

## Appendix 1: Summary of questions

This appendix provides a summary of the questions for consideration.

### Functions and powers of owners corporation

- 1 Are the current constraints on owners corporations' power to commence legal proceedings appropriate?

No.

If pending action is against an entity which owns Lots within the Plan then that entity should be denied voting rights and the balance of the members be deemed to be the 100% upon which a special resolution would then be determined.

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

No.

- 3 Should owners corporations be able to deal with water rights, including water that falls on common property?

Unequivocally, Yes.

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

Our understanding is that there is already legislation available that attends to the acquisition and disposal of personal property however something more specific could be enshrined in the OC Act.

- 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?

There should be a power that provides for the relocation of personal property (of value) from common property e.g. parking of cars on common property.

- 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?

No.

### Financial management of owners corporations

- 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?

We have found the benefit principle to operate effectively in most situations however it is a vexed issue as different people have different opinions as to who is benefiting from something.

The reverse of this principle should apply is what could be termed The Detriment Rule.

In other words costs should be able to be recovered from owners (and their tenants) for the reinstatement of damages caused by them to common property

- 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?

Yes. All debt collection costs of a reasonable value should be able to be recovered from the delinquent member given that they have been appropriately informed as to the sum of the costs which will be recovered in the event of non payment.

A matter of non-payment often is to do with not having the correct address of the member/owner.

The OC Act 2006 legislates (Section 134) that the Owners Corporation is to be informed by the vendor and purchaser of the Lot of the purchaser's current address within 30 days of the finalisation of the contract.

Greater emphasis must be placed on solicitors/conveyancers to provide a correct address. At the time of the sale purchasers need to be made aware of this obligation. A significant penalty should be able to be charged in the event that the current address is not provided.

- 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?

Costs are awarded but in general not sufficient to cover all costs therefore leaving the OC out of pocket.

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

No. Penalty Interest is usually an effective deterrent not to pay.

- 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?

Absolutely not!

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

Refer point 8 above.

- 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?

No relevant experience.

## Maintenance

- 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?

No. All OC's should have a maintenance fund and if not a maintenance fund then a contingency fund.

- 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?

Yes. However, more often than not when driven by the OC Manager.

- 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?

Refer 14 above.

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

Requirements/procedures as determined by legislation.

- 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?

Yes, but there already exists that capacity under the OC Act 2006.

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

If there is no maintenance fund and the OC wishes to implement then the funds should come from the General Administrative fund or a Special Levy otherwise paid out of the existing maintenance fund.

In relation to a related matter Section 42(b) of the OC Act 2006 should be abolished.

All insurance matters should be attended to within the General Administrative budget

- 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?

Should apply where there is no maintenance fund and levy to be a minimum % of the total General Administrative levy or alternatively equate to say the cost of the annual insurance premium.

- 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?

If a Lot owner deems that a repair is urgent yet the OC refuses to attend to it then the Lot owner should have the ability to arrange repairs at their initial cost and then seek an order from VCAT for recovery of the cost from the OC. This is similar to what occurs under the Fencing Act.

If an OC refuses to attend to non urgent repairs then a Lot owner can apply to VCAT under Part 11 of the OC Act.

- 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?

Cost of damage caused by owners/tenants should be recovered from that person who has caused the damage. Refer comments in question 7 above.

In the event that it is the tenant then the Landlord should be held vicariously liable and if necessary pay the damage out of the bond held on behalf of the tenant in the event that the tenant does not pay.

Effective rules will include matters relating to external appearance and as a consequence alterations to common property would not be allowed.

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

No.

- 24 What are your views about the type and level of insurance cover that should be required?

Legal liability minimum should be increased to \$20M. May wish to legislate for the imposition of committee members insurance.

- 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)?

Unequivocally No!

- 26 What are your views about lot owners' responsibilities for any excesses or increased premium payable by the owners corporation?

Owners/Members must understand that each and every one of them are a party to the insurance cover and accordingly if they wish to make a claim that they are required to pay the excess unless determined by the OC Committee or possibly at an AGM.

