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Consumer Property Law Review
Policy and Legislation Branch
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**CONSUMER PROPERTY LAW REVIEW ISSUES PAPER NO.2 OWNERS
CORPORATIONS: JOINT SUBMISSION - NICOLE JOHNSTON BA, LLB (Hons)
M.Crim & NICOLE WILDE LLB**

Thank you for the opportunity to make this submission.

Authors

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Executive Summary

This submission has been prepared taking into account our joint professional experience in the strata legal industry, personal experiences of living and owning strata lots, workshop discussions and research. We have selected the following topics to provide comments and observations:-

1. The power to commence legal proceedings
2. Maintenance fees and plans
3. Voting and proxies
4. Requirements for a committee
5. Availability of records
6. Setting and changing lot liabilities and entitlements

The Power to Commence Legal Proceedings (Issue 2.1)

1. The Power to Commence Legal Proceedings (Issue 2.1)

Issue Question: Are the current constraints on owners corporations' power to commence legal proceedings appropriate?

Issue

- 1.1. There is ambiguity about whether the current statutory requirement for an owners corporation in Victoria to authorise itself to bring legal proceedings requires an owners corporation to pass a special resolution to commence legal proceedings in the Magistrates Court, Supreme Court and/or Federal Court to enforce a VCAT order obtained in VCAT Fee & Rules Proceedings.

Submission

Statutory Interpretation of section 18 of the *Owners Corporations Act 2006*

- 1.2. We have considered section 18 of the *Owners Corporations Act 2006* 'Power to bring legal proceedings' as it is currently drafted in light of the legal principles of statutory interpretation and our findings are *below*:-

- 1.3. Section 18 of the Act, broken down into its component parts, states that:-

- i. Subject to subsection (2), an Owners Corporation must;
- ii. Not bring 'legal proceedings';
- iii. Unless;
- iv. It is authorised by special resolution to do so.

- 1.4. Sub-section 18(2) states:-

- i. A special resolution is not required for an application to VCAT under Part 11 [Applications to VCAT]:-
 - a. To recover fees and other money; or
 - b. To enforce the rules of the Owners Corporation

The Power to Commence Legal Proceedings (Issue 2.1)

1.5. A 'legal proceeding' is defined in section 3 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) as:-

"...includes any civil criminal or mixed proceeding and any inquiry in which evidence is or may be given before any court or person acting judicially including a Royal Commission or Board of Inquiry under the Inquiries Act 2014..."

1.6. In our experience, VCAT monetary orders obtained by Owners Corporations through VCAT Fee & Rules Proceedings are most frequently enforced through the following methods:-

- i. Magistrate's Court or County Court Sheriffs' Warrants to Seize and Sell Personal Property;
- ii. Supreme Court Sheriffs' Warrants for Seizure and Sale of Real Property; and/or
- iii. Federal Court proceedings to obtain a declaration that the lot owner be declared bankrupt.

1.7. In all enforcement proceedings in the higher Courts, some form of affidavit evidence is required. For example, an owners corporation is required under Order 68 of the *Supreme Court (General Civil Procedure) Rules 2015* to file affidavit evidence regarding the nature of the VCAT monetary order, payments received, interest and costs accrued. Therefore, the enforcement proceedings fall within the category of 'legal proceedings' for the purposes of section 3 of the *Evidence (Miscellaneous Provisions) Act 1958*.

1.8. Section 18(2) of the Act expressly states that a special resolution is not required for an owners corporation to make an application to VCAT to recover fees or enforce its rules. The section is silent on whether *enforcement* of VCAT Orders that result from VCAT Fee & Rules Proceedings, in the Magistrates' Court, County Court, Supreme Court or the Federal Court fall within the 'exception' to the general requirement for an owners corporation not to bring legal proceedings unless it is authorised by special resolution to do so.

1.9. By way of jurisdictional comparison, in the A.C.T, the requirements for an Owners Corporation to take 'legal action' is focused on what the cost of taking the legal action will be. Clause 2.5 of Schedule 2 of the *Unit Titles (Management) Act 2011* sets out what parameters legal action must meet before being able to be approved by the Executive Committee. Subsection 2(b) relevantly says:-

"...Clause 2.5 (2) The executive committee of an owners corporation must not take legal action on behalf of the owners corporation unless—

...

