

Property Council of Australia
Victoria Division

Submission to the Consumer Property Acts Review Issues Paper No. 2

Owners Corporations

April 2016

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EXECUTIVE SUMMARY

The Property Council of Australia is the largest and most influential advocacy organisation in the property sector. We have 2,200 member companies that represent property assets worth over \$600 billion. Approximately 500 of these members are part of the Victorian Division.

Members of the Property Council represent the entire property investment cycle: finance, design, development, property maintenance and the services that underpin the sector.

The Property Council supports this review; however we believe that the limited nature of the discussion paper fails to address key underlying issues in the operation of the relevant legislation.

Principally, we are concerned that the Act's provisions are unduly restrictive when applied to the commercial property sector. Given the size and importance of the industry, the Property Council is disappointed that the discussion paper appears to focus almost solely on the regulation of residential property and does not recognise the very different nature of commercial property.

Our submission contains direct responses to questions posed in the Consumer Property Acts Review Issues Paper No. 2, as well as additional commentary we feel requires consideration.

RECOMMENDATION SUMMARY

The State Government:

- Ensure that lot owners cannot ‘opt out’ of the insurance policy taken out by the owners corporation.
- That the State Government ensure that a developer that retains ownership of units in an owners corporation following the owners corporation’s first AGM holds voting rights proportionate to its unit share, subject to existing restrictions in the law only.
- Require developers to prepare and provide an asset register to the owners corporation at the first AGM, as well as hand over the occupation permit for the building.
- Reform voting processes to overcome apathy in owners corporations by:
 - Limiting the number of proxies that can be held by an individual owner to no more than five per cent of the total number of lots;
 - Introducing a system of pre-meeting postal voting/absentee voting;
 - Making voting compulsory for all owners;
 - Providing the option of secret ballots on substantive issues;
 - Limiting the number of proxies or voting rights that can be held by an individual owner to no more than five per cent of all voting rights when voting for an Committee; and
 - The five per cent limits should only apply to large owners corporations. Limits on voting rights should be contingent upon the size of the owners corporation, with a sliding scale determining the proportion of voting rights allowed in different sized owners corporations.
- Remove the existing requirement of unanimous agreement to terminate a owners corporation replace it with a threshold of 75 per cent in favor of termination, regardless of the owners corporation’s age or asset type.
- Make training compulsory for a percentage (depending on the size of the owners corporation) of members of the Committee, with an exception for those with relevant experience.
- Allow committee members of large owners corporations to be remunerated for their service.
- Allow committees and managers to send notices and documents by email where an owner, tenant or other person associated with a owners corporation can elects to receive them by post, at their own expense.
- Place a three year limit on the consecutive holding of office for Committee members in large owners corporations.
- Create clearly defined dispute resolution pathways for the main disputes that arise in owners corporations to allow for the relatively quick, informal and inexpensive resolution of owners corporation disputes.
- Maintain the status quo with respect to Part 5 of the *Subdivision Act*.

ISSUES

Maintenance

Maintenance plans and maintenance funds

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

Our response

Maintenance schedule

The Property Council supports the suggestion that developers should be required to provide a maintenance schedule for consideration and adoption at the first AGM of new owners corporations.

1. Process for establishing maintenance schedule

We believe that while building users and operators are best placed to implement and manage maintenance, the building contractor will typically be best placed to identify the appropriate maintenance required for the building.

On that basis, it is logical for building contractors to be tasked with the preparation of a maintenance schedule for the initial term of the operation of a owners corporation.