Notwithstanding, there are instances where owners are negligent in respect to maintaining property/fittings within their own Lot and which as a result cause damage at the very least to adjoining Lots.

The primary cause of this type of damage relates to burst washing machines hoses and over flowing sinks, showers and bath tubs.

Under the above circumstances the cost (at the very least the excess cost) should be able to be recovered from that negligent resident.

## Meetings and decisions of owners corporations

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?

My main cause of discontent is where the Developer appoints a related company as the Owners Corporation Manager.

Whilst I am not requiring that they should not be appointed my argument is that they should only be appointed for an initial 12 months or until the second AGM (first being the inaugural AGM at which time the appointment was made) whereat the members can then decide the matter of management into the future.

28 What other changes should be made to developers' obligations?

Refer comments in question 27.

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

In the main there has been no issues however to safe guard proxy stacking the number of proxies held by one member should be limited to 10% of the total number of Lots.

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

Refer comments in question 29.

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

Existing legislation is adequate.

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

No.

33 What has been your experience of voting within an owners corporation?

Reasonably well accepted except where voting occurs for the election of a Committee.

The requirement of 92(2) may thwart the appointment of a Committee as nominees for Committee may not receive a simple majority of votes especially if conducted by written vote/poll.

A related matter is to do with the lodgement of proxies and committee nominations. Currently the OC Act 2006 provides for the lodgement of proxies and committee nominations at the time of the relevant meeting whereas a Manager needs time to properly attend to the proxies and nominations and this certainly is not at the time the meeting begins.

It is recommended that proxies and nominations are to be received by the Secretary of the OC (usually the Manager) at least 5 working days prior to the meeting otherwise that will not be accepted.

Otherwise let the OC determine the deadline for acceptance of such documents.

The downside for an OC Manager is that the current legislation does not assist in the proper and professional preparation of a meeting. There have been numerous occasions where it has taken a significant amount of time to attend to proxies etc. and the proper recording of who is able to vote causing delay in the start of the meeting and unrest amongst the Lot owners in attendance who question the OC Manager why they haven't been able to attend to these administrative matters prior to the meeting.

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

The threshold for a unanimous resolution should be reduced to 90%

- 35 What are your views about the adequacy of the provisions for convening meetings?

Adequate.

- 36 What has been your experience of annual general meetings and other owners corporation meetings that you have attended?

In the main a good experience other than for my observations noted in question 33.

In relation to the minutes of an AGM/SGM these should be issued within 14 working days irrespective as to whether there was a quorum present.

Accordingly every member of the OC whether they are present at the meeting or not receives the minutes and every new purchaser subsequent to the AGM/SGM receives a copy as contained in the Section 32.

As a consequence there should be no need to reissue the minutes with the Agenda of a subsequent meeting. It's just doubling up at a further cost to the Owners Corporation.

In this current day and age minutes can be posted on websites for the access by members at any time.

- 37 How can the views of tenants be most effectively shared with the owners corporation?

They're shared with the OC on a quite frequent basis usually when they contact the Manager regarding a matter which is adversely affecting their quite enjoyment otherwise through their landlord.

## Committees

- 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?

Committees should be a maximum of 7. Refer other State legislation.

A Committee member should not be able to proxy another committee member or any other person in their stead.

Issuing of minutes to be determined by the Committee or newly appointed Committee at its discretion.

## Rights and duties of lot owners and occupiers

- 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?

Only when approved by the Owners Corporation.

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

Caveat Emptor! An owners corporation should be very reluctant to approve changes to external appearance as it will set precedences.

- 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?

In respect to Landlords all rights are lost.

The owners corporation should have the right to refuse access by members to common facilities where that member is delinquent in payment of OC fee. This should also extend to the tenant if the member is a Landlord.

Also, the OC should have the ability to restrict access to certain services within the building for example the CCTV control system.

## Rules of the owners corporation

- 42 Who should comply with, and be bound by, the rules? Should ignorance of the rules be a consideration?

All Stakeholders of an Owners Corporation should comply and be bound by the Rules

At law ignorance is no excuse (irrebuttable presumption) and reinforced by the fact that whether they be the Model Rules or additional Rules prepared on behalf of the Owners Corporation they are readily available.

