

Consumer Property Acts Review Issues Paper No. 2 – Submission

Please find below my submission in relation to the above noted Issues paper (numbering is as per the Issue Paper).

Functions and powers of owners corporation

- 1 Are the current constraints on owners corporations' power to commence legal proceedings appropriate?
 - **No – Owners Corporations (OC's) should be able to commence legal proceedings after an ordinary resolution. Obtaining a special resolution in large OC's is extremely difficult due to owner apathy and the current requirement of a special resolution.**
 - **The conditions to obtain a special resolution should be changed as the current conditions are effectively impossible to meet in larger OC's resulting in poor management of the OC due to having their hands tied formatters requiring such a resolution.**
 - **To achieve a Special Resolution currently you are required to obtain 75% of the total lot entitlements of all lots in the OC, this should be changed to all lots represented at the meeting (or those submitting a ballot paper). This will be consistent with QLD and NSW legislation who only take in those voting at a meeting, not all lot owners in the OC. This would result in those owners voting to have their say achieve an outcome and not have the views of those taking the time to attend a meeting to be overridden by those owners that choose not to attend or simply don't care.**
- 2 Are there any other issues relating to the power to commence legal proceedings?
 - **OC's should be able to recover all reasonable costs from the defaulting party, currently VCAT is hesitant or unwilling to reimburse OC's for all costs involved in obtaining an order.**
- 3 Should owners corporations be able to deal with water rights, including water that falls on common property?

Nothing to comment.
- 4 Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?
 - **Clear guidelines should be included in the Act with means of disposing personal property left on Common Property, this will prevent recourse back to the OC or the manager for their actions.**
- 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?
 - **As per comment above for Q4.**

- 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 – the power to sign a document, and who can, should be contained in the resolution of the OC and documented in the minutes of a meeting.**

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?
- **It's a very vague principal that has had little success when challenged at VCAT. The principal is too vague and if continued to be used should include examples of when it can be so VCAT can use these as a guideline.**
- 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 most definitely. Some recalcitrant owners "play the system" and wait until the day before the VCAT hearing before paying their overdue fees. Such owners should repay the OC expenses in preparing and submitting applications to VCAT or their legal fees in engaging a person to do this on their behalf.**
- 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?
- **Cost awarded are not sufficient to meet the costs actually incurred in bringing such action.**
- 10 Should owners corporations be able to apply a discount for the timely payment of fees or charges?
- **Yes. A model similar to the QLD model works extremely well. Currently lot owners may be willing to delay paying their fees and incur a small amount of interest for their own purpose whilst the OC may be struggling to pay incoming expenses. By having a discount system (e.g. 10% if paid on time) will result in a greater incentive for these owners to pay fees on time and in my experience does not result in increased requests to the OC for the discount to be applied (as they can currently due with overdue interest amount) – which has been an argument against this practice. In reality total requests decrease as owners pay on time and do not incur either overdue interest and missed discounts.**
- 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, this would be a complete waste of time and significantly impact cash flow for smaller OC's with limited cash reserves to carry such a debt through the long winded dispute process.**
- 12 Are there any other issues relating to payment of fees or charges?
- **OC's should be able to charge Lot owners for reimbursement costs for items, such as damage they have caused to Common Property (accidental or malicious), or cleaning common property areas after they have left a mess after a party etc. Currently the OC has to take legal action to receive such monies which is again too expensive to do so and is rarely done and all owners have to pay the bill for the behaviour of one resident.**
 - **Owners who do not provide an Australian address for service of notices should be fined. Even though this is a requirement it still occurs and makes recovering debt from these owners extremely difficult.**

- 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?
- **OC's should be able to recover reasonable administration fees for providing goods or services to lot owners. The time and expense used to on charge costs to lot owners (including such costs like printing and postage) should be able to be recovered by the user of that service.**

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 should be treated the same.**
- 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?
- **No – most OC's have short term thinking when it comes to future maintenance requirements.**
- 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?
- **Absolutely Yes that maintenance plans are mandatory. Such plans alert owners to the need to plan ahead for future expenditure requirements and no distinction should be made between small or large OC's as all have maintenance requirements.**
- 17 What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements?
- **Maintenance Plan must be in place within 12 months of the OC commencing, ideally the developer should set aside funds to prepare such a plan at the commence of the scheme.**
 - **OC's must set fees to meet the requirements contained in the Maintenance Plan, if they choose not to fully fund such a plan then a detailed reason must be included in the AGM minutes at each meeting where the yearly fees are set.**
- 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 as it is common that Maintenance Plans do not capture all items in the OC that needs replacement over time. Requirements being that it must replace an existing item not to purchase a new item.**
- 19 Should funds for implementing the maintenance plan come only from the maintenance fund?
- **OC should be left to decide where funds are to be drawn from.**
- 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?
 - **Contingency Funds are not necessary for an OC that has an adequate budget and has a maintenance plan. Lot owners are hesitant to approve additional expenditure if it has no clear purpose.**
- 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?
- **Dispute process is sufficient in this regard.**
- 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?
- **See Q12**
- 23 Are there any other issues relating to repairs to common property or services?
- Nothing to comment.**
- 24 What are your views about the type and level of insurance cover that should be required?
- **OC's should be left to decide what cover they feel is adequate over and above the building 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)?
- **Never.**
- 26 What are your views about lot owners' responsibilities for any excesses or increased premium payable by the owners corporation?
- **Lot owner should pay for such increased excesses.**
 - **In addition OC insurance premiums should be paid by owners based on their respective Lot Entitlements as the building sum insured is based on the replacement cost of the lot which is generally what the Lot Entitlement figures as based upon. It is only fair that owners with higher valued properties contribute more to the insurance premium (this is sometimes not taken into account in the Lot Liability calculations). This would be in line with QLD legislation.**