The Power to Commence Legal Proceedings (Issue 2.1)

(b) the costs of taking the legal action are reasonably estimated by the corporation's legal representative to be not more than the amount prescribed by regulation; or

(c) the corporation approves taking the legal action by ordinary resolution.

- 1.10. In our experience, the current requirement to pass a special resolution to commence legal proceedings is often honoured in the breach then in the observance. Case authorities suggest that the failure to pass a special resolution will not invalidate proceedings, but that proceedings will simply be stayed pending the passage of a valid special resolution. In our view the current state of the law in this regard potentially sets precedent for diminishing the importance of compliance with statutory procedures that apply to how owners corporations are meant to function.

Conclusion

- 1.11. Section 18 should be amended to make clear that an owners corporation who successfully obtains an order through a VCAT Fee or Rules Proceeding, is entitled to enforce the order. Our suggested amendment to section 18 of the *Owners Corporations Act 2006* is *below* in red:

SECTION 18

Power to bring legal proceedings

- (1) Subject to subsection (2), an owners corporation must not bring legal proceedings unless it is authorised by special resolution to do so.
- (2) A special resolution is not required for:-
 - a. An application to VCAT under Part 11 to recover fees and other money or to enforce the rules of the owners corporation; or
 - b. **A legal proceeding to enforce an order obtained in a proceeding of the kind referred to in subsection (2)(a).**

- 1.12. The power to obtain VCAT Orders through VCAT Fee & Rules Proceedings has 'no teeth' if the owners corporation does not also have the power by ordinary resolution to swiftly enforce such orders.

Issue Question: Are there any other issues relating to the power to commence legal proceedings?

- 1.13. Yes. There is concern that the initial owner of a scheme can use its voting power in the control period to thwart legal action against itself or an associated or related entity. In our experience, this occurs in relation to building defect claims and fee recovery claims. We discuss this further under the issue of voting rights

The Power to Commence Legal Proceedings (Issue 2.1)

however, we recommend that the initial owner is precluded from voting on matters in which it or an associated or related entity has an interest including the commencement of proceedings.

Maintenance Plans and Maintenance Funds (Issue 4.2)

2. Maintenance Plans and Maintenance Funds (Issue 4.2)

Issue Question: 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?

Issue

- 2.1. The current legislative obligations on owners corporations in Victoria to forecast for anticipated major expenditure of a capital nature are effectively at the discretion of the owners corporation as funding maintenance plans are not mandatory. Lack of planning can exacerbate repair costs and result in unexpected expenditure and financial burden on members.
- 2.2. There is an issue with the current scope of a maintenance plan being too proscriptive. Section 37 of the *Owners Corporations Act 2006* currently states three capital items that must be included in a maintenance plan. This is inadequate to reflect the diversity of owners corporations. The scope should be amended to make it wide enough to include items of renewal, replacement and repair particular to an owners corporation's individual needs.

Relevant Academic Research & Findings

- 2.3. Researchers in Australia have studied the suitability of funding models for capital works in strata scheme.¹ Findings from their research indicates that a maintenance fund is the most appropriate model for owners corporations (as opposed to raising special levies or financed debt). This is primarily due to the principle of 'temporal equity':

"...the lot owner should make a contribution to paying for the common property maintenance that equates to the lot's pro-rated share of common property deterioration during the owner's period of ownership..."²

- 2.4. In addition, these researchers suggest that inadequate funding structures for maintenance and capital expenditure can led to systemic failures in owners corporations.
- 2.5. A major research project undertaken by City Futures Research Centre at UNSW looked at managing major repairs in strata schemes.³ Researchers found that

¹ Kaylene Arkcoll, Chris Guilding, Dawne Lamminamki, Lisa McManus and Jan Warnken, (2013), "Funding common property expenditure in multi-owned housing schemes", *Property Management*, Vol. 31 Iss 4 pp. 282 – 296: Link to this document: <http://dx.doi.org/10.1108/PM-09-2012-0031>

² *Ibid*, 288.

Maintenance Plans and Maintenance Funds (Issue 4.2)

the level of satisfaction that lot owners experience can be affected by the way in which funds are raised to pay for capital expenditure. Relevant findings include:-

“...Levels of dissatisfaction with the way in which funds were collected in their strata schemes were high amongst survey respondents. The most common concern related to owners’ unwillingness to pay higher levies, resulting in insufficient funds in the budget and the consequent collection of special levies. Indeed, almost a third of survey respondents indicated that major repairs and maintenance was funded by special levies in their scheme. The second most common concern related to a lack of, or poor, planning regarding major repairs and maintenance funding and a lack of information provided to owners about these issues by the executive committee and/or managing agent...

