**SUBMISSION TO CONSUMER PROPERTY ACTS REVIEW ISSUES PAPER 2**

**SUBMISSION 2**

I have been a Member of OC Committees for 21 years, much of the time as Chairperson (two OCs).

I am tertiary qualified in Science and Quality Management and have been Chairperson of several technical (senior level) and social committees (200 people plus) in the last 30 years.

I will only comment on issues that I have adequate background. Any points I wish to emphasize are indicated in larger, underlined font.

**Q6**

Signing of any document carries the inference that the signee’s organization/signee has read the document, understands the ramifications of it, and is willing and capable of complying with the document.

The common practice of agreeing/approving documents without reading, is unacceptable.

I’d be surprised if more than a small proportion of owners and committee members would read the Act, any Instruments or Contracts in enough detail to attest to any of the above being true, so any belief the seal adds any extra integrity, is an illusion, in this regard.

Another argument against use of a separate piece of paper (viz an instrument), is my observation that the commonly used Instrument of Delegationproforma, in my view contains several significant errors, which no one has chosen to notice. These presumably arose from the document being inadequately reviewed/updated in 2010/2011, when Section 11 of the Act (as it stood at that time) had major changes.

The “Seal method” should be discontinued for the above reasons alone.

There are two remaining options to delegate authority from the OC to the Committee. They are:

1. Allow delegation to be automatically conferred by the Act, if a Committee is elected.
2. Allow it be conferred by explicit Resolution at the AGM. (This is in fact a current an option.)

With a bit of tinkering with the Act wording, the first option should suffice.

I would suggest the Act mandate, this default delegation still appear as an AGM Agenda item, and be noted in the AGM Minutes.

Care must to be taken to avoid any confusion/ambiguity in the cases:

* When the delegation to the Committee is not 100% (ie there is/are additional delegation[s]).
* When a delegation is done as per Section 102.

**Q7**

The Act must allow this principle.

I have two excellent examples as illustrations:

1. My OC has a communal Hot Water Service, fully maintained by the OC, which supplies hot water to all but one Unit. This one Unit (built at a later date) has it’s own separate Hot Water Service, inside the Unit. This Unit shouldn’t therefore pay, via their fees, for anything relating to the communal Hot Water Service, as their Unit doesn’t get one drop of water from this Service - they are not connected to it.
2. Our building has a complex set up re external windows. By the Titles and as I recall the Subdivision Act, where there are different Owners on each side of the window, ownership is shared 50/50. So by logical extension, so is the liability for costs of repair and replacement.

Where one of these owners is the OC, the Unit Owner pays 50% (for his half) and the OC 50% (for their half). In this case, the Owner will pay 50% out of their private pocket and their share of the OC charge.

Our property has an almost a 50/50 mixture of properties where the titled owner owns both sides vs the titled owner owns the inside and the OC the outside.

Owners who are 100% liable for their window repairs should not contribute/subsidize again, via OC Fees to the window repairs etc of neighbors who have window repairs that the OC is 50% liable. Nor the reverse.

**Q10**

Absolutely not!

They are merely complying with the contract - these people are adults, not school children, being rewarded for getting their homework in on time. It also adds unnecessary complexity.

**Q11**

Yes.

The law basically operates in a hierarchical process of resolving at each level before proceeding upwards. The consideration may be very brief, but the protagonists have the absolute right of reasonable opportunity to present their case at each level. The OC has no entitlement to interfere.

**Q14 - Q17**

That so many small non prescribed OCs, are lax in meeting their maintenance obligations, is largely because there is no formal contract to act as a standard, viz there is no maintenance plan, because the Act doesn’t require there to be one.

If the Act mandates a plan must be compiled, that plan would then become a basic enforceable contract, which if nothing else, would give individual objectors something concrete to nail objections to.

The current system doesn’t allow enforcement of a minimum level of maintenance. In the worst case the Committee, even through a Resolution can just dismiss any objections, for no reason other than they have a majority support. In contrast violation of a contract cannot be overruled by the voting process.

Note, the amount of maintenance is related to other things than just the number of Units.

For example their age, their condition, the amount of facilities, gardens etc. The current situation of requiring a maintenance plan only for properties containing 13 Units or more, is thus nonsense.

