Preamble

1. Disputes in owners corporation (OC) are a form of "neighbourhood disputing" that can be divisive and damaging to the individuals and communities concerned. Research into this area in Australia reveals that it is one of the most pervasive forms of disputing in the general population and can rapidly escalate.[1]
2. I found the issues and questions posed in the *Consumer Property Acts Review Issues Paper No. 2: Owners Corporations* (the Issues Paper) interesting, comprehensive and generally well balanced. In this response I will focus on just a few areas of concern and interest to me emerging from my own research and perusal of the cases at VCAT relating to OC.[2]

Dispute Resolution

3. The Victorian legislation is designed to promote self-governance by providing a legislative framework for owners and residents to work together and to resolve disputes through dialogue, consultation and negotiation. Specifically the *Owners Corporations Act 2006 (the Act)*, in section 1(b), states that one of its two purposes is, "…to provide for appropriate mechanisms for the resolution of disputes."
4. It provides for a three layered or tiered schema for managing conflict that arises. The first tier is dispute prevention. This includes providing information and advice on internal communication and grievance procedures, as well as internal dispute resolution for owners corporations, with a default process set out in the model rules to the Act. The second tier provides for access to a low cost dispute resolution process. Under section 161 of the Act Consumer Affair Victoria (CAV), through the Director of Consumer Affairs, can direct disputes to conciliation from:

[1] See Condliffe, P., *Conflict Management: A Practical Guide*, Lexis Nexis, 2016 (5th ed.) at p 301-2.
[2] These comments are mainly sourced from the publication titled *Owners Corporation Management and Disputes*: *Handbook and Reporter*. This publication came about as the result of my doctoral studies into the way in which disputants choose conflict management processes and how they perceive fairness in such processes. I used OC disputes as a way of contextualising these important issues. This led to a peripheral study of the disputing outcomes at the Victorian Civil and Administrative Tribunal (VCAT) in relation to such disputes. It is available from through the Law Institute of Victoria Bookstore and from the author.

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- a current or former lot owner;
- mortgagee of a lot;
- insurer;
- occupier of a lot;
- purchaser of a lot; and
- manager of an owners corporation.

5. CAV itself appears to have been relatively inactive reporting very little conciliation under the Act.[3] By contrast the Department of Fair Trading in NSW runs a virtually compulsory mediation scheme which takes over 1,000 cases per year.[4] Therefore, rather than having most matters proceed through to a hearing with the consequent delays and costs to the parties a significant number of matters are settled at mediation in NSW. In Victoria the rate of hearing of owners corporation matters appears to be consequently approximately twice that of NSW. These conclusions are further reinforced from some preliminary analysis of survey data from owners corporation managers in Victoria, which the author was involved in, which indicates that the model rules under the Act are perceived not to be particularly useful by OC managers and that they tend to follow their "own procedures".[5] What the research did squarely highlight is the way in which the design of a disputing process can impact on disputants and consequently on the wider community. The figures from VCAT would also seem to indicate that many disputes are not being directed to that Tribunal and are probably being managed by OC's themselves or being 'lumped.' That is, they are being put up with by residents and managers in the hope that they will not escalate.
6. The third tier of the disputing process is VCAT. It was proposed by the Review preceding the introduction of the Act that VCAT consider cases involving more complex technical and legal issues relating to the operations of OC. It is arguable that this result has not been achieved because of the factors noted in the preceding paragraph. As noted in the issues paper an OC cannot apply to VCAT for an order in relation to an alleged breach unless the dispute resolution process required by the

[3] See for example: Consumer Affairs Victoria, "*Annual Report 2012-2013*" Melbourne, 2013.
[4] See for the same period: Department of Fair Trading, "*The Year in Review 2012-2013,*" p.38.
[5] Leshinski, R., Parenyi, A., Condliffe, P. "Appropriate Dispute Resolution for Owners Corporation Internal Disputes - a Case Study from Victoria, Australia." in 3rd World Planning Schools Congress. Perth, 2011.

internal OC rules has been followed and the OC is satisfied that the matter has not been resolved through that process: see section 153(3). Note that in *Owners Corporation PS514657D v Strong (Owners Corporation)* [2011] VCAT 877 (4 May 2011) the Tribunal found that where a Notice of Breach had been issued against a resident for inappropriate behaviour it was not incumbent on the OC to strictly follow the procedures outlined in the model rules before making an application to VCAT to enforce the Notice. It would be required to issue a Final Notice however. Also, section 18 provides that an OC cannot take legal action, except upon the issue of repayment of overdue fees or to enforce the rules of the OC, without a special resolution of the committee of management.