One-third of survey respondents considered their owners corporation or managing agent had not budgeted adequately for major capital works. The major concern was the striking of special levies to cover the costs of major capital works. Indeed, a third of all respondents noted that major capital works were often funded by special levies...

Approximately one-third of the 80 respondents who answered the question regarding the adequacy of their sinking funds responded positively. The most common reason given for considering their sinking fund adequate was that a good sinking fund plan was in place. There was, however, also a common concern over the inadequacy of some sinking funds, particularly when they did not fully cover major capital works costs...”⁴

Submission

- 2.6. The relevant research on the topic of how owners corporations should prepare for capital works demonstrates that mandatory planning and funding structures are not only necessary, but are also desirable from a consumer satisfaction perspective.
- 2.7. Currently section 37 of the *Owners Corporations Act 2006* requires a maintenance plan to include the ‘*major capital items anticipated to require repair and replacement within the next ten years*’. Major capital items include: lifts, air-conditioning plant or heating plant.
- 2.8. We question why there is a need to particularise ‘major capital items’ when schemes are so diverse and should be able to determine what items are of a capital or non-recurrent nature.

³ Easthope, H., Randolph, B. & Judd, S. (2009) *Managing Major Repairs in Residential Strata Developments in New South Wales* (Sydney: CFRC).

⁴ Ibid.

Maintenance Plans and Maintenance Funds (Issue 4.2)

- 2.9. We consider the legislation in this regard should be drafted more broadly requiring owners corporations to prepare maintenance plans for anticipated capital works, and then leave it to the scheme to determine (perhaps in conjunction with specialist advice) what capital items exist.

Conclusion

- 2.10. It should be mandatory for all owners corporations with more than two lots, to obtain and fund a maintenance plan.
- 2.11. The scope of the mandatory maintenance plan should be extended, and reflect the maintenance plan/sinking fund requirements set out in the Queensland and A.C.T jurisdictions. We consider section 37(2) should be deleted as it is overly prescriptive.
- 2.12. We acknowledge that there needs to be a degree of flexibility embedded in the legislation to enable an owners corporation to amend the maintenance plan and determine the annual levy contributions. Sections 80 and 81 of the *Strata Schemes (Management) Act 2015* (NSW) are useful provisions.

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

- 2.13. Make maintenance plans mandatory to obtain, approve and fund with the exception of two lot schemes.

Payments from the Maintenance Fund (Issue 4.3)

3. Payments from the Maintenance Fund (Issue 4.3)

Issue Question: 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?

- 3.1. If maintenance plans are mandatory, as we have recommended, then the instances of 'unplanned works' should reduce.
- 3.2. We consider the provisions under section 45 of the *Owners Corporations Act 2006* as currently drafted adequately covers the circumstances in which payments from the maintenance plans can be used for unplanned works.

Issue Question: Should funds for implementing the maintenance plan come only from the maintenance fund?

- 3.3. Yes

Voting and Proxies (Issue 5.2)

4. Voting and Proxies (Issue 5.2)

Issue Question: What is your experience of voting and the use of proxies within an owners corporation?

Issue

- 4.1. In relation to committee meetings, we consider the legislative requirement in section 111(3) of the *Owners Corporation Act 2006* (that the meeting notice must set a date being not less than 14 days after the date of the document as the ballot closing date) can lead to unnecessary delays in the decision-making process. Often, committees need to make decisions in a timelier manner.

Submission

- 4.2. We strongly recommend the minimum ballot closing period in section 111(3) be reduced from 14 days to three (3) days. In addition, if a majority of votes is received before the three (3) day closing period, that the resolution is deemed to be passed when the last vote required for a majority is received. This aligns with the legislative requirements in New South Wales.
- 4.3. Accordingly, we recommend section 111 is amended as follows:

Ballots

- (1) A ballot held by a committee must be held in accordance with this section.
- (2) A notice in writing containing the proposed resolution to be voted on must be sent to each member of the committee.

The Electronic Transactions (Victoria) Act 2000 enables this notice to be given electronically.

- (3) The document must set out a date (being not less than ~~14~~ three (3) days after the date of document) that is to be the closing date for the ballot.
- (4) A resolution for which a ballot is held is passed only if a majority of the members of the committee state that they are in favour of the resolution before the closing date for the ballot.

