site valuation', or whether subsequent valuations can be indexed 'desk valuations'), and
- whether owners corporations should take out other types of insurance that are currently voluntary, for example: contents insurance for the common property; insurance for the performance of its functions; and insurance on behalf of its officers and committee members against liability for a breach of their duty to exercise due care and diligence, where the officers or members are personally liable (for example, where the officers or members have not acted in good faith).

### Other issues

Other issues include whether the insurance provisions should take into account:

- situations where lot owners choose to take out their own reinstatement and replacement insurance for their lot or for their interest in the common property, and wish to 'opt out' of the policy taken out by the owners corporation, and avoid being levied for the latter
- lot owners whose use of their lot increases the insurance premium payable by the owners corporation. Currently, such owners cannot be levied a differential amount to cover the increase. However, under the New South Wales legislation, this can be done with the consent of the lot owner; and if the owners corporation believes the lot owner has refused consent unreasonably, it can apply to the tribunal for an order for a differential amount, and
- situations where a claim on an insurance policy by an owners corporation concerns work done to only one or some lots, or relates to the common property but is attributable to an individual lot owner or occupier, by allowing owners corporations to require the relevant owner or occupier to pay for the excess or increased premium.

### Questions

- 24 What are your views about the type and level of insurance cover that should be required? I have no problem with the levels.
- 25 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. If anyone answers yes which other items of common area costs could/should be available for opt out (lets say gas costs for owners who only have electric appliances).
- 26 What are your views about lot owners' responsibilities where their actions (or inactions) result in increased insurance premiums or excesses payable by the owners corporation? I have no view, the principle of combined responsibility should always apply.

# 6 Meetings and decisions of owners corporations

Part 4 of the Owners Corporations Act covers sets out:

- the obligations of the initial owner/developer
- the processes for convening and conducting annual and special meetings of the owners corporation
- voting requirements at meetings and by ballot, including proxies and powers of attorney
- the requirements for passing resolutions of the owners corporation, and
- that the officers of an owners corporation are the chairperson and secretary.

## 6.1 Developers' obligations

The Act imposes duties on developers to:

- act honestly and in good faith and with due care and diligence in the interests of the owners corporation, and
- take all reasonable steps to enforce any domestic building contract.

These obligations apply for a 5-year period from the date of the registration of the plan of division, and only where developers own a majority of the lots. After the 5-year period, such developers are free to vote according to their own interests, like any other lot owner.

Different approaches are taken in other states, for example:

- under Queensland legislation, the initial owner/developer is bound by certain duties when they engage an owners corporation manager, for as long as they control the voting in any way ('the control period'), and
- under New South Wales legislation, an owners corporation manager must disclose, before their appointment, any connection with the original owner/developer, and any direct or indirect pecuniary interest in the owners corporation. Developers, and persons connected with them, cannot be appointed as manager until 10 years after the registration of the strata scheme. Further, a developer with more than two-thirds of the voting entitlement may only appoint a (non-connected) manager until the holding of the first annual general meeting.

## Issues

### Timeframe for the developers' duties

The duties (including duties to act in good faith and with care and due diligence) are intended to apply in the initial period, when developers essentially control the owners corporation. Accordingly, they apply in the first 5 years, and where the developer owns the majority of lots.

However, a developer may not necessarily sell the majority of lots within 5 years, and even if they do, they may still have control of an owners corporation and the contracts it enters into, by retaining lot(s) to which the developer has allocated the majority of lot entitlement (which governs voting entitlement).

## Nature and scope of developers' duties

Developers' duties are owed to the current members of the owners corporation (which may, in the early stages, comprise solely the developer, or the developer and only a few other owners). In contrast, under Queensland legislation, a developer who in any way controls the voting must consider the interests of *future* members of the owners corporation, and ensure that the management contract terms are appropriate for the development.

Additionally, the obligation in Victoria for developers to take all reasonable steps to enforce a domestic building contract does not prevent them from voting on matters relating to building defects and their rectification. The New South Wales legislation prohibits developers from voting on such matters.

## Other issues

It has been queried whether a developer should, together with the other documents they are required to present at the first meeting of an owners corporation, provide a copy of the occupancy certificate (issued by a building surveyors, and indicating that the building is suitable for occupation).

### Discussion prompts

*A developer may retain control of owners corporations in a range of circumstances, for example:*

- **Owners Corporation A** has a developer of a new and relatively upmarket building. While most of the lots are still unsold, the developer appoints a manager that is its subsidiary. The developer does not always explain that the manager is a subsidiary but advises owners, and future purchasers, that it is confident that the two firms have a good working relationship, and that the manager will execute the developer's 'vision', so that no owners, or future owners, will miss out on the promised lifestyle.
- **Owners Corporation B** has a developer who has sold most of the lots, but more than 5 years later, still has the greatest voting power. The management contract is up for renewal, and the developer and (a non-associated) manager agree that, in return for the manager's appointment, the developer will be paid a share of the management fees. The arrangement is fully disclosed to the other owners before the appointment. Some owners are nevertheless upset that they 'did not have any real choice', while others do not really mind as long as their new manager does not perform poorly.

## Questions

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

27 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. There must be a limitation on the time that a developer can obligate an OC committee on any contract. However, if the developer is still the owner of the majority of the lots (one lot one vote) not the majority of the lot entitlements after 1 year, 10 years or 100 years he/she has the right to cast their votes for the OC committee as he/she likes.
- interests they must consider, and whether there are any matters they should be prohibited from voting upon, and
- duration of their obligations?

28 What other changes should be made to developers' obligations? Anything that obligates the OC committee beyond the developers guarantee periods on the building.

## 6.2 Voting and proxies

The Owners Corporations Act acknowledges problems with voter apathy and absentee voters by allowing lot owners to authorise a person to act as their proxy to vote for them or to represent them on the owners corporation committee. However, the Act prohibits a person requiring or demanding that a lot owner give a proxy or power of attorney to someone.

In relation to the owners corporation committee:

- a lot owner can appoint a proxy to stand for election to the committee, or to be co-opted to assist the committee, and
- an existing committee member can appoint a proxy to continue to represent them on the committee. However, the owners corporation may make a rule requiring a majority of the committee to consent to any such proxy having a vote at a committee (with such consent not to be unreasonably withheld).

Section 98 of the Act provides for the election of a chairperson of the owners corporation. That chairperson may, under section 93, have a second or casting vote where the votes are tied.