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?
 - **Contracts entered into by developers should be limited in duration or have to be confirmed at the first AGM where lot owners are present. Such existing contracts should have clauses that stipulate the contract must be approved at the next AGM after settlements have occurred.**
 - **Developers should be excluded from voting on matter pertaining to defects.**
 - **Developers should be prevented from appointing associated companies with contacts with the OC.**

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

Nothing to comment.

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

- **A proxy holder should be limited to holding proxies for no more than 10% of the total lots in the OC (consistent with QLD legislation) as this prevents proxy farming) – if the OC has under 10 lots then they can only hold 1 proxy.**
- **Committee members appointing proxies for a Committee meeting should only be able to give their proxy to another Committee member. Committee members should only be able to hold one proxy per members (consistent with QLD legislation). I have experienced many circumstance where the lot owners at an AGM have voted a person to the Committee who in turn gives their proxy for the Committee to another person who the owners at the AGM did not want on the Committee. This is not in the interest of Lot owners and only those elected by the OC should be representing them on the Committee.**

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

- **See above.**

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

- **The chairperson's casting vote should be removed as no one Committee member should have more voting rights than another.**

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

- **No – this may allow developers to prevent owners for voting on matters that may have a detrimental effect on the developer and would be unfair for the lot owner. Generally lot owners do not fully read their contract of sale so would easily miss such an inclusion if permitted.**

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

- **Voting at general meeting should be altered to that used in QLD where voting papers are issued and owners can choose to either vote via the voting paper or attend the meeting. This results in greater representation of lot owners at a meeting allow more owner to have their say on matters. Attending meetings or giving a proxy is not suitable to a lot of owners.**
- **Owners wishing to submit motions for an AGM or nominate for the Committee should do so by the end of the financial year of the OC. This allows for adequate time before the AGM for the secretary to prepare for the meeting, and can allow for an agenda with all items to be discussed to be issued to owners, rather than have new topics being brought up on the day of the meeting that owners have no knowledge of to make an informed decision.**

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

- **To achieve a Special Resolution currently you are required to obtain 75% of the total lot entitlements of all lots in the OC, this should be changed to all lots represented at the meeting (or those submitting a ballot paper). This will be consistent with QLD and NSW legislation who only take in those voting at a meeting, not all lot owners in the OC. This would result in those owners voting to have their say achieve an outcome and not have the views of those taking the time to attend a meeting to be overridden by those owners that choose not to attend or simply don't care.**

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

Nothing to comment.

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

Nothing to comment.

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

- **Tenants can express their views to the owner of their Lot and the lot owner can pass these concerns on to the Owners Corporation should they wish.**

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?

- **Committee size should be restricted to 7 members (as per other states in Australia). Large Committees are dysfunctional and often result in no actions being taken on matters due to the dysfunction.**
- **Chairperson should not have a deciding vote.**
- **Minutes of meeting must be issued within 14 days of the meeting. Currently there is no requirement to issue minutes at all unless where an interim special resolution was made.**

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?

- **Current arrangements are sufficient – Owners Corporation to approve all such requests that significantly change the external appearance of a lot.**

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

- **Ability to fine residents whose behaviour negatively affect the external appearance of the lot, e.g hanging washing over the balustrade or elsewhere on the balcony. Residents routinely ignore requests to remove washing from balconies and due to cost the OC cannot take the matter further (see Q47)**

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?

- **Access must be allowed to be restricted to certain areas of Common Property for OH&S reasons.**
- **Access to recreation areas should be able to be restricted to those Lot Owners who have paid their fees up to date and if the lot owner (or resident) breaches rules then access should be able to be restricted for a period of time (access to their apartment will always be granted). e.g. residents who vandalise gym equipment should be prevented from accessing the gym.**