- 4.4. We note that section 54 of the *Body Corporate & Community Management (Standard Module) Regulation 2008* (Qld) also provides an example of how Committees can formally make decisions by majority vote (outside of Committee Meetings).

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

Voting and Proxies (Issue 5.2)

Issue

- 4.5. The right to vote is the ultimate democratic tool in the decision-making process. We are concerned that the Victorian legislative provisions relating to proxies has enabled an environment to be created where proxy farming is the norm and lot owners are easily dissuaded from participating in voting. Proxy farming leads to an abuse of power where individuals can pursue their own self interests. Decisions are therefore not representative and can lead to long term arrangements being implemented that impacts upon schemes for years. An environment needs to be created whereby lot owners are encouraged to participate in the decision-making process and not simply transfer their rights to other parties.

Submission

- 4.6. We recognise that there are times that a lot owner may be unable to participate in meetings but wish to vote on a matter. The use of proxies should therefore be limited. We recommend that proxies should only be held by other lot owners (excluding the initial owner).
- 4.7. We consider that the restrictions on proxies relating to quantity of proxies able to be obtained for a general meeting as set out in section 107(4) of the *Body Corporate & Community Management (Standard Module) Regulation 2007* (Qld) and clause 26(7) of Schedule 1 of the *Strata Schemes Management Act 2015* (NSW) should be implemented in Victoria. For example, a person must not hold proxies greater in number than 5% of the lots.
- 4.8. We note that in the A.C.T, lot owners are prohibited from giving proxies to managers or service providers and in our view clause 3.26(3)(b), Schedule 3 of the *Unit Titles (Management) Act 2011* (ACT) should be taken into account in considering amendments to the Victorian legislation.
- 4.9. We also consider that the *Strata Schemes Management Act 2015* (NSW) Schedule 1, Clause 15 relating to a developer's ability to control the Owners Corporation's decision to take action in respect of building defects affecting a property should be implemented in Victoria.
- 4.10. A Committee Member should be prohibited from giving a proxy for a committee decision to anybody, including another committee member. Permitting the use of proxies at committee level is problematic. Committee members are elected by the members of the owners corporation at general meetings to represent their interests at the committee level. Elected members should not be able to delegate further to a proxy.

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

Voting and Proxies (Issue 5.2)

- 4.11. Committees need to be able to function effectively. A 'hung' (equal) committee vote is effectively a non-decision. In order to make a proactive decision, we consider the Chairperson's right under section 93 (as currently drafted) to make a casting vote, appropriate to address this issue. We consider no change is required.

Issue Question: Should a contract of sale be able to limit the voting rights of lot owners?

- 4.12. No. They remain the owner of the lot until settlement and an owner rights should never be diluted or erased.

Requirements for a Committee (Issue 6.1)

5. Requirements for a Committee (Issue 6.1)

Issue Question: 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?

- 5.1. We consider that in the interests of promoting effective Committee decision making, the number of Committee Members should be changed from a maximum of twelve (12) to a maximum of seven (7). We recommend section 103(1) of the *Owners Corporations Act 2006* is amended to reflect this.
- 5.2. As an alternative position, we note the owners corporation could be given the option of passing a special resolution to have a bigger Committee of between seven (7) to thirteen (13), akin to section 39(2)(b) of the *Unit Titles (Management) Act 2011* (ACT).

Availability of Records (Issue 9.1)

6. Availability of Records (Issue 9.1)

Issue Question: Are there any other issues relating to owners corporation records you wish to raise?

