

# Consumer Property Law Review: Options for reform of the *Owners Corporations Act 2006*

## SUBMISSION

From:

Michael Nugent

Director and Owners Corporation Manager – Bencorp OCM Pty Ltd

Michael Nugent is a qualified accountant, Certified Owners Corporation Manager, Member Strata Communities Australia. Michael was instrumental in developing the accounting standards adopted as best practise by SCA (Vic) and was the industry representative on the Short Stay Enquiry Panel.

### 1.1 Licensing versus registration of owners corporation managers

#### COMMENTS:

An owners corporation manager, even of a small 4 unit development, is managing assets well over \$1,000,000 and some large owners corporations have a turnover in excess of \$1,000,000 per year, all on behalf of owners. To consider that managers have no minimum training, educational qualifications or licencing requirements, other than minimum public liability insurance, is unsatisfactory and offers no protection to property owners or to the professionalism of the industry.

Managers have far greater knowledge of Owners Corporation legislation than owners and I have seen repeated abuses of this knowledge to insert unfair terms into management agreements, propose resolutions at AGMs that will benefit them and protect their management and, on occasions, bully members to refrain from action to remove the manager.

Managers have a fiduciary responsibility to owners for the funds they manage on behalf of their clients. Separate bank accounts for each development (not for each owners corporation in a multi stage owners corporation) is essential. A prudent Committee should obtain evidence from their manager that funds on hand are actually held by the manager through copies of bank statements etc. Pooled funds should not be permitted.

#### RECOMMENDATIONS

1. Introduce a full licensing scheme for owners corporation managers
2. Introduce a separate licensing scheme established for professional owners corporation managers. The scheme should include the licensing of individuals and corporations. Additionally, the Regulator should have the power to deregister individual managers or companies in the event of serious breaches or misconduct. Appeal against deregistration could be made to VCAT.
3. A requirement of registration should be that the applicant is a member of SCAV

While acknowledging there will be costs to set up and administer the licensing scheme, the advantages will outweigh the costs. Too many industries go unregulated until an incident happens and then action is taken. This is an opportunity for the Government to raise standards and protect the public.

The advantage to the industry is sufficient, to enable a large part of the costs to be passed onto applicants by way of annual registration fees. By making membership of SCAV a requirement of registration, much of the costs can be pushed back onto the industry.

Any perceived barrier to entering the industry would be outweighed by greater career prospects for staff and professional status of managers.

What other eligibility criteria should be considered?

Like many professions, a manager must be a member of the appropriate industry body and the SCAV is in a position to act in this capacity. It requires minimum professional development and can, over time, introduce minimum educational standards

What other matters are important to consider for the transitional arrangements?

Managers who have had at least three years membership of SCAV and three years certified experience as an owners corporation manager with a licensed firm, would be exempted from undertaking educational standards if they provided evidence of adequate attendance at professional development education courses.

## 1.2 Maintaining the knowledge and skills of owners corporation managers

The discussion paper raised two options

- **Option 1A** – Introduce a full licensing scheme for professional owners corporation managers.
- **Option 1B** – Enhance the current registration scheme for professional s corporation managers.

RECOMMENDATION:

1. That these options are not mutually exclusive and that both be adopted
2. A requirement for annual registration is that the registrant be a member of SCAV and, to retain membership, the Registrant must meet the CPD requirements

## 1.3 Unfair terms and termination of management contracts

COMMENT:

It would be far too hard to define what terms may be considered to be unfair.

RECOMMENDATION:

1. A standard contract be created by CAV and SCAV and that this contract be the only one permitted (in much the same way that REIV has standard contracts for the sale of property and for leasing properties).
2. That the contract does not permit:
  - a term of greater than 3 years,
  - that no automatic renewal beyond 3 months (which is the normal charging period for the OC manager)
  - the Manager to withhold owners corporation funds to satisfy any claim by the manager against the OC. A separate claim can be made by the Manager for damages (ie loss of profits, not gross fees)

3. That Developers are not permitted to enter into ANY contracts (OC Management, cleaning or any other services) on behalf of the OC with an associated entity within the meaning of the *Corporations Act 2011*.
4. Prohibit owners corporations from refusing consent to an assignment of the contract; This could be by a term that requires the owners corporation's consent but that consent not to be withheld unreasonably.
5. The appointment of a manager can be revoked at any time (s.119(6)). A Manager should not be permitted to refuse to hand over the records, even if the manager considers that the removal was in breach of the contract. The right of a Manager to take action for unreasonable dismissal should not be restricted, however any claim must be for damages (ie loss of profits) and not be for loss of fees.
6. Owners Corporations must be aware that unilateral termination of a contract without due cause and following the proper dispute processes set out in the management agreement will leave the owners corporation exposed to a claim that is likely to succeed.