### Issues

#### 'Proxy farming'

It has been suggested that there should be limitations on the practice of 'proxy farming'. This occurs when some lot owners or owners corporation managers seek to be authorised as a proxy for as many owners as possible, particularly absentee owners. These proxy-holders can accumulate significant voting power.

#### Chairperson's voting rights

The Act does not require the chairperson to refrain from voting in their own right, or to vote impartially (when voting in their own right, or when exercising a casting vote).

#### Restrictions on a lot owner's voting rights

The Act does not specifically address the situation where contractual terms attempt to limit the voting rights of a lot owner, such as terms contained in a sale of contract between a developer and the owner.

Additionally, issues have been raised about whether owners with unpaid fees (who are not allowed to vote) should be able to act as a proxy for another lot owner.

### Questions

- 29 What is your experience of voting and the use of proxies within an owners corporation? [Good](#)
- 30 Should there be restrictions placed on the appointment of proxies, and if yes, in what circumstances? [No](#)
- 31 What are your views about the adequacy of the provisions that set out the Chairperson's voting rights? [Adequate](#)
- 32 Should a contract of sale be able to limit the voting rights of lot owners? [No](#)

## 6.3 Resolutions

The Owners Corporation Act provides for certain decisions to be made by ordinary, special or unanimous resolution. To pass each resolution, a certain threshold of support must be reached, as shown in Table 2 below.

Depending on the circumstances, the vote may be on a 'one vote per lot' basis, or based on 'lot entitlement'. Lot entitlement for each lot is shown on the plan of subdivision, and indicates the relative weight or proportion of the voting power to be held by the owner of that lot.

Where the threshold for a special resolution has not been met, but more than 50% of the total votes are in favour, and no more than 25% of the total votes are against the special resolution, section 97 deems such a resolution to be an interim special resolution.

Notice of the interim special resolution must be provided to all lot owners within 14 days of the relevant meeting or close of the ballot. At the end of 29 days, the interim resolution becomes a special resolution, unless lot owners who hold more than 25% of the total votes for all lots petition the owners corporation secretary against the resolution.

**Table 2: Voting requirements to pass resolutions**

Voting method	Ordinary resolution	Special resolution	Unanimous resolution
<i>Meeting, where the vote is undertaken by a show of hands, on a 'one vote per lot' basis</i>	Simple majority of votes cast at the meeting	75% of total lots, not merely the lots represented at the meeting	100% of total lots, not merely the lots represented at the meeting
<i>Meeting, where a lot owner has requested a poll (written vote)</i>	Simple majority of total lot entitlements	75% of total lot entitlements	100% of total lot entitlements
<i>Ballot (votes outside of a meeting, using ballot forms)</i>	Simple majority of votes returned, on a 'one vote per lot' basis, provided that the total votes returned represent at least 50% of the total lots, or 50% of total lot entitlements	75% of total lot entitlements	100% of total lot entitlements

### Issues

A special resolution (75% support) is required for decisions such as leasing common property, or borrowing more than the current amount of annual fees. An unanimous resolution (100% support) is required for decisions that significantly alter property rights, such as to:

- sell any part of the common property
- alter lot liability or lot entitlement, or
- wind up the owners corporation (note that the voting threshold for this matter is dealt with as a separate issue in section 13 of this paper).

Nevertheless, in recognition of issues relating to apathetic and/or absentee voters, the Act allows for an interim special resolution. However, there is no corresponding process for an interim unanimous resolution where, for example:

- at least 75% of the total votes for all lots are in favour of the unanimous resolution, and
- no votes against the unanimous resolution.

### Questions

- 33 What has been your experience of voting within an owners corporation? Generally good, however, lot owners apathy has limited the ability of other lot owners (some would say more interested lot owners) to improve the overall building.
- 34 What are your views about the appropriateness of the voting thresholds for ordinary, special and unanimous resolutions, and arrangements for interim resolutions? Too high and used to stop, anything that a small minority of lot owners (usually absentee landlords), any building improvements that have a short term cost increase.

## 6.4 Meetings

The Owners Corporations Act specifies the persons who may convene annual general meetings and special general meetings (which fall between annual general meetings), as shown in Table 3 below. In doing so, it distinguishes between elected officials (the secretary and chairperson), the manager, and individual lot owners.

Section 81 requires owners corporations to arrange for minutes of general meetings to be kept, and section 146 enables lot owners to inspect them.

**Table 3: Persons who may call meetings**

Meeting type	Secretary	Chairperson	Manager	Lot owner
<i>Annual general meeting</i>	Yes	Yes	Only on behalf of the committee, or in the absence of a committee	Only in the absence of a committee
<i>Special general meeting</i>	Yes	Yes	Only on behalf of the committee, in the absence of a committee, or if nominated by lot owners with at least 25% of the total lot entitlements	Only if nominated by lot owners with at least 25% of the total lot entitlements

### Issues

#### Lot owners with unpaid fees

While section 94 of the Owners Corporations Act disentitles a lot owner in arrears from voting, it is not clear whether this extends to preventing a lot owner in arrears from nominating someone, or being nominated, to convene a special general meeting.

#### Minutes

Although an owners corporation must organise for minutes of meetings, there are no specific requirements for when and how they must be distributed to lot owners.

## Tenant participation

In some apartment buildings, many (and sometimes most) occupiers are tenants. The Owners Corporations Act does not provide for their participation in general meetings; for example, there are no requirements that tenants be notified of meetings or given permission to attend or address meetings.

### Discussion prompts

*Owners corporations may face a range of issues in convening meetings, for example:*

- **Owners Corporation A** has a secretary who types the minutes and emails them to members. Some lot owners say that they wait too long for the minutes, or that not everyone is 'tech savvy'. The secretary, however, is a busy volunteer, and not many lot owners want to take on the role.
- **Owners Corporation B** has a large number of tenants in the building. Some have difficulty raising common property maintenance issues through their estate agents and would like to attend owners corporation meetings on such issues. Some lot owners are concerned that tenants will raise grievances that do not actually concern the owners corporation, and there are already ways for tenants to communicate with the owners corporation. Some also say that financial decisions are 'private' matters for owners. Some other owners suggest that tenants should participate, so that they can get to know the rules, and what the owners corporation does.

