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Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria

By email: consumerpropertylawreview@justice.vic.gov.au

**CSV Submission to Options for reform of the
Owners Corporation Act 2006**

1. BACKGROUND:

Consulting Surveyors Victoria (CSV) currently represents 120 member firms that have as principals or employees the vast majority of Licensed Surveyors that produce, lodge for certification and manage the plans of subdivision that create the more than 30,000 new parcel titles (including both land and building parcels) that come into existence in Victoria each year. Our members' clients range from the largest of national and international development companies through to a 'mum and dad' individual 'developer', undertaking a once in a lifetime dual occupancy development of their family home.

Our members are the originators of plans of subdivision that create subdivisions involving owners corporations, act as advisors to individual property owners and developers, large and small, whilst liaising closely with Land Use Victoria on an on-going basis to maintain and enhance the quality and usability of such plans of subdivision. Our members also interact with the public, owners corporation managers, solicitors, estate agents and conveyancers throughout the state on a regular basis in relation to title dealings, subdivision, redevelopment of existing plans and owners corporation management. On that basis the Association's members have a distinct interest in a number of particular aspects of the Options Paper for reform of the *Owners Corporation Act 2006*.

We also note that the *Subdivision Act 1988* covers every type of subdivision in Victoria and that Part 5 of that Act needs to be considered in the context of the full Act and all Regulations associated with the Act, not just in isolation. Additionally the context that all types of owners corporation subdivisions, ranging from some dual occupancy two lot subdivisions, through unit developments of 3 -100+ lots, low rise apartments, apartment towers, complex mixed use developments, vacant lot developments incorporating shared facilities (such as recreational complexes and golf courses) and even rural subdivision situations, fall within Part 5 requires consideration in evaluation of potential impacts of legislative change.



Section 37 of the *Subdivision Act 1988*, dealing with Staged Subdivisions, is one section of the Act which is of particular relevance to efficient subdivision of some subdivisions involving owners corporations.

We believe that surveyors strive to ensure a good outcome in their subdivisions, whether of simple or complex nature, and see it as their professional duty to lead the Plan of Subdivision preparation which, for complex projects, requires input from all stakeholders – i.e. as Licensed Surveyors they co-ordinate and lead as the subdivision experts. The motivation to co-ordinate and lead coming from the desire to ensure good future operation of the structure created in the plans of subdivision for the benefit of the eventual individual property owners, the cadastre, their clients and the community.

2. GENERAL COMMENTS:

As an organisation Consulting Surveyors Victoria will generally limit the comments in this submission to matters within the Options Paper that directly relate to our members' areas of expertise and experience.

CSV firmly believes that a number of the options proposed for amendment of Part 5 of the *Subdivision Act 1988* have significant overlap between the interests of efficient owners corporation management, appropriate title definition and dealings affecting owners corporation plans in a very broad sense and which require significant workshopping of any proposals for change, involving all relevant stakeholders (CSV being a significant stakeholder). **We believe that such workshopping must occur prior to the adoption of any of the proposed options, or other actions, as the basis of amendment of the *Subdivision Act 1988*.**

We believe that it is essential to maintain a degree of simplicity in relation to the setting of lot entitlements and lot liability for the majority of owners corporation subdivisions and that any detailed principles should be specified as guidelines, rather than mandatory principles, due to: (1) the many and varied factors influencing these matters, (2) the long lead time, in many instances, between preparation of an initial plan of subdivision for contract purposes and the ultimate registration of the plan and (3) the potential for litigation challenging the basis of setting of entitlement and liability under prescriptive requirements.

2.1 Surveyors Workshop

Subsequent to our submission to the Consumer Property Acts Review Issues Paper in April 2016 CSV conducted a workshop involving a cross section of Consultant Licensed Surveyors undertaking subdivisions incorporating Owners Corporations providing their views on a number of aspects related to such subdivisions. The workshop initially reviewed the background to the Consumer Property Acts Review and in particular the then recent ACSV and Strata Community Australia (SCA) submissions to Issues Paper 2 of that review. The notes from the workshop are included as an appendix at the end of this submission.

At the conclusion of the workshop there was consensus that there is not currently a clear and definitive methodology accepted by Victorian consulting surveyors for the definition of lot entitlement and lot liability and unanimous resolution matters need constructive action. Further depending on the outcomes and recommendations from the Consumer Property Acts review it considered that it would be desirable (potentially essential) to provide / formulate documentation to provide further guidance for consulting surveyors in these areas.

3. SPECIFIC RESPONSES:

Part 5 of the *Subdivision Act 1988*

Q. 54. How much should developers' property rights regarding initial settings of lot liability and entitlement give way to considerations of fairness?

Consulting Surveyors Victoria believes that the determination of lot entitlement and lot liability should be based on a fair and equitable outcome for all lot owners and we believe that in most instances that this is the current premise that most surveyors operate under when they prepare plans with minimal input from developers. As discussed under the Surveyors Workshop section above there are multiple factors that influence the determination of liability to a large degree and of entitlement to a lesser degree.