The maintenance schedule should be constructed by the building contractor as follows:

a) Plant maintenance

- i. Schedule of maintenance tasks and indicative timing for servicing of lifts, air conditioning chillers/peripherals, and ESD/sustainability plant (photovoltaics, black water systems etc) and any other operation plant forming part of, or attached to, the building;
- ii. Schedule of consumable items and indicative date for replacement based on life expectancy of consumables;
- iii. Identification of any warranties issued by plant designers/suppliers/installers and the respective expiry dates for such warranties; and
- iv. Identification of any contractors/maintenance providers that must perform plant maintenance so as to maintain existing warranties.

b) Building maintenance

- i. Schedule of maintenance elements and indicative timing for servicing, maintenance and cleaning of structural/building fabric elements including roof material, roof plumbing, awnings, louvres or attached moving components, windows, seals, externals doors etc;
- ii. Detailed description of the nature of cleaning and servicing required, particularly with respect to moving components such as louvres, high maintenance components such as varnished timber finishes and particularly where buildings are located in harsh environments (for example, hot/cold climates, seaside locations etc);
- iii. Schedule of consumable items and indicative date for replacement based on life expectancy of consumables;

c) 'Soft' facilities management-

- i. To the extent necessary, a disclosure of any information relevant to the provision of soft facilities management services that will improve the longevity or operation of the strata building. Such information may relate to the softness/sensitivity of finishes such as marble, issues with respect to the placement or operation of garden irrigation systems, operation or cleaning issues related to waste management/refuse systems etc.

Unless the owners corporation disagrees with any component identified in the proposed maintenance schedule or the timeframes for provision of such services, the maintenance schedule should become binding for its term. We consider that a six year schedule would be appropriate.

2. Duty to comply with maintenance schedule

While the building contractor is best placed to draft and propose the maintenance schedule, the owners corporation is best placed to oversee and manage compliance with the maintenance schedule. To ensure compliance with the maintenance schedule, the owners corporation should be required by law to budget for the provision of maintenance in accordance with the maintenance schedule.

This makes sense for consumers in the event that a defect arises, and the building owners commence action against the contractor, the owners will only succeed against the builder if they can demonstrate that the defect is a consequence of a breach of contract or of statutory warranty and is not a result of fair wear and tear. Accordingly, the building owners will preserve their interests and indirectly collate evidence of their maintenance of the building, by complying with the maintenance schedule and retaining evidence of such compliance.

Defects as a compulsory agenda item

The Property Council also supports the inclusion of defects as a compulsory agenda item at the first AGM of all owners corporations.

In the first 12 months from the date of practical completion of the building, developers hold retention money from builders and/or sub-contractors that can be used to repair defects. Practical completion may occur sometime before purchasers settle their apartments. The obligation is between the builder and the developer not between the builder and the purchasers. Therefore, the earlier that defects and defect rectification issues are discussed, the better.

Our recommendation

That the State Government ensure that:

1. Developers are required to provide a maintenance schedule for consideration and adoption at the first AGM of a new owners corporation;
2. The maintenance schedule is prepared by the building contractor and should be structured as set out in this submission; and
3. Defects are included as a compulsory agenda item at the first AGM of owners corporations.

Insurance

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)?

Our response

The Property Council does not support a system where lot owners can ‘opt out’ of the insurance policy taken out by the owners corporation. As they do not individually own the common property, they therefore should not have the individual right to choose how it is protected.

Our recommendation

The State Government ensure that lot owners cannot ‘opt out’ of an insurance policy taken out by the owners corporation.

Meetings and decisions of owners corporations

Developers' obligations

What are your views about the appropriate obligations for developers who control owners corporations, including the:

- a. obligations concerning any contracts they cause the owners corporation to enter into**
- b. interests they must consider, and whether there are any matters they should be prohibited from voting upon, and**
- c. duration of their obligations?**

Our response

The Property Council believes that the existence of competing interests between owners and developers of owners corporations does not justify further restrictions being placed on the ability of developers to be involved in owners corporations following the first AGM.

If a developer retains ownership of units in a owners corporation following the owners corporation's first AGM, that developer should hold voting rights proportionate to its unit share, subject to existing restrictions in the law only. The developer has a wealth of knowledge about the construction and structure of the building that is invaluable to the proper management of a owners corporation. We believe that the value of this knowledge should not be overlooked.

Our recommendation

That the State Government ensure that a developer that retains ownership of units in an owners corporation following the owners corporation's first AGM holds voting rights proportionate to its unit share, subject to existing restrictions in the law only.

What other changes should be made to developers' obligations?