### Questions

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

- 35 What are your views about the adequacy of the provisions for convening meetings? Adequate
- 36 What has been your experience of annual general meetings and other owners corporation meetings that you have attended? I have experienced wide ranging AGM's and tightly regulated short AGM's . Both types have been acceptable as they met their purpose. I am. However, totally against OC committees using the AGM as an addition committee meeting.
- 37 How can the views of tenants be most effectively shared with the owners corporation? There must be a route via the building manager or the OC committee chairperson for tenants to make their views known to the OC committee. This should not mean that disputes between renter and owner should be handled by the OC committee.

# 7 Committees

Part 5 of the Owners Corporations Act sets out:

- when a committee is required
- the committee's membership and officers, and their obligations
- the powers of the committee and to whom they can be delegated, and
- the requirements for convening, conducting and voting at committee meetings

## 7.1 Requirements for a committee

Under the Owners Corporations Act, a committee is a sub-group of 3 to 12 elected lot owners (or their proxies) that, subject to the owners corporation rules, have the powers of the owners corporation that are delegated to it. A committee is mandatory for owners corporations with 13 or more lots. The committee members are responsible for electing the chairperson.

Section 111 of the Act regulates the conduct of a committee ballot, but does not state who may arrange for a ballot. This can be contrasted with section 83, which sets out that a ballot of the owners corporation may be arranged by the chairperson or secretary (or a lot owner or manager with the required number of nominees).

As with meetings of the owners corporation, the committee is required to keep minutes of its meetings and allow lot owners to inspect them. Again, there is no requirement for their distribution to lot owners after a meeting.

### Issues

A number of issues have been raised about committees, and whether further guidance should be provided in the Act, or whether the issues are most appropriately dealt with at the discretion of individual owners corporations. These issues include:

- when a committee is required – for example, it has been suggested that, given the value and complexity of many smaller owners corporations, any owners corporation with 8 or more lots should be required to have a committee
- the appropriate size of a committee – for example, it has been suggested that a maximum of 7 members would enable the owners corporation to work effectively, and would be similar to most other Australian jurisdictions.
- whether the Act should set out the role and voting power of the chairperson (or whether this should be left to the owners corporation to determine), and
- whether there should be requirements for the distribution of committee meeting minutes, and their timing.

## Question

- 38 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 OC committee is mainly an amateur body made up of owners operating in their own free time. There should be a minimum size of 3 and a maximum of 12 committee members. Any smaller and it could become a governing clique and larger and it is unmanageable. There should be no limits to the make, type or number of specialist sub-committees appointed by the OC committee to handle specific specialist subjects, however any recommendations from a sub-committee remains a recommendation and only the OC committee can formalise a recommendation into a executable action.

## 8 Rights and duties of lot owners and occupiers

Part 7 of the Owners Corporations Act sets out the obligations of lot owners and occupiers regarding matters such as the:

- owners corporation rules
- outward appearance of lots
- common property
- overhanging eaves
- applications for building and planning permits, and
- rights of lot owners regarding decoration of the interior parts of their lots.

### 8.1 Changes to the external appearance of lots and access to the common property

Under the Act, lot owners are required to properly maintain any part of the lot that affects its external appearance. If a lot owner fails to carry out required works, the owners corporation has the power to require the works to be done.

However, the Act does not provide for a process for dealing with proposals by lot owners to *alter* the external appearance of their lot. While owners corporations can also make rules regarding the external appearance of lots, there is no Model Rule that applies in these circumstances. The Model Rules are 'default' rules that apply where the owners corporation has not made any rules, or does not have any rules on a particular matter.

#### Issues

The process for dealing with proposals by lot owners to alter the external appearance of their lot is essentially at the discretion of individual owners corporations.

Issues have been raised about whether this is adequate, whether there should be Model Rules (default rules) in the absence of any rules, or whether there should be other legislative requirements (for example, a requirement for a special resolution).

## Questions

- 39 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? If the change is reasonable and does not markedly change the architecture of the building. The OC committee, utilising outside technical support if required, should have the right to agree/disagree on behalf of lot owners.
- 40 Are there any other issues about the external appearance of lots? What has been your experience? Mainly the location of movable washing stands, pet excrement, abundant greenery and the building of sunscreens or sun shades in clear view of other apartments or obviously affecting the overall appearance of the building. My experience of issues affecting the external appearance of the building has been universally bad. It is mostly a cultural issue.

## 8.2 Access to the common property

While the Owners Corporations Act allows owners corporations to make rules about the common property, and repair and maintenance of common property and services, there are no specific requirements relating to access to common property or services.

### Issues

Issues have been raised about whether the Owners Corporations Act should specifically provide for:

- 24-hour access for lot owners and occupiers to the common property or services, and
- any right of the owners corporation to impose reasonable conditions on such access.

The lack of such an access right may affect the convenience of lot owners and occupiers wishing to gain access, especially out-of-hours and where keys or security cards are required.

### Question

- 41 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? The Owners Corporation Act should set out the minimum requirements, the model rules should be adapted to suit individual OC's.

## 9 Rules of the owners corporation

Part 8 of the Owners Corporations Act (sections 138 to 143) sets out:

- the power of owners corporations to make rules, including provision for the Model Rules set out in the regulations under the Act
- the requirement that rules do not unfairly discriminate against a lot owner or occupier, or conflict with rights or obligations under the Act or other legislation
- that the rules bind the owners corporation, lot owners, lessees, sub-lessees and occupiers,
- the requirements for lodging the rules with the Registrar of Titles (at Land Victoria), and
- the obligation of owners corporations to give copies of the rules to lot owners (the obligation of lot owners to give copies of the rules to occupiers is contained in section 136).

One issue that is beyond the scope of this paper is whether owners corporations should be able to make rules prohibiting a certain use of a lot, where that use is permitted under the applicable planning instrument.

Local planning schemes control the use, development and protection of land within a particular council area. Each of Victoria's local government areas has a planning scheme which has been developed to achieve particular policy objectives for that council area. Planning schemes apply to private and public land in Victoria and everyone is required to comply with the requirements of the relevant planning scheme.

Therefore, the question of whether a particular land use is appropriate is a matter to be addressed in the planning scheme and not through rules made by an owners corporation.

The following are some issues that have been raised about the provisions of Part 8 of the Act.

### 9.1 Visitors and guests

The Owners Corporations Act states that lot owners, lessees, sub-lessees and occupiers are bound by the rules, but does not refer to their visitors and guests (collectively, their 'invitees').

Under rule 5.1 of the Model Rules (the default rules that apply in the absence of any owners corporation rules, or any owners corporation rules on a particular matter), the owner or occupier is responsible for ensuring that their invitees do not unreasonably interfere with the peaceful enjoyment of any other person entitled to use the common property.