I surmise that since the Act, with non prescribed properties, doesn’t mandate planning, the Committee would naturally habitually rely on Owner complaints, or a threat of an AGM, to initiate maintenance activity – viz reactive management. The decision would inevitably be expedient or politically based rather than contractual/logical.

Over 2007 to 2013, our OC reduced the value of insurance claims by 90% and reduced the occurrence of emergency repairs to zero, by using regular audits and imaginative thinking in an OC with a large backlog of maintenance. The OC was subsequently rewarded by a considerable premium reduction.

It should be noted that emergency repairs at night, weekends etc are grossly more expensive. The OC is completely a hostage to the circumstances.

All OCs should have a maintenance plan, even if the property is brand new.

**Q18**

Of course there should be!

Not all maintenance can be known at a particular point in time. Things that are operating constantly die randomly when some critical failure occurs.

If the Hot Water system dies, the plumbing springs a leak, the lights system fail, the roof leaks or the common area floods, these are almost always unplanned events. Good maintenance eg a more frequent inspection regime, can anticipate often but not 100% .

Any critical service, anything that is dangerous, anything that directly causes major future expense (particularly leading to insurance claims), anything of major annoyance to residents must be repaired in days or a couple ofweeks, no matter what the cost.

**Q19**

From a resident owner’s perspective it really doesn’t matter.

A practical issue is that I have found, is that too many Real Estate Agents and Owners, too frequently get confused by fee and levy requests and unbelievably pay the wrong amounts and/or at the wrong time. A few years ago, I found It was thus less of a hassle to combine small levies and general fees into the one payment –due at the normal quarterly. Date The label on the money is less important, than whether or not it is assigned/collected correctly in the first place.

Any competent accounting system can differentiate. Meeting Minutes via Resolutions can specify such division of intention.

**Q21**

The issue of how to cope with an incompetent committee is probably the most critical issue of all.

A fundamental right of every individual Owner is to know the OC on it’s own initiative will ensure maintenance is well done.

Unfortunately in practice, Committees can be “democratically incompetent” easier than “democratically competent”. The OC Manager is powerless to intervene. The complaint system is of questionable use.

Incompetent Committees ironically by their incompetence, mask it very well, by for example:

* Being reactive and emotional rather than proactive and efficient.
* Being embroiled in internal politics and self preservation, rather than “doing their job”.

There is far too little incentive for committees members to be competent – landlord committee members, feel no obligation (that’s why they use a Real Estate Agent); making a neighborhood “nice” is a long way down the list of importance compared to “money”, “maintaining your own patch”, and other life style choices etc.

Many treat Committee Members treat OC Meetings as a social club, but an OC in fact is more a business. Even small non prescribed ones are managing up to $10 million dollars of real estate. Committee Members must take their obligations seriously, seriously consider issues independently, and always vote and act for the good of the whole OC.

The Act must be written to force good practice:

* Committees must have formal Meetings, complying to good meeting practice.
* Attendance to Meetings must be restricted to those with a legitimate interest only – viz Owners, Committee Members, Proxies, not friends, partners, mates etc.
* Unfinancial Committee Members must be banned from attending Committee Meetings. This is not discrimination – they have a choice - pay up.
* Committee Meetings must only be chaired/minuted by their elected officers – viz rotation of the chairperson is not permitted. I note though the Act is silent, CAV say it in their guide. The role of a Chairperson is far too important to hand around like a hat.
* “Proxy stacking” merely to get a Committee majority must be banned. It is blatantly unethical.
* Meetings must be conducted by proper professional process.
* Committees must be prevented from deliberately discarding Agenda items they don’t like.
* Committees must be prevented from discarding Agenda items, by deliberately limiting Meeting time.
* Committees must be forced to consult widely and report regularly.