We note that under Stakeholder feedback there is a dot point referring to '*developers retaining lots with disproportionately low liability or disproportionately high entitlement*' and comment that, particularly in relation to staged plans of subdivision, there may be reasonable and equitable grounds for such occurrences and we believe that the relevance and occurrence of this issue should be further evaluated before it is accepted as a catalyst for change.

Option 20A: Retain the developers' discretion but place a time limit on their application.

We believe that there are some instances where the discretion should be retained, but with due consideration of 'just and equitable' principles. Whilst we see benefit in a time limit for some situations we also anticipate that in many instances there will be limited or no desire for reassessment and legislating for a mandatory reassessment may be counter-productive.

Q. 55. If developers rights should give way to fairness, which of the options 20C to 20E (sic) for the initial setting of lot liability and entitlement best ensures fairness, and why?

Consulting Surveyors Victoria believes there is a degree of merit in each of the options presented and believes that the principles in each option may currently be applied in many instances. However we have significant concerns with the practicality of adoption of prescriptive requirements given the broad range of subdivision types and that application of some of the principles may cause unnecessary and unwarranted litigation concerns for surveyors.

Option 20B: Apply the current principles for changes to lot liability and entitlement to initial settings - simple principles.

As noted above we believe that these simple principles are currently applied in many instances and concur that this is a relatively simple and logical option. We believe that incorporation of some additional guidelines (developed through the workshop process we have previously advocated) for developers and surveyors would benefit the process.

We note that, whilst there is no clear and definitive methodology utilised by all surveyors, many surveyors adopt separate methodologies for different types of development e.g. using relative lot areas for Entitlements and Liabilities in horizontal developments, and relative values for Entitlements in vertical developments, with Liabilities in vertical developments being based on either value or area – with variations to the methodology, as appropriate depending on the individual development.

As outlined in the CSV Workshop Appendix, many owners corporations could be considered to be similar to a municipal council, where the statutory principle of “capacity to pay” is used in determining council rates, based on improved property value. This concept supports relative lot value as the simple basis for both Entitlements and Liabilities.

Option 20C: Set lot liability and entitlement according to more detailed principles

Whilst this option provides more detailed principles the interpretation and application of the principles requires subjective and quantitative analysis of multiple aspects that are not part of a surveyors core expertise and would require a multi-disciplinary approach. We believe that it would only be possible to have detailed principles if these are specified as guidelines rather than prescriptive principles and that there is a clear limit on avenues for disputing the values adopted. The simple notions of ‘reasonableness’ and ‘a little more or a little less’ relative to the settings of the lot liabilities and entitlements in the context of the initial plan of subdivision should apply. (Any substantial changes to the nature of lots within a plan of subdivision during the development period would, of course, require review of the initial settings).

Option 20D: Set lot liability according to specified criteria

The response outlined in Option 20C above applies, plus it is noted; (1) that a plan of subdivision essentially defines boundaries and cannot define use and occupancy and these factors can vary significantly over the life of a building or development and (2) that reference to market value at the time of lodgement (we presume this is intended to refer to lodgement for registration) is impractical due to the long preceding contractual arrangements that have occurred in many instances.

Q. 56. Under what circumstances could options 20B to 20D be implemented by the developer rather than a licensed surveyor (which could be cheaper and quicker)?

In most smaller owners corporation developments it is our members experience that developers (be they individual property owners, builders or small scale developers) have minimal input to the setting of lot entitlement and liability and that they generally rely on their consulting surveyors expertise and advice. For larger developments there is quite often a team approach involving at least a number of: the developer, surveyor, solicitor, project manager, future owners corporation manager, valuer and marketing personnel. We do not believe that a general principle of implementation by the developer alone would be practical.

Q. 57. To what extent should the surveyor (or developer) be required to set out the criteria were applied in achieving the settings?

Current requirements of Land Use Victoria for lodgement of an owners corporation plan of subdivision include provision of a signed declaration of the method for setting of lot entitlements and lot liabilities. We would expect this requirement to continue.

Q. 60. Which option, and why, is the best and fairest way to provide for a more flexible process to sell buildings governed by owners corporations?

CSV considers Options 21A and 21B are the best and fairest options to balance the interests of the majority and the individual in a manner that balances safeguards and barriers. Option 21B is considered the more workable and to be more flexible for the greater good, without sacrificing any individual owner's rights, based on our understanding that this option is based on considered analysis and refinement of the NSW legislation.

Q. 61. Under Option 21D, which voting thresholds and VCAT processes are preferable, and why?

Whilst not advocating this option, CSV prefers the Tier 1 thresholds as those providing the best balance of interests.

Q. 62. Under Option 21E, which sub-alternative is preferable, and why?

CSV does not believe this option should be adopted.