At law, the responsibility of a lot owner or occupier for any damage by invitees depends on whether a lot owner or occupier *permitted* the breach; that is:

- lot owners are responsible for breaches by their lessees and invitees that the lot owner permitted
- lessees are responsible for breaches by their sub-lessees and invitees that the lessee permitted, and
- sub-lessees or other occupants are responsible for breaches by their invitees that they permitted.

#### Issues

As the Owners Corporations Act does not specify whether the owners corporation rules explicitly apply to invitees, issues have been raised about whether:

- the rules should apply to invitees

- who should be responsible for ensuring compliance with the rules by invitees, and
- who should be responsible for any damage caused by a breach of the rules by invitees (including whether such responsibility should depend, for example, on the person in breach having been provided with a copy of the rules).

It has been suggested that ultimate responsibility for both ensuring compliance with the rules, and for any breach of the rules, should rest with the lot owner. The New South Wales legislation 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.

One issue that is beyond the scope of this review is short-stay accommodation which has been recently examined by an independent panel established by the Government in February 2015. The independent panel has reported to the Minister for Consumer Affairs, Gaming and Liquor Regulation and the Minister for Planning on the issues, options and recommendations associated with 'short-stay' parties in residential buildings and the Government is currently considering its response following further consultation.

### Questions

- 42 Who should comply with, and be bound by, the rules? Should ignorance of the rules be a consideration? The Lot Owner and all of his/her renters, visitors, tradespeople, delivery people and invitees
- 43 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 must be ultimately responsible. The only party that the OC committee has a relationship with is the lot owner.

## 9.2 Model Rules: pets and smoke drift

The Model Rules are set out in Schedule 2 to the Owners Corporations Regulations 2007, and cover:

- health, safety and security, including the storage of dangerous substances, and waste disposal
- management and administration of common property, including metering, use of common property, parking, and damage to common property
- lots, including changes to their use
- behaviour of persons on common property, and noise and other nuisance, and
- dispute resolution.

Owners corporations may make their own rules in all these areas, provided that the rules do not unfairly discriminate against an owner or occupier, or are inconsistent with other laws.

The NSW legislation provides for owners corporations to select one of three model rules in relation to pets:

- a rule prohibiting pets, except fish, without the prior written consent of the owners corporation, which must not be withheld unreasonably (if no rule is selected, this is the default rule)
- a rule prohibiting pets, except a cat, a small dog, a small caged bird or a fish, without the prior written consent of the owners corporation, which must not be withheld unreasonably, or
- a rule prohibiting pets outright.

Additionally, the NSW legislation allows owners corporations to make rules in relation to nuisance, and specifically notes that smoke drift can constitute a nuisance.

## Issues

The regulation of pets and smoke drift in owners corporations are commonly raised issues about owners corporation rules. However, the current Model Rules in Victoria do not provide any 'default' position on these matters.

### Discussion prompts

*Owners corporations may face a range of issues in developing rules, for example:*

- **Owners Corporation A** has a mix of owners and residents, including owners of cats, dogs, fish and birds. Some owners and residents have various pet allergies, or find loud animals to be disruptive. Other owners and residents do not have pets and do not mind others having them. The owners corporation is contemplating an appropriate course of action, but is also aware that many pets were acquired before there was any rule in place.
- **Owners Corporation B** has smokers. Mostly, the smokers smoke in their lot and not in the common hallways or reception area. However, some smokers smoke on their balconies, with smoke drifting into nearby lots of non-smokers. However, when smokers smoke in their own rooms, the smoke can also circulate through the air conditioning system through the building to other lots, including the lots of non-smokers. Some of the non-smokers are unhappy about this, but some smokers suggest that they should be able to smoke in the privacy of their own lot,

### Questions

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

- 44 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)? No. There are responsibilities of Lot Owners and these responsibilities cannot be extended to whether they have a pet or not. There are requirements with regard to nuisance (noise, smell, smoke etc.) these rules, via the relevant dispute processes, should be used to settle any questions regarding pets and/or smoking.
- 45 Are there any other issues relating to the coverage of the Model Rules?

## 9.3 Energy saving and other sustainability measures

Owners corporations can make rules about the external appearance of lots and about design, construction and landscaping. There is no restriction on the making of rules that have the purpose or effect of preventing lot owners installing water or energy-saving or other sustainability items in or on their units.

### Issues

Owners corporations in Victoria may make restrictive rules about the installation of energy-saving and other sustainability measures because they believe the items will interfere with other lot owners' use and enjoyment of their lot or of the common property.

In contrast, building legislation in Queensland restricts the ability of owners corporations to make rules merely to enhance or preserve the external appearance of a building if they have the purpose, or effect of, prohibiting the installation of such things as:

- roofs with colours that have particular solar absorption values

- energy efficient windows
- solar hot water systems, or
- photovoltaic cells.

### Question

- 46 What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units? The rules allow for changes to the externals of the building under specific circumstances. If the changes proposed by a lot owner materially affect the external views of the building to the detriment of other lot owners, the OC committee has the full right in fact a duty to veto the intallation.

## 9.4 Penalties for breaches of the rules

Section 166 of the Owners Corporations Act enables VCAT to impose a civil penalty of not more than \$250 for breaches of the rules. This amount has not changed since the Act commenced. Penalties go into the Victorian Property Fund (established under the *Estate Agents Act 1980*) for public-purpose uses.

Under the New South Wales legislation, the maximum civil penalty for a breach of the rules was recently increased from 5 penalty units (\$550) to 10 penalty units (\$1,100) for a first breach and 20 penalty units (\$2,200) for a subsequent breach. Civil penalties are imposed by the New South Wales Civil and Administrative Tribunal but are payable to the owners corporation.

Under the South Australian *Strata Titles Act 1988* owners corporation rules can provide for the owners corporation itself to impose a penalty for breach of the rules (within a prescribed maximum amount) that is payable to the owners corporation. Appeals can be made to the Magistrates Court, where the owners corporation has the burden of proving the breach.

### Issues

Issues have been raised about whether:

- the current civil penalty for rule breaches of \$250 remains adequate, and
- any penalties should be payable to the owners corporation. While penalties cannot currently be paid to owners corporations to prevent possible abuse of powers, it may also result in a lack of incentives for owners corporations to take rule breaches to VCAT.