7. Section 162 states that VCAT must be satisfied that there is a "dispute" involving an OC before it can intervene: see *Boyes v OC No. 1 PS 514665E (Civil Claims)* [2009] VCAT 2405 (10 November 2009). VCAT will normally consider the presence of a "dispute" under the Act then go on to "sub-factors," "considerations" and "specific considerations" to help analyse and resolve the issues before them.[6]

The model rules

8. Importantly, as noted above, section 138 of the Act provides that:

   (1) By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1.

   Schedule 1 specifically provides for the making of a broad variety of rules, in addition to dispute resolution, including internal grievance procedures, hearing procedures and communication procedures. If an OC does not make its own internal dispute management rules then the default model rules provided for under the Act will apply per section 139.

9. There are a number of potential issues concerning the model rules (par. 6) in relation to dispute resolution. First, they are quite general in

[6] See Condliffe, P., Abrahams, A. and, Zeleznikow, J. (2011). "Providing Online Decision Support for Owners Corporation Disputes." Australasian Dispute Resolution Journal 22(2): 84.

approach and therefore may not meet the needs of particular OC. Second, they do not specifically allow for the use of interventions such as mediation, conciliation or arbitration. Third, the timelines are quite restrictive. Finally, the Rules can be quite unwieldy in some respects especially relating to Rule 6 (5) which requires the "grievance committee or the owners corporation" to "meet" with the parties to the dispute. What this means and how it would be operationalised is not clear. These limitations of the model rules raise the question of the usefulness of implementing alternative rules under the Act.

10. Recent research indicates that a small majority of OC managers (55%) rely upon the model rules.[7] Of the 55.9% who relied on the model rules almost half, 48.4% were not satisfied with these rules. The survey showed that 35.3% used informal rules. This would appear to indicate that a relatively high percentage of OC and property managers do not value the model rules. Devising their own informal approaches to conflict indicates that the model rules were found to be lacking.
11. The Act has left the design of alternative dispute procedures to replace the model rules more suited to the OC committee. The appropriate design of any alternative will depend upon a number of factors including the size of the corporation as well the nature of the disputes likely to be encountered. However, the adoption of alternative rules can be a complex process involving the adoption of a set of model rules; presentation of a special resolution for ratification at an owners corporation meeting; the setting up a dispute resolution committee; and registration of the new rules with the Registrar of Titles at the Land Titles Office (Victoria) to ensure they are enforceable. As a result there have been very few alternative rules schemas registered in Victoria.
12. The alternative rules can be in a form that the OC considers appropriate for its needs. Complex designs may not be appropriate where the OC has only a small number of lots. However, larger owners corporations, such as in high rise apartment complexes, may benefit from a more elaborate and considered design due to the higher number of people involved and

[7] Leshinski, R., Parenyi, A., Condliffe, P. "Appropriate Dispute Resolution for Owners Corporation Internal Disputes - a Case Study from Victoria, Australia." In 3rd World Planning Schools Congress. Perth, 2011.

the implications for the OC this kind of dispute management structure raises.[8]

13. Governments around Australia have established principles or criteria for assisting businesses and organizations in establishing dispute management systems. For example, the Victorian Government's Justice Department has identified eight principles for a conflict management system: fairness, timeliness, proportionality, choice, transparency, quality, efficiency and accountability.[9] Other government and industry bodies have developed similar typologies.[10]
14. Having an in-house procedure based upon the principles identified by industry and government may provide a range of procedural advantages.[11] These can include:

    - greater user choice;
    - flexibility;
    - the potential for fairer outcomes;
    - a non-confrontational process;
    - cost advantages;
    - the ability of participants to be 'heard' and to participate in developing the outcomes; and
    - user ownership and control of the process.

15. Process flexibility can also lead to accommodation of non-legal principles and is often categorized as a distinct advantage of such processes. For example, issues that are considered legally or commercially irrelevant, but which are nevertheless very important to the persons concerned, may be swept aside by professionals engaged to manage a matter. Flexibility of the process allows adaptation of the process to the needs and culture of the disputants. Participants can agree to apply their own values to the

