

Submission to:

Consumer Property Law Review
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Consumer Affairs Victoria
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Consumer Property Acts Review Issues Paper No. 2 Owners Corporation Act 2006

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1 Functions and powers of owners corporations

1.1 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 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?

Answer: There needs to be greater power to take suppliers and developers to court, so long as these powers are not used to take an individual lot owner to court, as an owners corporation has more power and resources at its disposal.

- 2 Are there any other issues relating to the power to commence legal proceedings?

Answer: Any power to commence legal proceedings against an individual lot owner should remain as they are at present, to prevent a power imbalance.

1.2 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?
- 4 Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?

1.3 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?

Comment: Yes, they do need these powers. The safeguards should be a right to be heard by a grievance committee or similar, and a right to appeal the decision.

1.4 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?

Comment: No, a common seal is no longer necessary. The signature of the Chairperson of the owners corporation and at least one other committee member should be required.

2 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.

2.1 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 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?

No experience

2.2 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?
- 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?
- 10 Should owners corporations be able to apply a discount for the timely payment of fees or charges?

Comment: Yes, they should be able to apply a discount for timely payment.

- 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?

Comment: Yes, in the interests of procedural fairness.

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

2.3 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?

Comment:

Yes, they should be limited in a similar way to the Residential Tenancies Act

3 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'.

3.1 '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?

3.2 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?
- 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?
- 17 What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements?

3.3 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?
- 19 Should funds for implementing the maintenance plan come only from the maintenance fund?

3.4 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
- 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?

3.5 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?
- 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?
- 23 Are there any other issues relating to repairs to common property or services?

3.6 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?
- 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)?
- 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?

4 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.

4.1 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
 - 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?

4.2 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?

Comment: Voting needs to be clearly set out in the Act or Regulations. There are too many gaps in the current process.

30 Should there be restrictions placed on the appointment of proxies, and if yes, in what circumstances?

31 What are your views about the adequacy of the provisions that set out the Chairperson's voting rights?

32 Should a contract of sale be able to limit the voting rights of lot owners?

Comment: No, once a property is sold, no restrictions should be placed on the new owner's voting rights, as this would be biased towards the developer.

4.3 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?

Comment: Terrible experience. There has been little regard for democratic processes and procedural fairness. There have been cases where an owners corporation sub-committee tried to stop nominations from being considered by the members at the AGM. No one in the committee thought there was anything wrong with this cronyism, until Consumer Affairs intervened and told them they had no right to veto any nominations.

There seems to be no right for Agenda items to be suggested by lot owners as part of general business at an AGM. There is also no requirement for the agenda item to be discussed and, in our case, it is always deferred until after the new committee has been formed, thus taking away any right to discuss issues at an AGM. This is totally undemocratic and defeats the purpose of the meeting. Rather than the Act allowing a committee to set their own rules, they should be given clear guidelines of what to do, otherwise power goes to their head and they devise ways to try to stop others having their say. One trick they use is to include so many agenda items that they leave no time to discuss any other issues. The chairman simply states that the new committee will consider them after the AGM, which defeats the whole purpose, since committee meetings are closed and lot owners are told they are not allowed to attend. This prevents any discussion on issues raised at the AGM and encourages secrecy and corrupt behaviour where issues raised are simply covered up.

Time limits are also placed on an AGM in order to restrict discussions. This is why it is essential to have a "General Business" section of every AGM as a standing agenda item.

Regarding persons who may call meetings, how is a lot owner meant to obtain 25% of the total lot entitlements? Who determines this and how does a lot owner obtain this information? What if the information is not provided in a timely manner? There have been cases where an owners corporations manager has refused to supply this information.

Can lot owners be prevented from speaking at an AGM? The committee members can make allegations about anyone during the AGM, but lot owners do not seem to have a right of reply. This is unfair and undemocratic, as there is a huge power imbalance.

How are votes counted at an AGM? Can lot owners request a secret ballot on the night? What if someone wants to act as a scrutineer? There are too many unanswered questions surrounding the voting process.

The ballot process is very unclear.

34 What are your views about the appropriateness of the voting thresholds for ordinary, special and unanimous resolutions, and arrangements for interim resolutions?

4.4 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?
- 36 What has been your experience of annual general meetings and other owners corporation meetings that you have attended?
- 37 How can the views of tenants be most effectively shared with the owners corporation?

5 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

5.1 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 owns 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?

6 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.

6.1 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?

Comment:

Lot owners should have the right to change the external appearance of their lot, as this is the responsibility of the local municipal authority. An owners corporation is not a local council and should not have any right to tell a private lot owner what to do with his or her property.

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

Comment:

We have found that owners corporations think and behave like a local council in regulating the appearance of a lot. You cannot have both the local council and the owners corporations overlapping jurisdictions on planning issues. A Planning Scheme regulates the appearance of a lot, not an owners corporation.

6.2 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?

7 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.

7.1 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?
- 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?

7.2 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)?
- 45 Are there any other issues relating to the coverage of the Model Rules?

7.3 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?

7.4 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?

Comment:

The appeal/review provisions are inadequate. Section 155 of the OC Act allows for an owners corporation to issue a notice to rectify breach, if it believes a lot owner has not followed a rule, but there is no provision for a lot owner to appeal this decision or to seek a review. Section 156(3) states that a lot owner must rectify a breach. What if the lot owner disputes the rule or the validity of the breach notice? This section is silent. Then Section 157 states that the owners corporation can issue a final notice and can apply to VCAT for an order. This seems heavily stacked in favour of an owners corporation and assumes that the owners corporation has made the right decision to begin with. Unfortunately, this is not always the case, so there needs to be some provision for procedural fairness by allowing a lot owner to dispute the notice of breach.

48 Are there any other issues relating to the rules of owners corporations?

Comment:

There is currently no provision for changing rules to match the OC Act. For example, our rules were made and approved in 2002, but they have not been changed or amended to reflect the new OC Act of 2006 and some of the rules are inconsistent with the legislation. There is no legal requirement for them to be changed. The legislation states that any rules which conflict with the Act or Regulations are invalid, but this requires going to VCAT to challenge the rules, at a cost of almost \$600 each time. Why should a lot owner pay the cost of doing this and what incentive is there for doing so? Perhaps there needs to be a provision requiring rules to be updated and/or reviewed each time there is a legislative change. Or at least to make it easier to change them for this reason.

8 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.

8.1 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?
- 50 Are there any other issues relating to owners corporation records you wish to raise?

Comment:

There seems to be no requirement for records to be released or easily made available to lot owners. Some requests have simply been ignored in the past, as there is no time limit for their release. This can sometimes be used to obstruct and frustrate attempts at keeping an owners corporation committee open and transparent.

8.2 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?

Comment:

Information about short stay accommodation can be included in a certificate. The more information available to prospective buyers the better.

So long as it makes it clear that the decision whether or not to allow short stay apartments is for the relevant municipal authority and has nothing to do with an owners corporation.

- 52 Are there any other issues relating to owners corporation certificates?

9 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?

Comment:

Any decision made by an owners corporation committee needs to have a robust dispute resolution process that is easily accessible and understood by all parties. The internal process is fairly clear, but the Consumer Affairs process is hard to find, as there is very limited information available of the CAV website. Once an internal review process is concluded, and there is still no agreement, it should be possible to go straight to VCAT, rather than spending more time trying to conciliate a matter where there is little or no likelihood of a negotiated outcome. Especially, if all the parties agree to bypass the CAV step.

- 54 Are there any other issues relating to dispute resolution?

10 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?
- 56 Are there any other issues relating to applications to VCAT?