### Questions

- 47 What are your views about civil penalties for breaches of owners corporation rules? The penalty should be indexed from its inception date to now and an annualised indexation rate clause should be incorporated into the act.
- 48 Are there any other issues relating to the rules of owners corporations?

# 10 Owners corporation records

Part 9 of the Owners Corporations Act sets out:

- the records that owners corporations must keep, and for how long,
- the obligation of owners corporations to keep an owners corporation register (with specified information about the owners corporation, such as details of contracts, and the names and addresses of all owners)
- the obligations of owners corporations to make its records, and the owners corporation register, available for inspection and copying, and
- the obligation of owners corporations to issue owners corporation certificates (containing information about the owners corporation for prospective purchasers).

The following are some issues that have been raised about the provisions of Part 9 of the Act.

## 10.1 Availability of owners corporation records

Section 146 of the Owners Corporations Act states that owners corporations *must* make the required records (such as the meeting minutes, rules, and copies of resolutions) available for inspection free of charge. An owners corporation *may*, not *must*, provide copies upon payment of the requisite fee.

VCAT has interpreted the obligation to provide inspection as entitling a lot owner to inspect any document in which the lot owner and the other members have a common interest except documents covered by legal professional privilege (see *Owners Corporation RP003605 v Chung* [2015] VCAT 238). Legal professional privilege protects certain communications between lawyers and their clients from compulsory disclosure.

### Issues

Issues have been raised about:

- whether fees for copies of records should apply to reasonable requests by lot owners for the list of names and addresses of lot owners, given that the list may help facilitate communication between lot owners, and
- whether clarifications to the Owners Corporations Act are required, noting that it appears that some managers charge lot owners for their time in facilitating access to the owners corporation records, relying on the fee structure set out in their management contracts. The Act does not expressly prohibit this practice, but in any case, it is not permissible. Because managers only have a contract with the *owners corporation* (not individual lot owners), they can only charge the owners corporation (where the contract allows such a charge).

## Questions

- 49 What are your views about owners corporations' and managers' obligations regarding availability of records and about limitation on lot owners' inspection rights? A lot owner should have unlimited rights of inspection of any and all documents appertaining to his/her lot without any form of hinder. This right should be limited to any document under legal privilege and/or documents pertaining to ongoing contract bidding or contracts being negotiated. Inspection can or could also mean via an OC Building Electronic notice board or website, providing these aids are only accessible to Lot Owners.
- 50 Are there any other issues relating to owners corporation records you wish to raise?

## 10.2 Owners corporation certificates – short stay accommodation

An owners corporation certificate is provided by sellers to prospective buyers of properties affected by an owners corporation. The certificate must contain a range of information, including, for example, the owners corporation fees for that lot, and the insurance held by the owners corporation (section 151).

### Issues

The Act does not require owners corporation certificates to include information for prospective buyers about whether the relevant planning instrument allows the apartments in the building to be let for short-stay accommodation, and if so, how many are available for short-stay accommodation.

This information may be relevant to investor-buyers intending to let the apartment for short-stay accommodation, and to other buyers who do not wish to live in a building in which short-stay accommodation is permitted.

Note that whether or not a planning instrument should allow for short-stay accommodation is a matter for planning laws, and beyond the scope of this paper (see sections 8 and 8.1).

## Questions

- 51 What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates? If the Buildings House Regulations preclude the use of any lot as a short stay accommodation, including short term paid use when the owner may be a co-occupier such as the AirB&B model, this information must be included in the OC certificate. There should be no grey area where a new owner can claim that they did not know.
- 52 Are there any other issues relating to owners corporation certificates? A statement should be included in the OC certificate that the new owner is personally responsible for informing his/her tenants, guests, tradespeople, delivery people or invitees are required to abide by the Building Regulations.

# 11 Dispute resolution

Part 10 of the Owners Corporations Act (sections 152 to 161) and sets out:

- the process for the making of complaints by lot owners, occupiers and owners corporation managers about breaches of the Act, regulations or rules
- how owners corporations must deal with alleged or possible breaches, and
- the role of Consumer Affairs Victoria (CAV) in conciliating owners corporation disputes.

Section 153 of the Owners Corporations Act states that an owners corporation cannot take action in relation to a breach of the Act, regulations or rules, or apply to VCAT, unless it has exhausted the dispute resolution process required by its rules.

Some VCAT decisions have differed about whether this requirement also applies where an owners corporation pursues a breach on its own initiative (as distinct from when it is dealing with a complaint). This is also an issue in relation to unpaid fees (see question 11 above).

## Issues

It has been suggested that the internal dispute resolution process is only relevant and helpful as a grievance procedure for dealing with disputes between residents (that is, where a lot owner or the manager has made a complaint about an alleged breach of the rules). Therefore, an owners corporation that has discussed an issue and decided to pursue a potential breach on its own initiative should not be hampered by the dispute resolution process.

Alternatively, it has also been suggested that the dispute resolution process could be dispensed with where the breach is flagrant, and where recourse to the dispute resolution process would be futile.

## Questions

- 53 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 OC committee should only be the arbiter of last resort in disputes between owners. Disputes arising from misuse of common areas or between a lot owner and the OC committee should always be open to the dispute resolution procedure.
- 54 Are there any other issues relating to dispute resolution?

## 12 Applications to VCAT

Part 11 of the Owners Corporations Act covers applications to VCAT and sets out:

- who may apply to VCAT for the determination of an owners corporation dispute
- VCAT's powers to hear such disputes and to deal with other applications relating to owners corporations, and to make orders resolving them, and
- what VCAT must consider when making any order.

VCAT may hear and determine owners corporation disputes relating to the operation of owners corporations, alleged breaches by lot owners or occupiers of their obligations, or the exercise of functions by owners corporation managers.

Owners corporations, lot owners, occupiers, owners corporation managers, mortgagees and insurers of owners corporations may all apply to VCAT to resolve an owners corporation dispute. Former lot owners, occupiers and owners corporation managers may also make an application. The Director of Consumer Affairs also has standing to make applications regarding owners corporation disputes.

VCAT has broad ranging powers to make orders in relation to owners corporation disputes including (amongst other things) orders:

- requiring parties to do or refrain from doing certain actions
- for the payment of money, including money found to be owed by one party to another, or as payment of damages, or by way of restitution
- varying terms of contracts or agreements
- appointing or revoking the appointment of members of an owners corporation committee, including the chairperson and secretary
- appointing or revoking the appointment of an owners corporation manager or imposing conditions or restrictions on the management by a manager
- in relation to damaged or destroyed buildings or improvements, and
- regarding the payment of insurance money under a policy taken out by an owners corporation.