The Act fails to make Committees sufficiently unaccountable:

* I have always been uncomfortable that the Chairperson of the OC and the Chairperson of the Committee is the same person. The former is directly accountable to the OC (the parent body) which superficially means any tasks not delegatable/delegated. But it also include accountability for the Committee’s overall health and performance. If a Committee is incompetent, the Chairperson of the OC needs to make themselves aware of this and initiate steps to rectify eg reelection.
* I am also uncomfortable; the Act allows the two Officers of the OC and the two officers of the Committee to have the same name. The two Officers of the OC for example could be called “Executive…” or similar. And they should be directly elected by the OC, not handballed the position, as per Section 105.
* Section 112 (11) is most unwise – it naively permits all sort of undesirable practices, under the guise of “democracy”.
* I think the notion, that a lower body can indirectly sack the Chairman of the OC (by sacking the Chairman of the Committee) is totally unreasonable. (I note Consumer Affairs Victoria as late as the 2014 Guide, advises it can’t be done, which contradicts the Act!)
* Process wise, the OC Committee and Officers are elected and appointed at a General Meeting, yet despite the higher level, General Meeting Resolutions being irrevocable by the Committee, Sections 105 and 107 contradict this and permit the Chairperson and Secretary to be sacked later by the Committee. This is also inconsistent, with Section 103 (6), where a General Meeting seems be the only way to remove a Committee Member.
* Committees are elected without the slightest attempt to assure people are adequately competent, experienced and committed. Election is based solely on entitlement.

My own personal view is that, for OC above 5 or 6 Units, it would be pretty common, that the elected Committee would not have anyone capable of being a good Chairperson. If this is true the option of appointing a professional (from the OC Manager or elsewhere) should be put into the Act.

All the above issues need to be resolved to get accountable and competent committees.

**Q22**

Those causing damage should be prosecuted as per the general law if they refuse to pay for rectification.

Except for minor things, the OC should resolve by Special Resolution in response to a written proposal submitted to a General Meeting.

The biggest danger is unaccountable Committees doing “jobs for the boys”.

**Q25**

My finding, about 6 years ago was Insurance Companies don’t support the notion. It is too hard to allocate liability for areas that are shared by several people/policies eg if someone falls over in driveway, separate insurance companies would always deny liability and there would be an expensive convoluted legal process to determine who would pay.

No.

**Q26**

Since it is the OC’s Insurance Policy, the OC is obligated to manage the risks. If the OC doesn’t know, it needs to look harder and be more aware. To force an Owner to pay an excess or premium penalty would require proof of negligence, which would be very difficult.

The excess should, except for rare exceptions, be borne by the Insured – the OC.

**Q29 and Q30**

The use of proxies and indeed quite a lot of current meeting practices are antiquated - far too open to abuse; far too often an excuse to be lazy. People must be allowed and indeed encouraged to contribute one way or other, to ensure democracy, is not “muzzled” by procedure.

My view is proxies should be mainly used for people who have permanent/semi-permanent/long term reasons for not being able to attend eg due to age/infirmness, injury/illness etc, intellectual limitations etc. Some evidence would need to be presented as to the truth of such claims.

There is an argument to use a proxy to overcome a skill deficit, but this would be a long term proxy.

The OC should not accept proxies just because people don’t wish to come.

Proxy shopping to bolster voting should be absolutely banned.

As much as it may displease OC Managers, of small and middle size OCs, I think as many resolutions as possible should be resolved via Email/Ballot of the whole OC, rather than resolved on phony proxies.

We need to vigorously adopt modern technology.

AGM Meetings should be run to suit the clients not the OC Managers. OC Managers should run AGMs at night and be banned from charging exorbitant night time rates – we live in a 24/7 world now.

The meeting system needs to be run so as the views of such people are clearly considered. With any complicated issue it is highly undesirable that a complex resolution can be decided using proxy votes, unless the person is a permanent proxy.

The limit that Committees are allowed to spend should be greatly reduced.

A Committee of 3 in an OC of 12, with Annual Fees of $20000, can spend $40000 with the vote at a Committee Meeting of one Committee Member plus a proxy. This is totally unreasonable.

I suggest the limit be 25% of the yearly fees, then it must be resolved by a General Meeting.

**Q35**

The loophole in Section 109 2(b), that permits Committee Meeting Notice to be less than 3 days, must be closed. By the power of Section 112(11) the Committee could decide a Notice Time of 5 minutes. This is absurd.

Notice should be a minimum of 7 days - no exceptions.

**Q36**

The simple answer – very variable; too often not good.

I note the Act doesn’t even mandate a requirement for Committee to hold Meetings. Section 112 (11) gives the Committee, the power to decide, not to hold Meetings. (Fortunately, AGMs are compulsory [Section 69].) Not having Meetings then conveniently negates the requirement for Minutes, thus the Committee can operates as an unaccountable “secret society”.