[8] Douglas, K., R. Leshinsky, et al. (2008). "Models of Mediation: Dispute Resolution Under the Owners Corporation Act 2006 (Vic)." *Australasian Dispute Resolution Journal* 19(2): 95-103.
[9] Justice, D. o. (2004). New Directions for the Victorian Justice System 2004-2014. Melbourne
[10] Department of Industry, S. a. T. (1997). Benchmarks for Industry-Based Consumer Schemes. Canberra, Ross, W. and D. Conlon (2000). "Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications
[11] See: Combining Mediation and Arbitration." Academy of Management Review 25(2): 416-427, Cheeks, R. (2003). "Multistep Dispute Resolution in Design and Construction Industry." Journal of Prof Issues in Eng Education and Practice: 84, (NADRAC), N. A. D. R. A. C. (2006). Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters. Canberra, Chau, K., W (2007). "Insight into Resolving Construction Disputes by Mediation/Adjudication in Hong Kong." Journal of Prof Issues in Eng Education and Practice 143, Douglas, K., R. Leshinsky, et al. (2008). "Models of Mediation: Dispute Resolution Under the Owners Corporation Act 2006 (Vic)." Australasian Dispute Resolution Journal 19(2): 95-103.

dispute. Potentially this flexibility can lead to greater freedom from any substantive systemic bias. Rather than simply applying the same process template over a range of disputes, participants can be innovative in developing a range of processes that meet the particular needs of disputants. The non-confrontational nature of the process may also lead to an important benefit: maintenance of ongoing relationships between the parties which can be crucial in neighbourhood and OC type disputes.

16. The review of the Act should allow for an in depth review of the dispute systems employed. A potential alternative three stage model is outlined in the Handbook previously mentioned.[12] This is outlined below.

An In-house Model for OC Disputes

Stage 1: Self-help: the parties are encouraged to meet and talk informally using the formulation in the specially drafted model rules. There is no prescribed structure to this process.
Stage 2: Mediation/Conciliator: a process which enables the parties to reach their own solution to the issue/s but provides that the mediator/conciliator controls the process.
Stage 3: Arbitration: A process of adjudication where the parties agree to be bound by the decision of the arbitrator. It can be provided by the Mediator previously engaged or by another independent intervener.

[12] Condliffe, P., Owners Corporation Management and Disputes: Handbook and Reporter, 2015 (2nd ed.) – available at the Law Institute Bookstore, Melbourne or from the author.

17. Arbitration has been included in the process because it does have certain advantages. However, the role of arbitration is such a scheme can be controversial because of all the alternative processes it leaves the parties with less autonomy and when it is not managed properly within the framework of a dispute management process can be both unwieldy and costly. However, it is interesting to note that in response to a crisis in the construction of condominiums due to prolific litigation concerning water leakage Washington state legislature introduced legislation based upon a mandatory arbitration and conciliation procedure. These reforms were accompanied by requiring the initiating party to advance the costs of the arbitration or conciliation but allowing for these costs to be awarded to the party that "wins" the case.[13] The Arbitrator decides the case purely on the arguments and evidence presented to him by the parties. The parties must prove their cases on the balance of probability to the satisfaction of the Arbitrator. The use of arbitration can lead to improved efficiencies and certainty in the process. Arbitration, because of the operation of the applicable legislation allows for potential procedural irregularities to be addressed and ensures that impartial professional skills are brought to bear on the dispute. The inclusion of it also reflects the use of a similar process (adjudication) in the Queensland and in many overseas schemes.
18. The Rules of this scheme (outlined in the Handbook) are intended to allow the parties to present their cases without the need for legal representation. However, in some instances legal representation will be required. The process requires the parties to present their cases and accompanying materials to the mediator/conciliator and arbitrator. This is not an inquisitional scheme although both the mediator/conciliator and arbitrator can, where appropriate, ask for further information. Some parties will probably require assistance in presentation and guidelines for this purpose can be readily produced.
19. The advantages of proceeding in the way outlined is that the parties and the OC keep or maintain the dispute within a clearly delineated process where they are able to plan or predict a process with some certainty. The model rules and the statutory process under the present Act do not easily allow this

[13] O'Donnell, Mark and David Chawes, "Improving the Construction and Litigation Resolution Process: The 2005 Amendments to the Washington Condominium Act Are a Win-Win for Homeowners and Developers" (2005-6) 29 *Seattle University Law Review* 515

especially from the vantage of the OC. This is because the statutory scheme allows an owner or resident to proceed to CAV or VCAT after the initial complaint whereas the OC appears limited to the statutory process.[14] This scheme also allows the OC to budget for projected costs and ensure some certainty of outcomes. If implemented it would be advisable for the OC to contract with a provider of ADR services to provide the necessary services at an appropriate rate. [15]

20. The Issues Paper indicates that the model rules are only useful for 'internal grievances' and they should not hinder an OC from initiating legal action in certain types of disputes. The major problem with the model rules, as previously indicated, is that they are so deficient as to be probably unusable by most disputants including the OC. Nevertheless, clarification of the process to be adopted by disputants is important but the lack of viable process alternatives to that provided by VCAT inhibits and precludes the ready and efficient resolution of disputes. This is particularly so for those who may prefer a more informal and confidential process.
21. Four steps are required to enable OC to adopt their own process of dispute management. These are:

    1. Adopt a set of model rules;
    2. Present a special resolution for ratification at an OC meeting;
    3. Set up a Dispute Resolution Committee; and
    4. Register the new Rules with the Registrar of Titles at the Land Titles Office.