Issue

- 6.1. Sections 146 (1) and 150(1) of the *Owners Corporations Act* allow 'eligible persons' (a lot owner, a mortgagee of a lot, a purchaser of a lot or the representative of a lot owner or mortgagee or purchaser of a lot) the right to inspect the registers and records of the owners corporation.
- 6.2. Our concern is that potential purchasers (parties who have not yet signed a contract of sale but are considering a purchase) do not have a right to inspect the records and registers under these noted provisions. We believe that prospective purchasers should have a right to inspect the records and registers of the owners corporation. A party considering such a purchase is currently unable to verify the accuracy of the information on an owners corporation certificate (as provided in the section 32 statement) and to seek further information that may influence their purchase decision, unless the seller of the lot consents. We understand that there is information that may be of a sensitive or private nature (lot owners contact details, internal communications between lot owners, managers, and the owners corporation and information that may be privileged) and that there are costs associated with allowing inspections to be undertaken.
- 6.3. Johnston (Deakin University) and Leshinsky (RMIT University) have recently undertaken research and raised concerns about the overprotection of owners corporation records and the inability for purchasers to obtain information about the owners corporation prior to committing to a contract for the sale of a lot.
- 6.4. An analogy can be drawn from the purchase of shares in a company. When deciding to buy shares in a company, an interested party has the right to obtain and inspect the records of the company to ensure that they are well informed about the company prior to making the purchase decision. There is no reasonable explanation as to why potential purchasers of a lot in an owners corporation scheme are not afforded the same right.
- 6.5. The South Australian *Strata Titles Act* 1988 (s 41) allows prospective purchasers to inspect the records of the scheme.

Submission

- 6.6. We recommend that sections 146 (1) and 150(1) of the *Owners Corporations Act* be amended to include prospective purchasers.
- 6.7. We recommend that a prescribed fee be set in the regulations requiring parties to pay for an inspection with an exemption for committee members. We note that other jurisdictions (for example, Queensland) allow the owners corporation (or its

Availability of Records (Issue 9.1)

delegated manager) to charge a fee for the reasonable costs incurred for interested party inspections.

- 6.8. The current discretion owners corporations have to decide whether or not to give an inspecting party copies of the documents, should be changed. It should be mandatory to provide copies either upon payment of a reasonable fee, or permit the inspecting party to take their own electronic copies.

Setting and Changing Lot Liability and Entitlement (Issue 13.2)

7. Setting and Changing Lot Liability and Entitlement (Issue 13.2)

Issue Question: What are your views about:

- *who should set the initial lot liability and entitlement, and any criteria that should be followed*
- *how lot liability and entitlement should be changed, and*
- *any time limits for registering changes to the plans of subdivision with Land Victoria.*

Issue

- 7.1. We have concerns about the way in which lot liabilities and lot entitlements are set. The methodology for setting lot entitlements and liabilities is currently inconsistent between the stages of creating an owners corporation and alterations made after an owners corporation has been created. There does not appear to be any justification for this inconsistent approach.

Submission

- 7.2. Section 27F of the *Subdivision Act 1988* currently requires a plan providing for the creation of an owners corporation to specify details of lot entitlement and liability, and the basis of the allocation. There is no apparent methodology in relation to how the allocation is determined at the time the plan is registered. In addition, section 27F is inconsistent with section 33 which applies when an existing owners corporation wishes to alter existing lot entitlements and liabilities.
- 7.3. We consider section 33 (subject to our comments *below*) should be amended to ensure that a consistent calculation methodology is applied from the outset.
- 7.4. Section 33 of the *Subdivision Act 1988* is vague. Section 46 of the *Body Corporate and Community Management Act 1997* (Qld), by way of an example, provides a clear calculation methodology (particularly in relation to the relativity principle). This accords with the Supreme Court of Victoria's interpretation of section 33 in the case of *The Concept Developer Pty Ltd v Conroy & Ors* [2015] VSC 464 (14 September 2015) which relevantly stated:-

*"... 50. I draw from the authorities that whether a lot liability is just and equitable is not to be determined in accordance with fixed rules. It is a question of fact to be resolved in all of the circumstances in a principled way. The relevant circumstances are revealed by the statutory purposes and text. The owners corporation should begin by identifying the objectives of a lot liability, which is to express the proportion of the administrative and general expenses of the owners corporation that a lot owner is obliged to pay. Therein lies the rights and obligations of the lot owners. **The initial focus will be on the nature of the subdivision, the number of lots, the area, layout,***

Setting and Changing Lot Liability and Entitlement (Issue 13.2)

and uses of the common property, the existing expenses of the owners corporation and how those expenses are incurred in relation to the use of common property by lot owners and their invitees onto the subdivision. If known, how the proportionate contributions were initially set may be a relevant consideration..."
[Emphasis added]

Conclusion

- 7.5. Imposing a consistent approach for setting lot entitlements and lot liabilities from the inception of an owners corporation will in our view:-
- 7.5.1. increase transparency for lot owners about the basis of their lot liability and lot entitlement; and
 - 7.5.2. reduce the number of applications by members of owners corporations to alter lot entitlement and lot liability at a later stage.



Nicole Johnston



Nicole Wilde

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