Meeting quality defects include.

* Agendas – critical items missing, disordered.
* Using AGM Agendas cluttered with items abdicated by the Committee.
* Not doing adequate consideration of documents, but just acknowledging the tabling,
* Meeting participants (OC Managers included) often are poorly prepared.
* Not using the Minutes as a means of keeping track of jobs.
* Dysfunctional process.
* An inability to draft good resolutions – including presenting unnecessary or even “illegal” resolutions.
* Poor quality Minutes

One of the most useful skills OC Managers and Chairpersons must have, is the skill to run top class meetings.

**Q37**

I lived in a block of Units in the 1970’s. All residents interacted face to face. Today with all the social media, interaction between residents/owners etc is effectively nil. Need I say more!

Someone from Committee needs to show “people skills” and talk to them.

**Q38**

Unless there is a suitably experienced willing candidate on the Committee , for OCs above 10 or so Units, the OC must have a trained person (from the OC Manager?) to determine, prioritize and supervise maintenance eg a “Property Manager”. There is simply too great a risk allowing unskilled people unsupervised to manage $10 million+ properties. Currently the OC Manager contract doesn’t even require the OC Manager to visit the property.

So as to avoid distortion of process, the Act should require Committees contain Members representative of the different types of owners, eg landlords, resident owners, companies, Real Estate Agents.

In a practical sense every Committee should have a couple of resident owners, to be the “on site” eyes of the Committee. Properties cannot be fully managed remotely.

There needs to be built in, good consultative processes

**Size**

***Above 10 Units***

Committee minimum of 5; maximum 10.

***5 to 10 Units***

Committee of 5 – set size.

***2-4 Units***

All are on Committee.

**Q39**

If the external wall belongs to the OC they are entitled decide its appearance. But they shouldconsult.

If the external wall is the Unit Owner’s property, the OC cannot force the Owner to do anything. They may suggest, but they can’t insist.

OCs could take legal action if additions eg air conditioners etc don’t comply with the law eg OHS, noise etc.

**Q44**

There can be conditions, including banning, placed on legal activities, but the bans have to be based on the proving the offence and solving the problem by removing the item of offence.

The Owner’s property does not come under OC jurisdiction, so while the OC can for example prevent smoking in common areas on the basis of smoke offending others (as per bans in restaurants etc), it is not illegal to smoke inside a Unit and the OC is powerless here.

An OC cannot ban pets per se. If a pet “dirties” the common area, or makes excessive noise, the OC can require that the offence be stopped, but cannot solve the problem, for example by universally banning pets.

Re music, the offence is the loudness of the music, not the music itself.

Any activity in the common area must be legal. An interesting question is, do police have the power to charge someone with doing something illegal on common property, if the OC request?

**Q47**

OCs and particularly large OCs tend to make a large number of laws. These laws should be necessary and not ham fisted attempts to modify reasonable behavior.

**Q49 to Q52**

According to Section 150, viewing the OC Register is done by permitting the viewer to come to the OC Manager’s premises for viewing. This is obviously time consuming, if the OC Manager is far away.

It needs to be clarified whether the Committee may have it’s own copy. I have been (as chairperson) been refused this service sometimes, but not always. Does the Privacy Act really ban it, or do lazy people just assume it does?

Since OC Managers have Management Systems, it should be allowable for them to keep Committee Minutes (rather than the Secretary). This allows much easier access to the Minutes by anyone in the OC. It also overcomes the logistical difficulty, when the OC changes secretaries.

It needs to be clarified whether Committee Minutes need to be kept for 7 years. The Act is ambiguous on this.

**Q53 and Q54**

I have always believed the greatest insurance against disputes is good quality communication skills between the well trained people. Going to a dispute resolution process merely confirms this belief.

It concerns me how little power Consumer Affairs Victoria really have.

Nevertheless, there needs to a simple but powerful system for resolving/clarifying minor issues, independent of the OC Manager, particularly for Owners.

I fully concur with the suggestion, by various people responding to Paper 1, of an ombudsman.

Kind Regards

Jim McLaughlin

(26/4/2016)