VCAT may make orders to determine disputes about a resolution, or proposed resolution of an owners corporation. In doing so, VCAT is required to consider whether the resolution is oppressive to, unfairly prejudicial to, or unfairly discriminates against, a lot owner.

VCAT may also hear disputes about the owners corporation rules (which owners corporations can make or alter through a special resolution, under section 138,). VCAT may, for example, determine that a rule does not have any effect, under section 140, because it unfairly discriminates against a lot owner or occupier.

## Issues

Currently, where a dispute about an owners corporation rule goes to VCAT, it is unclear whether VCAT must consider:

- the rule itself, that is, whether the rule unfairly discriminates against a lot owner or an occupier, and/or
- the resolution authorising the rule, that is, whether the resolution is oppressive to, or unfairly prejudicial to, or unfairly discriminates against, a lot owner.

This distinction may affect the range of factors that VCAT must consider. By way of illustration, a rule (such as a rule prohibiting pets) could, on the one hand, be oppressive or unfairly prejudicial to a lot owner, but not be discriminatory (because it applies to everyone).

## Questions

- 55 What factors should VCAT consider in determining disputes about the validity of an owners corporation rule? [The resolution authorising the rule. The rule itself is part of the conditions of sale of the property and has been accepted at the point of sale by the lot owner and all other lot owners and should not be open to dispute resolution.](#)
- 56 Are there any other issues relating to applications to VCAT? [See my earlier comments](#)

# 13 Owners corporations in retirement villages

There may be owners corporations in retirement villages because all or some of the residents own their units (have a strata title). Therefore, this review is also examining the interaction between the Owners Corporations Act and the *Retirement Villages Act 1986* (Retirement Villages Act).

While the arrangements between the retirement village operator and residents are generally governed by the Retirement Villages Act, if an owners corporation exists within a retirement village, all residents who own their properties are members of the owners corporation and subject to the requirements of the Owners Corporations Act

The Retirement Villages Act attempts to reduce the regulatory overlap between it and the Owners Corporations Act by providing that:

- the annual meeting of the owners corporation doubles as the annual meeting of the retirement village, and
- the owners corporation has the powers of the residents committee set up under the Retirement Villages Act meaning that the meetings of the owners corporation can double as meetings of the residents committee.

## Issues

Some of the issues that arise are:

- the role of village operators at village meetings and whether residents should be able to exclude operators from such meetings, or from parts of such meetings
- limitations on village operators who have majority voting power in the owners corporation, especially in relation to voting on proposals to increase owners corporation fees and to change the rules
- the participation and voting rights of leasehold residents in relation to owners corporations in their villages, and
- whether it is appropriate for the village residents committee and the owners corporation and their respective annual meetings to be combined as is currently permitted.

These issues arise in different ways depending on the operating model of a retirement village. In practice, a number of different retirement village models can result in the creation of an owners corporation. Therefore, three example models have been prepared to assist in illustrating these issues further.

**Model 1 – Owner-residents with shared facilities located on common property**

Under this model all the residential lots are owned by the residents. These residents are called ‘owner residents’ in the Retirement Villages Act. As a result, the only members of the owners corporation are the residents.

The facilities that are shared by all owner residents are located on common property which is the responsibility of the owners corporation. The upkeep of the common property is funded by the owners corporation fees paid by the residents. These fees are controlled under the Owners Corporations Act.

Examples of shared facilities include a dining room, community centre, swimming pool and bowling green.

In this example, owner-residents would be responsible through the owners corporation to make decisions about the common property.

Swimming pool and bowling green (Common property of the owners corporation)	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot
	Owner resident Lot	Community centre and dining room (Common property of the owners corporation)				
	Owner resident Lot					
	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot

The retirement village operator provides other services to the residents, for which the residents pay a maintenance charge. The maintenance charge is controlled under the Retirement Villages Act.

Examples of such services include security and emergency nursing services.

***Issues that may arise when owners corporations exist in a retirement village***

Although the Retirement Villages Act tries to reduce the regulatory overlap by combining the owners corporation and retirement village annual meetings, issues may still arise if operators and residents become confused about the different obligations under the two Acts in relation to the following matters:

- the different governance requirements under the two Acts for owners corporation meetings and retirement village meetings
- the different matters that are covered by the financial statements required under the two Acts
- the different matters that are covered by the owners corporation fees which covers the common property and controlled by the Owners Corporations Act, and village maintenance charges which cover the provision of services provided by the operator to the residents which are controlled the Retirement Villages Act, and
- the different assets and liabilities that determine the solvency of the owners corporation and of the retirement village.

In addition, if a retirement village has more than one owners corporation (with different memberships) there can be confusion about which owners corporation meeting doubles as the retirement village meeting.

**Model 2 – Owner-residents with shared facilities on lots owned by the retirement village operator**

As with Model 1, all the residential lots are owned by the residents, that is they are all owner residents.

However, the facilities that are shared by all owner residents are located on lots which are owned by the retirement village operator.

In this example the retirement village operator has the majority of the voting entitlements in the owners corporation.

Swimming pool and bowling green (Lot owned by retirement village operator)	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot
	Owner resident Lot	Community centre and dining room (Lot owned by retirement village operator)				
	Owner resident Lot					
	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot

***Issues that may arise when the retirement village operator has voting control of the owners corporation***

The interaction between maintenance charges, which are controlled by the Retirement Villages Act, and owners corporation fees, which are controlled by the Owners Corporations Act, may be an issue in villages where the retirement village operator has voting control of the owners corporation.

The Retirement Villages Act largely restricts increases in maintenance charges to the Consumer Price Index (CPI). The intention is to protect residents, particularly pensioners, from excessive increases in their living costs.

However, under the Owners Corporations Act, increases in the owners corporation fees are at the discretion of the owners corporation, and are not subject to the same controls.

Therefore, an issue can arise if the retirement village operator has a majority of the voting entitlements in the owners corporation, as the operator could use its voting power on the owners corporation to increase owners corporation fees beyond increases in the CPI and against the wishes of the owner-residents.