Rules of the owners corporation

- 42 Who should comply with, and be bound by, the rules? Should ignorance of the rules be a consideration?
- **Everyone owning, occupying, visiting an Owners Corporation should be bound by the rules. Ignorance of the rules has never been nor should it be a reason for breaching rules**
- 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?
- **The owner of the Lot should at all times be responsible for themselves and their guests or tenants for any breaches, whether "permitted" or not.**
- 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)?
- Nothing to comment.**
- 45 Are there any other issues relating to the coverage of the Model Rules?
- **The responsibility of dealing with and attending to leaks within Lots is very common and reference to the s16 of the Water Act 1989 should be made within the Model Rules to make it clear.**
- 46 What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?
- Currently requirements in the Act are sufficient when dealing with changes to the appearance of a lot which may include sustainability items.**
- 47 What are your views about civil penalties for breaches of owners corporation rules?
- **Owners Corporations should be able to fine lot owners for breaches of the rules, fines should be related to "fee units". The vast majority of rules being breached in Owners Corporation do not progress to VCAT for enforcement. Example would be a resident creating excessive noise on a regular basis (i.e. parties every weekend), whilst the Owners Corporation can hold a grievance meeting and issue breach notices, if the breach persists the Owners Corporation are not willing or more pointedly do not have the funds to spend to take such a person to VCAT and spend multiple days at VCAT (Directions Hearings – Compulsory Conferences – Final Hearing) which can result in the Owners Corporation spending many \$1000's to achieve an order from VCAT that simply will state the owner must adhere to the rules. If they don't then the Owners Corporation has to continue the expense to pursue this further. Being able to fine a resident at the beginning of the process will allow for such rules to be taken more seriously by residents. Obviously if fines are disputed then they can go through the dispute process with the Owners Corporation. Reference can be taken from the South Australian legislation on this topic.**
- 48 Are there any other issues relating to the rules of owners corporations?
- **Owners Corporation should be able to set rules on short stay accommodation and be able to limit lengths of stays in apartments in their particular Owners Corporation to what they deem fit and resolved by special resolution at a General Meeting.**

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?

- **Those that are inspecting the records should pay reasonable costs for the Owners Corporation or Manager to prepare the records for such inspections in addition to the time during the inspection as such inspections result in questions and assistance provided to those inspecting to find information they are seeking.**
- 50 Are there any other issues relating to owners corporation records you wish to raise?
- Nothing to comment.**
- 51 What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?
- **Purchasers should conduct their own investigations with council if the relevant planning instrument allows for short stay accommodation in a particular building. In addition, Owners Corporations do not know how many short stay apartments are operating in the building at any given point in time, so to be required to list how many there are would never be accurate and is therefore not appropriate to include in the certificate.**
- 52 Are there any other issues relating to owners corporation certificates?
- Nothing to comment.**

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 be able to dispense with the dispute resolution process if they feel the breach is flagrant and recourse to the dispute resolution process would be futile.**
- 54 Are there any other issues relating to dispute resolution?
- **The dispute process is cumbersome and not affective. Currently when a dispute is lodged the first course of action is to hold a Grievance meeting with all parties in an attempt to resolve the matter and if they don't then a breach notice or VCAT action can commence. In my view Owners Corporations should be able to firstly issue breach notice and should that fail the Owners Corporation can determine if they wish to hold a Grievance meeting or go directly to VCAT for a resolution. The latter is more appropriate when the outcome of a grievance meeting is known before it takes place due to the personalities involved in a dispute.**
 - **In addition to the above, s157 relates to issuing Final Notices, which is a pointless exercise and should be deleted from the Act. The Notice to Rectify Breach (s155) gives a person 28 days to rectify the breach which, if they were to do this, is plenty of time to commence action to stop the breach. By issuing a final notice with another 28days to rectify the breach is a waste of time and resources when the outcome will be the same as the first 28 days period.**

Applications to VCAT

- 55 What factors should VCAT consider in determining disputes about the validity of an owners corporation rule?
- **Rules set and agreed upon at a general meeting of the Owners Corporation should be what VCAT relies upon to determine a dispute within that particular Owners Corporation (subject to any conflict with the Act itself). VCAT should not determine whether or not a rule is suitable for a particular Owners Corporation, this is up to those that own lots within the particular plan.**

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

Nothing to comment that hasn't already been mentioned above.

Part 5 of the Subdivision Act

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

Requirement for dissolving an Owners Corporation should be reduced to 85% of all Lot owners.

61 What are your views about:

- who should set the initial lot liability and entitlement, and any criteria that should be followed
 - **Licensed Surveyor – criteria used should be consistent across all plans and be more adequately described on the plan of subdivision – existing comments are very vague in terms of how Lot liabilities and entitlements are calculated.**
 - **Lot Entitlements should be based upon the replacement value of the Lot (not the purchase value)**
- how lot liability and entitlement should be changed, and
 - **Should be able to be done via Special Resolution, as changes of circumstances or to the building can occur throughout the lifetime of a building.**
- any time limits for registering changes to the plans of subdivision with Land Victoria.
 - **Should be 30 days after the resolution of the Owners Corporation to approve the changes.**

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?

Nothing to comment.

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

Nothing to comment.

Submission by:

Tony Overell

Senior Owners Corporation Manager

tony@theknight.com.au

Experience

12 years' experience in the property industry working as an Owners Corporation/Body Corporate Manager in the following jurisdictions:

- Victoria
- Queensland
- Middle East – Sultanate of Oman