## 1.4 Duties and obligations of owners corporation managers

### RECOMMENDATIONS:

1. That managers must disclose, by way of a section in the annual report to members tabled at the AGM, any commissions, fees or other benefits received from suppliers to an OC. This will include fees from practises such as requiring suppliers to be "registered" with the manager before they can be engaged to provide services to an OC. It must also disclose any entity that provides a service to the owners corporation in which the manager has an association.
2. Access to financial documentation is adequate at present. Under the current Act a member (and others) is entitled to come to the offices of the manager to inspect the records of the OC. If any owner has concerns they should avail themselves of this right.
3. Pooled bank accounts between unlimited owners corporations should be prohibited, but permitted between limited owners corporations and the unlimited owners corporations on the same plan of subdivision. While there are dangers of one OC being in a negative position, the advantage to owners outweigh these concerns. The major advantage is to for the manager to issue one invoice for all OCs and for the Owner to pay all fees with one payment. This is important when paying by BPay with different reference numbers for each OC causing a risk of errors by Owners.
4. OC Managers have a fiduciary responsibility to hold funds in trust on behalf of the OC. Formal recognition as a "trust account" similar to estate agents and solicitors is necessary.

## 2 Responsibilities of developers, occupiers and committee members

### 2.1 Developers' obligations

#### COMMENTS

The Developer (first owner) has an obligation to the purchasers of the development, particularly in relation to the building contract and, therefore, in relation to defects. This obligation should continue for the warranty period (generally 10 years) and there is no reason why the developer should be released from their obligations just because they are no longer Lot owners.

There has been a history of some unscrupulous developers setting unrealistic apportionment of entitlement and liability that unfairly advantages the developer. Additionally, over time, there are circumstances under which the initial apportionment, which may have been fair at the time has become unfair. This can arise in staged plans of subdivision, in particular. Under current legislation, a unanimous resolution is required to change the apportionment and this is almost impossible to achieve, given that one or more owners would be agreeing to pay more.

Currently, a statement setting out the basis on which units of entitlement and liability have been set is required to be lodged when the Plan is lodged for Registration. I consider that this form should be adequate if completed properly and the basis appears to be reasonable. Land Victoria, when considering Registration of a plan, could check the form and sign off on it.

#### RECOMMENDATIONS

1. That the obligations of the original owner should extend to 10 years (generally building warranty period). These obligations should apply regardless of whether the first owner continues to own a lot within the Plan of Subdivision.

### 2.2 Duties and rights of owners and occupiers

#### COMMENT

I consider that the current legislation is operating satisfactorily and does not require alteration.

### 2.3 Duties of committee members

#### COMMENTS

Inherently, committee members have a conflict of interest in almost every decision that they make. Financial decisions will affect them directly as all share the costs of running an owners corporation; building decisions will affect the appearance, services, facilities or value of the building in which they share ownership; and behavioural issues affect the community of which they or their tenants are a resident.

Accordingly, I believe that the obligations for Incorporated Associations guidelines may not be suitable.

It seems a logical improvement to add the obligation to act in the best interests of the Owners Corporation.

#### RECOMMENDATIONS

1. That the obligation to act in the best interests of the Owners Corporation be added to the existing obligations set out in the Act.

## 2.4 Powers of owners corporations regarding community building, water rights and abandoned goods

### 2.4.1 Community building

#### COMMENT

I comment only on abandoned goods. An owners corporation regularly has to deal with bikes and other goods that are considered to be abandoned and the rights of the owners corporation to deal with these are unclear. I consider the guidelines set out in the *Residential Tenancies Act* for dealing with tenants' abandoned goods would be appropriate.

#### RECOMMENDATION

1. That a section be inserted in the Act that reflects the guidelines set out for dealing with tenants' abandoned goods in the *Residential Tenancies Act*.

## 3 Decision-making within owners corporations

### 3.1 Voting thresholds and the use of proxies

#### 3.1.1 Proxies and voting limitations

##### COMMENTS

The concept of interim resolutions in the event of a quorum not being present has overcome the failure of members to attend an AGM (albeit with a 29 days' delay). Additionally, interim Special Resolutions have made it easier for even very large OCs to obtain the votes required if the Committee properly presents its case and makes it easy for members to lodge a ballot. I do not consider a change is required.

While proxy farming can give rise to abuse, I believe that owners have the right to give a proxy to whomever they wish should not be restricted. No change is suggested.