Other issues that may arise when the retirement village operator has voting control of the owners corporation include:

- uncertainty about whether the retirement village operator can vote on ‘retirement village’ matters at merged annual meetings, and if yes,
- uncertainty about whether an issue at a merged annual meeting should be voted on according to the Owners Corporations Act, where voting entitlement is on the basis of lot entitlement, or according to the Retirement Villages Act, where voting entitlement is on the basis of one lot one vote

**Model 3 – Owner residents and non-owner residents with shared facilities located on common property**

Under this model some of the units are owned by owner residents and some are owned by the retirement village operator. The owner residents and the retirement village operator are members of the owners corporation.

The retirement village operator leases some of its units to other residents who are non-owner residents. The non-owner residents are not members of the owners corporation.

The common facilities are located on common property owned by the owners corporation. Under this model the owner residents and the retirement village operator would be responsible through the owners corporation to make decisions about the common property.

Swimming pool and bowling green  (Common property of the owners corporation)	Non-owner resident unit	Non-owner resident (lot owned by retirement village operator)	Non-owner resident (lot owned by retirement village operator)	Non-owner resident (lot owned by retirement village operator)	Non-owner resident (lot owned by retirement village operator)	Non-owner resident (lot owned by retirement village operator)
	Owner resident Lot	Community centre and dining room (Common property of the owners corporation)				
	Owner resident Lot					
Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot	Owner resident Lot

***Issues that may arise in retirement villages with residents who are not members of the owners corporation***

In this example, all residents of the village pay for the use of village facilities that are on the common property of the owners corporation.

However, an issue arises as the non-owner residents who lease their lots from the retirement village operator are not members of the owners corporation governing these facilities, and therefore do not have a say in the rules of the owners corporation relating to those facilities.

In addition, the provisions of the Retirement Villages Act that combine the owners corporation and village meetings may effectively deny non-owner residents a voice at those meetings as they are not members of the owners corporation.

## Questions

There are other retirement village operating models that have combined features of these 3 models in different ways.

Considering the range of circumstances where owners corporations exist in retirement villages and not limiting yourself to the example models above:

- 57 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 view](#)
- 58 What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?
- 59 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?

# 14 Part 5 of the Subdivision Act

Part 5 of the Subdivision Act covers:

- how owners corporations are created, including the rules and lot liability and entitlement
- ownership of the common property
- alterations to the plan of subdivision, including to lot liability and entitlement, and dissolution of the owners corporation, and
- VCAT's powers to resolve disputes under Part 5.

## 14.1 Sale of apartment buildings

There has been a lot of discussion recently about whether or not it is desirable to have an easier process for redeveloping apartment buildings, given that the number of households in greater Melbourne is projected to almost double from 1.59 million in 2011 to 3.11 million by 2051. Multi-unit residential buildings are part of the mix of available housing, comprising almost one-third of all new dwellings approved across Victoria.

This review focusses on the specific issues for owners corporations, raised by the current process for selling an apartment building. This process involves not only the individual sales of lots by each owner to a purchaser/developer. It also requires the winding up of the owners corporation and the sale of its common property, both of which require a unanimous resolution of the owners corporation under Part 5 of the Subdivision Act.

### Issues

There is a requirement that all owners must agree to sell or redevelop an apartment building. This is designed to protect the property rights of owners, but this level of consensus can be hard to attain. Accordingly, there are issues for this review in terms of balancing:

- the rights of minority lot owners who do not want to sell, noting that for some owners, relocation may be difficult because of their financial or social situation, and
- the rights of the majority who do want to sell, noting that ageing buildings can also become unaffordable for some lot owners to maintain.

Various jurisdictions have recognised the issues posed by ageing buildings, and the difficulties in obtaining unanimous consent from owners. In Singapore, Hong Kong, New Zealand, and parts of the United States, for example, the owners corporation can be wound up without unanimous consent, subject to a number of safeguards.

Under the New South Wales legislation, the previous requirements for unanimous resolutions and individual lot sales have been replaced with a process for the *collective* sale or development of a building that requires owners corporation to form a strata renewal committee and develop a strata renewal plan.

By special resolution (75%) at a general meeting, the owners corporation may agree to put a strata renewal plan to lot owners. Lot owners must be given at least 60 days to consider the strata renewal plan and obtain independent advice, and the plan lapses if it is not supported by at least 75% of lot owners within 12 months. Plans for renewal will be referred to the Land and Environment Court for final consideration, including consideration of the amounts of compensation for lot owners.

An alternative approach is for tiered voting thresholds, with a higher level of support required for newer buildings, and a lowered threshold for older buildings.

A November 2015 report from the University of New South Wales titled *Renewing the Compact City: Economically viable and socially sustainable approaches to urban redevelopment*, recommended that the threshold fall no lower than 80% support for the collective sale/redevelopment, and a voting period of between one and three months.

This approach has been adopted under the Northern Territory's *Termination of Unit Plans and Unit Titles Schemes Act 2014* where provision is made, with checks and balances, for collective sale resolutions requiring 95%, 90% or 80% support, depending on the age of the building. Western Australia is also considering this approach as part of its review of the *Strata Titles Act 1985*.

### Discussion prompts

*Owners corporations may face a range of issues in seeking to sell or redevelop the apartment building, for example:*

- **Owners Corporation A** has a minority of owners who do not wish to sell. Some are long-term residents who cannot afford to buy another home in the same area, at current market prices. Some of the elderly owners would like to remain in the area to be close to family and medical facilities, while some of the young owners would like to remain close to work and employment opportunities. They see the forced sale of their homes as an infringement of their property rights.
- **Owners Corporation B** has a large majority of owners who wish to sell. They have received a good offer from a developer, but only one owner is blocking the sale, despite an offer of fair compensation. Many of the owners find that the growing cost of maintaining their ageing building is not sustainable for them. They see property-holders as having rights (which should not be unreasonably denied) to sell their assets, and to release the equity in their homes, including their share of the common property.

### Question

Considering the range of circumstances that owners corporations may have to deal with, and without limiting yourself to the prompts above:

- 60 What are your views about the process for the sale/development of apartment buildings? [Sale of the complete building is once again the responsibility and interest of the combined ownership and should not be left to individual lot owners interest. I would expect that the OC committee would arrange a meeting, get the views of the owners and decide accordingly. The descision should be binding on all lot owners.](#)

## 14.2 Setting, and changing, lot liability and entitlement

Lot liability determines a lot owner's share of the annual fees, and lot entitlement determines a lot owner's voting power.

These are both determined by the developer. Under section 27F of Part 5 of the Subdivision Act, developers must specify the liability and entitlement of each lot in the plan of subdivision. They must also provide a document specifying the basis for the allocation, but there are no requirements for how the allocation is done.