4. ADDITIONAL ISSUE (UNANIMOUS RESOLUTION):

As noted in our previous submission to the Issues Paper, CSV believes the difficulty in obtaining appropriate resolutions (especially unanimous resolutions, requiring 100% agreement – and then also for mortgagee consent for all lots) for some dealings/actions in relation to owners

corporation subdivisions is a major hurdle to efficient and desirable outcomes in many cases. Such dealings include minor dealings with common property (both for addition to and removal from). For example, we are aware that the transfer of a small portion of existing common property, on which a public footpath was required after commencement of development, to a road authority has been significantly delayed and then stymied initially by the need for a unanimous resolution and then by the need for mortgagee consent for all lots. We believe that a better balance needs to be struck between the rights of existing individual owners (and mortgagees) and the overall 'common good' within an owners corporation development, potentially through a more flexible definition of unanimous resolution, as exists in some other jurisdictions. We firmly believe that this matter should be considered in the context of any changes to the Subdivision Act 1988 as part of this review.

5. CONCLUSION:

CSV believes that the combined operation of the Owners Corporation Act 2006, the Subdivision Act 1988 and related Regulations and Licensed Surveyors' role in this have provided Victorians with a generally effective and efficient titling and management system for plans of subdivision for many years. We acknowledge that some review is warranted to keep the system dynamic and effective and that establishment of some additional guidelines relative to matters contained in this submission. As noted in the submission, we believe that such workshopping must occur prior to the adoption of any of the proposed options, or other actions, as the basis of amendment of the *Subdivision Act 1988*.

Yours faithfully,

A handwritten signature in black ink, appearing to read "A Harman", is written over a white rectangular background.

Andrew Harman
President

Appendix

CSV SURVEYORS WORKSHOP NOTES

Subsequent to our submission to the Consumer Property Acts Review Issues Paper in April 2016 CSV conducted a workshop involving a cross section of Consultant Licensed Surveyors undertaking subdivisions incorporating Owners Corporations providing their views on a number of aspects related to such subdivisions. The workshop initially reviewed the background to the Consumer Property Acts Review and in particular the then recent ACSV and Strata Community Australia (SCA) submissions to Issues Paper 2 of that review.

Extensive discussion in relation to the setting of **LOT ENTITLEMENT AND LOT LIABILITY** resulted in the raising of points of view including:

1. Lot Entitlement and Lot Liability should be considered independently (and should not necessarily be identical for a particular lot) and should be assessed against the nature of a particular development.
2. Determination of lot entitlement and lot liability should be based on a fair and equitable outcome for all lot owners.
3. For some developments (smaller ones in particular) equal entitlements and liabilities across the board are generally accepted as the norm by both developers and purchasers.
4. Entitlements
 - Value should be the primary basis for lot entitlement. However: (a) What value? - *Proposed sale price or formal valuation (bearing in mind some price lists from early in the development process may be questionable)* (b) What about developments staged over a number of years? – *These should be related to the equivalent value at the time of the first stage.*
5. Liabilities
 - The Owners Corporation budget, where available, should be a primary factor when considering determination of lot liability, particularly in larger and mixed use developments. In looking at elements of the budget, the insurance element is closely

linked to value but commercial elements are linked to recurring costs. Use of early timeline developer's budget figures may raise validity issues.

- Use of lot area as the basis for evaluation of lot liability may be appropriate.
 - Many Owners Corporations could be considered as mini pseudo councils and consequently a parallel to valuation being the primary factor for municipal rating of properties (where individual land owners are sharing the overall total costs of operation whether they benefit from a particular service or not) could be argued as appropriate for the determination of lot liability.
 - Mixed use developments require careful consideration of the Owners Corporation structure and should involve a benefit test when determining liability.
 - Liability of car parks in residential buildings may need to be determined independently of the residential lots.
 - Complex evaluation of lot liability may not be warranted when only small variations in actual dollar terms would result.
6. Diversity of Owners Corporation plans of subdivision makes adoption of standard requirements/ criteria difficult.
 7. Some other Australian jurisdictions do not provide for both entitlement and liability to be defined.
 8. Surveyors should ensure that lot entitlement and lot liability documentation they prepare is fit for purpose.
 9. Issues regarding the long lead time for developments (large scale high rise, in particular) and the need to provide initial contract documentation two or more years before registration of the plan of subdivision.

It is evident from the above discussions that there is not a 'standard' practice for allocation of lot entitlement and lot liability due to the various influencing factors discussed.

Further discussion occurred in regard to **UNANIMOUS RESOLUTION** matters.

Points raised during discussions included:

1. The current requirement for formal 100% agreement for a unanimous resolution is generally found to be difficult to achieve for various reasons. This circumvents some positive, equitable and beneficial dealings from occurring.
2. A more achievable requirement, which also provides for suitable protection to individual lot owner interests, is desirable.
3. An appropriate mechanism for the termination of Owners Corporation plans of subdivision at 'end of life', collective sale or redevelopment phases, with appropriate protection for individual lot owner interests, is necessary.
4. Mortgagee consent requirements to minor dealings with common property add significant complexity to the execution of such dealings, with little tangible benefit to the interests of the mortgagees.

At the conclusion of the workshop there was consensus that there is not currently a clear and definitive methodology accepted by Victorian consulting surveyors for the definition of lot entitlement and lot liability and unanimous resolution matters need constructive action. Depending on the outcomes and recommendations from the Consumer Property Acts review it will be desirable (potentially essential) to provide / formulate documentation to provide further guidance for consulting surveyors in these areas.