The use of proxies at committee meetings is problematic. Committee members are elected and, just as a proxy cannot be passed on, an elected member should not be able to pass on their voting right to any other person. I do not favour enabling other Committee members being permitted to hold a proxy as it enables just one or two members to achieve a quorum and votes as they wish rather than as a majority of the Committee making the decisions.

Tenants have no financial interest in the Owners Corporation so should not have any rights in decision making of the OC. No change should be made.

##### RECOMMENDATIONS

1. That the right of a Committee member to appoint a proxy for a Committee meeting be removed.

#### 3.1.2 Decision-making powers for managers

##### RECOMMENDATION

The proposals of:

- where *no* lot owners attend a properly convened meeting (as distinct from the situation where the lot owners present are insufficient for a quorum) the owners corporation manager should be permitted to make interim decisions on the proposed resolutions, except if the resolution involves an amount greater than 10 per cent of the budget or involves the manager's contract, and
- if a special resolution fails to obtain the 75 per cent level or the level for an interim special resolution (at least 50 per cent of total lots in favour and not more than 25 per cent against) but there are no votes against the resolution and there is a quorum, the resolution should pass.

are good proposals and should be adopted within the Act. This is better than empowering owners to determine what powers their owners corporations manager is given in respect to passing interim resolutions. I suggest that the more uniform an owners corporations "constitution" is, the easier it is to inform owners.

#### 3.1.3 Special resolutions

##### COMMENT

As a manager specialising in larger owners corporations, I am very aware of the difficulty in passing Special Resolutions. I consider that the current legislation does provide sufficient opportunity to have Special Resolutions passed, albeit as interim Special Resolutions.

In the event of a Special Resolution not being practical for any reason, there should be a fall back position

#### RECOMMENDATION

1. That s.170(c) of the Act be amended to include Special Resolutions and reworded to read:  
*a requirement under this Act to have a unanimous resolution or special resolution*

## 3.2 Committee size and processes

### 3.2.1 Committee size

#### COMMENT

Having a maximum of 12 committee members reduces the number of occasions when an election would be required. Members do not like having to decide which of their number should be elected and who will miss out.

Having 12 members also assists in having a quorum for committee meetings.

A smaller committee is, from my experience, a more effective committee but, generally seven or so of the twelve the productive members, with the others just passengers.

Owners Corporations can resolve at a meeting to limit the size of its Committee so, on balance, I suggest the current committee maximum of 12 is better than a lower number

#### RECOMMENDATION

1. That the maximum size of the Committee remain at 12 members
2. That CAV prepares an instruction paper on the obligations and duties of committee members and this should include a conflict of interest model. The OCX is required to distribute this paper to all Committee members within 28 days of the election at an AGM

Owners Corporations can resolve at a meeting to limit the size of its Committee so, on balance, I suggest the current committee maximum of 12 is better than a lower number

### 3.2.1 Committee ballots

#### COMMENT

Decision making by Committees is regularly done by email ballots and the current legislation does not provide for this. A meeting can be held with committee members attending on line but this is often impractical. A means by which Committee can make timely decisions between Committee meetings is required.

#### RECOMMENDATION

1. That Committees be empowered to make decisions by email and that decision is made when a majority of the Committee respond in favour or against the proposal.

## 4. Dispute resolution and legal proceedings

### 4.1 Internal dispute resolution process

#### COMMENT

Rather than issues instigated by the Owners Corporation being an issue, I consider action taken by an owner/resident against the Owners Corporation to be the real problem. In such cases, the Grievance Committee is being asked to mediate on the Committee's own decisions.

I support the intention of the legislators that disputes should try to be resolved internally before initiating legal action.

Part 10 Division 2 of the Owners Corporations Act gives certain powers to the Director. To my knowledge, the Director has never taken any action and, I consider, that Complainants believe they can enrol the assistance of Consumer Affairs Victoria to assist in resolving an issue. However this is not the case and consideration should be given to a more accurate assessment of what the Director actually does (which is give advice).

#### RECOMMENDATION

Overall. I consider the Act works reasonably well and, despite my comments above, no changes are really essential.

### 4.1 Civil penalties for breaches of owners corporations rules

#### 4.1.1 Civil penalty maximum amount

##### COMMENT:

Despite VCAT's failure to impose civil penalties, I suggest that the amount of \$250 is woefully inadequate for serious breaches. Additionally, the charge has not increased since the Act was introduced in 2006.

Civil penalties must be imposed only by independent adjudicators. To enable Owners Corporation to potentially benefit from penalties that it decides itself or from payment to it for penalties imposed by others does not meet reasonable governance.