Our response

The Property Council supports the expansion of the list of documents required to be handed over by the developer at the first AGM. In particular, we recommend that the developer should be required to prepare and provide a concise asset register to the owners corporation at the first AGM.

An asset register would provide an overarching summary of all plant equipment and major common property that would need to be maintained, along with details of its location. For example, an asset register would provide information about the number and location of pumps, boilers, fire sprinklers etc within a owners corporation.

In addition, the developer should also be required to hand over the occupation permit for the building at the first AGM. This document includes information such as the final fire certificate and any relevant fire engineering or management in use plans.

Handing over an asset register and occupation certification would ensure that important information about a building is not lost when a developer ceases to be involved in the owners corporation. These documents are invaluable reference materials for those responsible for the management and maintenance of the building.

Our recommendation

That the State Government require developers to prepare and provide an asset register to the owners corporation at the first AGM, as well as hand over the occupation permit for the building.

Voting and proxies

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

Our response

Apathy is the biggest challenge facing owners corporations with respect to voting and proxies. While this cannot be remedied by policy, our recommendations will assist in decreasing some of the consequences.

Our recommendation

That the State Government reform voting processes to overcome apathy in owners corporations by:

1. Limiting the number of proxies that can be held by an individual owner to no more than five per cent of the total number of lots;
2. Introducing a system of pre-meeting postal voting/absentee voting;
3. Making voting compulsory for all owners;
4. Providing the option of secret ballots on substantive issues;
5. Limiting the number of proxies or voting rights that can be held by an individual owner to no more than five per cent of all voting rights when voting for a Committee; and
6. The five per cent limits in a) and e) above should only apply to large owners corporations. Limits on voting rights should be contingent upon the size of the owners corporation, with a sliding scale determining the proportion of voting rights allowed in different sized owners corporations.

Resolutions

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

Our response

The Property Council believes that the current termination procedures in Victoria's strata laws are too restrictive and must be reformed in order to facilitate the replacement of an unproductive or unliveable building once it reaches the end of its useful life.

As Melbourne's housing stock shifts to a more apartment oriented market, it is essential that Victoria's strata laws evolve too. The status quo, requiring *all* owners to *unanimously agree* to the termination of an existing owners corporation is strangling the development of new commercial and housing stock. In a system where one dissenter can frustrate the will of all other owners, many buildings are being pushed past their lifespan, risking the emergence of buildings that are unsound and unsightly.

The Property Council encourages the State Government to reform the way that owners corporations are terminated, as it will better facilitate the regeneration of buildings and enable urban renewal to meet future growth needs.

To achieve these overarching objectives, we support the following key design principles:

- 1. A reasonable threshold** – A fair and sensible approach would require a majority decision, rather than a unanimous one, for the termination of a owners corporation. Based on overseas practice, we advocate a threshold of no more than 25 per cent against termination.
- 2. Fair compensation** – For owners who oppose termination, fairness remains the key principle. Several international models have an allowance for owners who oppose termination to secure independent market valuations of the redevelopment value of the land before selling their share to the owners corporation.
- 3. Consumer protection** – Many owners do not have the resources or expertise to undertake redevelopment themselves. A new model should allow owners to engage a developer to undertake and manage the redevelopment process.
- 4. Preserve control** – A Renewal Plan should be required on all proposals to renew a owners corporation. It would require a staged process that sees owners consulted and would allow them to retain control over each step in the process.
- 5. Phased introduction** – Suitable transitional arrangements would need to be made to account for the interests of existing owners and investors in strata buildings. Legislation should allow for new termination provisions to apply after 12 months for new buildings and two years for existing buildings.

In addition, a new termination regime must apply to new *and* existing buildings, as well as residential *and* commercial buildings. While it would be easier to introduce a new regime that applies solely to new buildings, it is ageing strata buildings that pose the most immediate challenge.

Our recommendation

That the State Government remove the existing requirement of unanimous agreement to terminate a owners corporation and replace it with a threshold of 75 per cent in favor of termination, regardless of the owners corporations' age or asset type.

Committees

Requirements for a committee

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?