22. These procedural hurdles to adopt and implement an alternative set of rules are, in my view, too onerous and compound the inadequacy inherent in the existing model rules. These alternative rules can be in a form that the OC considers appropriate for its needs.[16] Specialised help may be needed to design them. Instead, it may be preferable to have a range of statutory alternative dispute model rules which can be adopted by simple majority of

[14] See however *Owners Corporation PS514657D v Strong (Owners Corporation) [2011] VCAT 877* (4 May 2011) referred to in in par 7.

[15] 1. Note that VCAT may enforce agreements made in a mediated settlement: see *Toorak Eagle Pty Ltd v Owners Corporation No 1 RP16950 (Owners Corporations)* [2014] VCAT 957 (1 August 2014).

[16] Note that hey cannot take away rights to access VCAT or the courts. The proposed rules must also not conflict with the Act, regulations, or natural justice.

the OC. If amendments are sought to be made to the particular model rules then they would need to be registered with the Registrar of Titles.

Decision Making under the Act

23. Decision making is an important part of any dispute system design and indeed of any organisational system. It is helpful that the Issues Paper has outlined the decision making schema under the Act because otherwise it may be almost impossible for most to comprehend! My experience of trying to provide an outline of this legislated schema to an OC resident recently is perhaps instructive:

I have considered your questions in some more detail and note as follows.

- *Div 7 of the Act allows for most decisions other than those requiring special or unanimous resolutions to be usually passed by a simple majority. This is usually by simple show of hands but can be by poll if a lot owner request this: s92(3).*

- *Special resolutions or unanimous resolutions require 75% of the 'lot entitlement' in a ballot or poll otherwise 75% of votes: s96*

- *S 83 sets out who can require a ballot including those with 'lot entitlements' over 25%.*

- *S 92 allows for 'any lot owner' to require a 'poll' of votes which is a written voting system based on lot entitlements*

- *S96 contemplates voting by ballot, poll and otherwise*

- *S 97 provides for that situation where, either by ballot or by vote (but does not include 'poll'), the vote does not reach the required 75% but does reach 50% where there is not 25% votes against.*

- *S 97 allows that in the above situation a notice then be provided to lot owners and within the allotted time they can register their opposition otherwise it will be passed.*

You are right about this being a confusing situation and one which lends itself to difficulties. In summary, in my view, any lot owner can require a 'poll' but only those designated in s83 can require a 'ballot' ie the Chair, Sec, a lot owner nominated by 25% of lot entitlements and the Manager. A ballot, as can be seen in P4, D5 is perhaps a more formal requirement and therefore there are limitations placed on its use. A poll simply requires a written noting of votes but the poll is then based on 'lot entitlements'. Neither 'poll' or 'ballot' is defined in the definitions section. However, it would seem, if you read s92(3) and s 96(a), the poll option allows lot entitlements to be the determinant whereas in a ballot this does not appear to be the case except in the case of a special resolution. So, unless a poll has been requested or it is a matter requiring a special or resolution, then it would appear that any vote would depend upon the number of lot owners rather than lot entitlements. I am not sure if this was intended by the Parliament, as I cannot see any reference to this in the 2nd Reading Speech or Intro Memorandum. If therefore, in the case of a special resolution, no poll or ballot has been requested then the votes goes by lot owner 'affected'.

Hope this helps and somewhat clarifies a confusing situation.

Conclusion and Suggestions

24. There is a need for a thorough review and revision of the dispute resolution and decision making procedures under the Act. It is arguable that the Act is not meeting its legislative objectives as outlined in section 1(b).
25. This review should in particular note and perhaps incorporate useful elements of the legislated schemes in relation to dispute resolution in NSW, Queensland and more recent initiatives in WA.
26. In particular:
    - the Model Rules in relation to dispute resolution (par.6) require urgent consideration;

- the procedures relating to commencing dispute resolution procedures, including litigation, and adherence to internal rules by OC and others should be clarified.

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