Essentially, lot liability and lot entitlement are at the developer's discretion, but if, subsequently, the owners corporation wishes to change the allocation, section 33 of the Subdivision Act requires that:

- in making any change to the **lot liability**, the owners corporation must consider the amount that would be just and equitable for the lot owner to contribute towards the administrative and general expenses of the owners corporation, and
- in making any change to **lot entitlement**, the owners corporation must consider the value of the lot, and the proportion that value bears to the total value of the lots.

Section 34D empowers VCAT to make an order to change a plan of subdivision in the absence of a unanimous resolution. This power depends on more than 50% of lot owners with more than 50% of lot entitlements supporting the change but does not make any provision for the situation where, say, the change is opposed by one lot owner (out of many other lot owners) with more than 50% of lot entitlements.

## Issues

### Setting lot liability and entitlement

Issues have been raised about whether matters as important as the lot owner's share of the annual fees, and their voting power, should at the developer's discretion, or allocated according to certain criteria.

It has been suggested that instead of developers determining the lot liability and lot entitlement, these should be set by an independent licensed surveyor, and determined by the criteria that are currently used for changing the lot liability and entitlement (including the value of a lot, compared to the total value of the lots.)

This also raises issues about the time at which the value of a lot should be determined, particularly in staged developments (where lots are built at different times), or mixed-use developments (where it may be difficult to compare the value of lots).

### Changing lot liability and entitlement

Currently the Subdivision Act does not specify:

- for changes to lot liability, how owners corporations should consider what is just and equitable for each owner to contribute towards the administrative and general expenses of the owners corporation (it has suggested that a useful 'starting point' or default position should be the proportion of the total area or total value that each lot represents)
- for changes to lot entitlement, how owners corporations should consider the value of the lot, and how to compare it to the total value of all lots; for example, whether it is the market value, unimproved value, or capital improved value that should be considered, and
- the time limit for changes to plans of subdivision to be lodged with Land Victoria, which records these changes.

## Questions

61 What are your views about:

- who should set the initial lot liability and entitlement, and any criteria that should be followed. The Developer prior to the sale of any lot
- how lot liability and entitlement should be changed, and Never unless additional apartments are created and additional lot liabilities should calculated according to the formula used by the developer. If apartments are combined the lot liabilities should be combined
- any time limits for registering changes to the plans of subdivision with Land Victoria. No

62 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? There should be no changes except as indicated above.

63 Are there any other issues relating to Part 5 of the Subdivision Act?

# Appendix 1: Summary of questions

This appendix provides a summary of the questions for consideration.

## Functions and powers of owners corporation

- 64 Are the current constraints on owners corporations' power to commence legal proceedings appropriate?
- 65 Are there any other issues relating to the power to commence legal proceedings?
- 66 Should owners corporations be able to deal with water rights, including water that falls on common property?
- 67 Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?
- 68 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?
- 69 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?

## Financial management of owners corporations

- 70 What are your views about the operation of the benefit principle? What is the experience of your owners corporation in applying the benefit principle?
- 71 Should an owners corporations 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?
- 72 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?
- 73 Should owners corporations be able to apply a discount for the timely payment of fees or charges?
- 74 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?
- 75 Are there any other issues relating to payment of fees or charges?
- 76 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?

## Maintenance

- 77 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?
- 78 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?
- 79 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?
- 80 What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements?
- 81 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?
- 82 Should funds for implementing the maintenance plan come only from the maintenance fund?
- 83 What are your views about contingency funds, including:
  - whether contingency funds are necessary
  - what type of owners corporations should have them, and
  - how they should be funded, the purposes that the funds can be used for, and how such purposes should be determined?
- 84 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?
- 85 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?
- 86 Are there any other issues relating to repairs to common property or services?
- 87 What are your views about the type and level of insurance cover that should be required?
- 88 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)?
- 89 What are your views about lot owners' responsibilities for any excesses or increased premium payable by the owners corporation?

## Meetings and decisions of owners corporations

- 90 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?
- 91 What other changes should be made to developers' obligations?
- 92 What is your experience of voting and the use of proxies within an owners corporation?
- 93 Should there be restrictions placed on the appointment of proxies, and if yes, in what circumstances?
- 94 What are your views about the adequacy of the provisions that set out the Chairperson's voting rights?
- 95 Should a contract of sale be able to limit the voting rights of lot owners?
- 96 What has been your experience of voting within an owners corporation?
- 97 What are your views about the appropriateness of the voting thresholds for ordinary, special and unanimous resolutions, and arrangements for interim resolutions?
- 98 What are your views about the adequacy of the provisions for convening meetings?
- 99 What has been your experience of annual general meetings and other owners corporation meetings that you have attended?
- 100 How can the views of tenants be most effectively shared with the owners corporation?

## Committees

- 101 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?

## Rights and duties of lot owners and occupiers

- 102 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?
- 103 Are there any other issues about the external appearance of lots? What has been your experience?
- 104 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?

## Rules of the owners corporation

- 105 Who should comply with, and be bound by, the rules? Should ignorance of the rules be a consideration?
- 106 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?
- 107 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)?
- 108 Are there any other issues relating to the coverage of the Model Rules?
- 109 What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?
- 110 What are your views about civil penalties for breaches of owners corporation rules?
- 111 Are there any other issues relating to the rules of owners corporations?

## Owners corporation records

- 112 What are your views about owners corporations' and managers' obligations regarding availability of records and about limitation on lot owners' inspection rights?
- 113 Are there any other issues relating to owners corporation records you wish to raise?
- 114 What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?
- 115 Are there any other issues relating to owners corporation certificates?

## Dispute resolution

- 116 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?
- 117 Are there any other issues relating to dispute resolution?

## Applications to VCAT

- 118 What factors should VCAT consider in determining disputes about the validity of an owners corporation rule?
- 119 Are there any other issues relating to applications to VCAT?

## Owners corporations in retirement villages

- 120 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?
- 121 What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?
- 122 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?

## Part 5 of the Subdivision Act

- 123 What are your views about the process for the sale/development of apartment buildings?
- 124 What are your views about:
- who should set the initial lot liability and entitlement, and any criteria that should be followed
  - how lot liability and entitlement should be changed, and
  - any time limits for registering changes to the plans of subdivision with Land Victoria.
- 125 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?
- 126 Are there any other issues relating to Part 5 of the Subdivision Act?