Our response

Training

The Property Council recognises that there can be difficulties in allowing owners with no experience or expertise to serve on the Committee of a owners corporation. Our members have identified this as a particular issue in the governance and management of large owners corporations, that is owners corporations of 100 units or more.

Apathy about the management of a building from the majority of owners in large owners corporations can result in the formation of “Super Owners Corporations”. In these kinds of Corporations, often just a few people with no experience – sometimes only 3-5 people out of 200-300 owners – will be responsible for making complex decisions about the management of a building worth tens of millions of dollars. The decisions made by owners with no experience or expertise can place the building at risk and very little can be done to reduce this risk. Introducing mandatory training for members of the Committee of large owners corporations would result in better building management.

Mandatory training should be run out of the Consumer Affairs Victoria, be paid for out of each owners corporations administrative fund and cover:

- the basics of running a owners corporation, including building management;
- the legal obligations of the Committee, including an explanation of office bearer's insurance; and
- information about defects, including seeking defect inspections and defect rectification.

We propose that mandatory training should be completed by a percentage (depending on the size of the owners corporation) of the members of a Committee before that committee is considered properly formed and able to carry out its functions.

Exceptions

An exception to mandatory training should be made for members of a Committee that have relevant industry experience, in order to ensure that they are not deterred from serving on the committee.

In relation to large owners corporations, to avoid the situation where a group of owners who have completed mandatory training become permanent members of the Committee, there should be a limit of three years consecutive service for each committee member. Committee members would be allowed to serve again, but not for more than three years at a time. If it then becomes difficult to form a properly constituted Committee, the duties of the committee should be assumed by the Manager until enough committee members have completed the mandatory training.

Increasing participation on committees

We understand that some owners may be deterred from participating on the Committee of an Owners Corporation due to the risk of legal liability.

Office bearers liability insurance should be compulsory in all owners corporations. Compulsory insurance should encourage more owners to participate in strata management and increase the pool of potential Committee members.

In addition, due to the level of time, knowledge, expertise and commitment required to run a large owners corporation, Committee members of large owners corporations should be remunerated for their time. Paying these committee members will result in the right people with the correct set of skills and training managing the building. It will also allow a certain level of accountability to be expected for the actions of these committee members.

Communication

We understand that requirements to post notices and other documents to owners in a owners corporation can be cumbersome and expensive for owners corporations.

We would support reforming strata laws to allow Committees and managers to send notices and documents by email with an owner, tenant or other person associated with a owners corporation being required to elect to receive them by post, at their own expense. With this system, paper based processes should not be required as they are unnecessarily costly and burdensome on owners corporations.

Our recommendation

That the State Government:

1. Make training compulsory for a percentage (depending on the size of the owners corporation) of members of the Committee, with an exception for those with relevant experience;
2. Allow committee members of large owners corporations to be remunerated for their service;
3. Allow committees and managers to send notices and documents by email where an owner, tenant or other person associated with a owners corporation can elect to receive them by post, at their own expense; and
4. Place a three year limit on the consecutive holding of office for Committee members in large owners corporations.

Dispute resolution

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?

Our response

The Property Council understands that resolving disputes that arise in owners corporations can be a costly, time consuming and difficult process to navigate. For these reasons, we support reforms to dispute resolution processes that help to realise the Government's goal of providing relatively quick, informal and inexpensive dispute resolution mechanisms.

An option that our members have identified to assist in the resolution of owners corporation disputes is to create clearly defined dispute resolution pathways for the main disputes that arise.

The main disputes include, but are not limited to:

- Disputes relating to breaches of rules – particularly breaches of rules relating to visitor parking, noise and the hanging of washing on balconies;
- Disputes relating to the handling of breaches of rules – such as the issuing of notices and penalties; and
- Disputes between owners corporations and caretakers.

Our recommendation

That the State Government create clearly defined dispute resolution pathways for the main disputes that arise in owners corporations to allow for the relatively quick, informal and inexpensive resolution of owners corporation disputes.

Part 5 of the Subdivision Act

What are your views about:

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

Our recommendation

That the State Government maintain the status quo with respect to Part 5 of the *Subdivision Act*.