- 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?

Vicarious liability should apply.

- 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)?

The OC Act 2006 and Model Rules deal adequately with Pets.

Passive smoking issues will not go away accordingly in needs to be dealt with in one form or another.

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

Not extensive enough especially when solely used for medium to large Owners Corporations.

- 46 What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?

So long as it does not adversely affect other members and the intrusion is acceptable (whatever that means) then a Lot owner should not be prevented from doing so.

- 47 What are your views about civil penalties for breaches of owners corporation rules?

There has to be deterrents in respect to the breaching of rules and the OC Act 2006 itself. Substantive penalties need to apply.

VCAT should have the ability to impose fines and not the director of CAV. Fines to only be issued after the dispute resolution process being followed.

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

Rules which are registered with the Plan of Subdivision must be enforced by VCAT unless contrary to other legislation.

## Owners corporation records

- 49 What are your views about owners corporations' and managers' obligations regarding availability of records and about limitation on lot owners' inspection rights?

Lot owners and agents should be able to inspect records but at their own expense and not that of the Owners Corporation. Expenses include the time incurred by the Manager to prepare the records and supervise the inspection.

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

Certain records should be excluded such as emails.

- 51 What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?

This would be too onerous! Records are not kept in respect to the type of occupant within a Lot.

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

No.

## Dispute resolution

- 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?

The Owners Corporation should act as it sees fit and not to comply with the dispute resolution process.

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

The current process requires the OC to follow their dispute resolution process which generally involves convening a grievance meeting in the first instance. A breach notice should however be able to be issued prior to the holding of a grievance meeting.

Wording in the breach notice needs to be altered so that it doesn't allow the person in breach 28 days to rectify. There are some breaches of rules that need to be rectified immediately i.e. a resident creating unreasonable noise.

Final notices to rectify breach should be abolished as currently 56 days to rectify a breach is excessive in the extreme.

## Applications to VCAT

- 55 What factors should VCAT consider in determining disputes about the validity of an owners corporation rule?

Only if the Rule contravenes other enacted legislation and that it has properly been implemented by a special resolution.

VCAT should apply an OC rule as read and not try and interpret an alternative meaning.

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

In respect to debt recovery judgements should be made in absentia of one or both parties.

## Owners corporations in retirement villages

- 57 What are your views about how annual meetings under the Owners Corporations Act and under the Retirement Villages Act should be conducted in retirement villages with an owners corporation?

No Comment.

- 58 What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?

No Comment.

- 59 How can the views of retirement village residents who do not own their units be taken into account in managing common property within the owners corporation?

No Comment.

## Part 5 of the Subdivision Act

- 60 What are your views about the process for the sale/development of apartment buildings?

There should be the ability for an existing property to be sold where 90% of Lot owners agree based on 1 vote per Lot. This is conditional on each Lot owner being paid an equitable amount for their Lot.

- 61 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.

I believe that there should be parameters established as to how to determine Lot liabilities and entitlements.

Notwithstanding they should be determined by a licensed land/building surveyor with extensive experience in setting schedules of this nature.

If a staged development then anytime until the final stage is due for settlement.

- 62 In the absence of a unanimous resolution, what requirements should be met before VCAT can be empowered to change the lot liability and lot entitlement on a plan of subdivision?

As per the current requirements of the Subdivision Act 1988.

- 63 Are there any other issues relating to Part 5 of the Subdivision Act?

Income generated by an Owners Corporation should be accounted for in the hands of the Owners Corporation and not the individual owners/members.

As the income is not usually distributed to members it would be presumptuous for me to suggest that little of this income would be declared individually by the members obviously resulting in possibly minimal tax being paid whereas if the income rests in the hands of the Owners Corporation the Owners Corporation would be obliged to declare that (taxable) income and pay, notionally, 30% in tax to the ATO.

## Other Matters

- 64 In the OC Act 2006 the word 'lot' used to identify a private title or part title should be expressed with a capital 'L' to give greater emphasis to the word itself.

Response by:

Robert Evans

The Knight Alliance - Owners Corporation Management Company

BLA 180

29.04.16