##### RECOMMENDATION:

1. Civil penalties should be based on penalty units so that it retains relevance with current costs.
2. Owners Corporations should not profit directly from any penalties imposed

### 4.2 Initiating legal proceedings

#### COMMENT:

As discussed earlier, it is challenging but not impossible for an Owners Corporation to pass a Special Resolution, particularly as an Interim Special Resolution.

Developers/builder are aware of the legislative requirement to obtain a Special Resolution and use often this to avoid undertaking defect rectification. However, where there are significant problems, the Owners Corporation should be able to pass the Special resolution. Developers must act in the best interests of the

Owners Corporation (refer 2.1.1) and should not be entitled to block a special resolution if the matter affects themselves.

The requirement to pass a Special Resolution restricts Committees from being overzealous in pursuing a legal solution. Regularly the cost of rectification is less than legal costs.

Owners corporations should be free to take action in any court for recovery of debts from owners or and enforcement of rules. Generally, VCAT is the most suitable jurisdiction, but not always.

RECOMMENDATION:

1. If Developers/Builders are still owners, their votes be excluded from any Special Resolution that directly affects them. (in much the same way that an OC Manager cannot vote in a decision related to OC Management).
2. That clause 18 (2) be amended to remove the words "*for an application to VCAT under Part 11*" be removed. This will enable a claim to be made in the in another Court if thought more appropriate.

## 5 Differential regulation of different-sized owners corporations

### COMMENT:

Owners Corporations should not be compelled to have professional managers regardless of their size. I am aware of large owners corporations that effectively “self-manage” (150 Clarendon being just one).

Owner Corporations with no common property are a different type of Owners Corporation than is contemplated in the current legislation.

The intention of the Legislators was to eliminate the need for one-off special resolutions for predictable maintenance costs in larger Owners corporations. This is a good approach and should be extended to all OCs with 4 or more members over time.

### RECOMMENDATION

1. That owners corporations with no common property should be exempted from large sections of the Act
2. The requirement for Owners Corporation to have a maintenance fund should be progressively lowered from Prescribed OCs to +75 members, then +50 and then +25 members.

## 6 Finances, insurance and maintenance

### 6.1 Defaulting lot owners

#### COMMENT

In most owners corporations, the fees are payable quarterly at the start of the quarter so I consider a Prepaid bond would impose an unreasonable burden on lot owners. Bonds should be administered like rental tenancy bonds and the administration of this is not warranted by the perceived benefit.

#### RECOMMEDATION:

1. Security bonds not be considered
2. The owners corporation be empowered to recover a *Regulated* final notice fee to an owner.
3. The owners corporation be empowered to recover legal fees incurred at scale rates from an owner or more if so directed by VCAT
4. Default judgements by VCAT should not be permitted unless Notice of the proceedings has been handed in person to the defaulting owner or their Agent.

### 6.2 Insurance

No Comments or Recommendations are made in respect to this section.

### 6.3 Maintenance plans and maintenance funds

#### COMMENT

The intention of the Legislators was to eliminate the need for one-off special resolutions for predictable maintenance costs in larger owners corporations. This is a good approach and should be extended to all OCs with 4 or more members over time.

There is little purpose in having a maintenance plan unless the owners corporation is required to raise sufficient funds to meet the expected expenditure in the plan

#### RECOMMENDATION

1. The requirement for Owners Corporation to have a maintenance fund should be progressively lowered from Prescribed OCs to +75 members, then +50 and then +25 members.
2. An owners corporation with an adopted plan must raise sufficient funds to cover the expected expenditure set out in the plan.

## 6.4 Increased expenditure arising from lot use

### COMMENTS

Relying on Units of Liability provides certainty to owners on the level of fees that they will be charged.

Other options for apportionment of charges adds undue complexity that is not warranted

### RECOMMENDATION

No changes are necessary.

## 7 Part 5 of the Subdivision Act

### 7.1 Common seals

#### COMMENT

The most common use of the common seal is used is on owners corporation certificates. In removing the requirement that a certificate bears the seal will increase the likelihood of a forged or unauthorised certificate.

### 7.2 Procedure for initial setting of and changes to lot liability and lot entitlement

#### 7.2.1 Initial settings of lot liability and entitlement

##### COMMENT

Pursuant to s33 (2) and (3) of the Subdivisions Act, the criteria for setting units of entitlement and of liability are different, however in many plans the units set are identical for both. This indicates that building surveyors are not applying the philosophy advocated in the Act

Currently, a statement setting out the basis on which of entitlement and liability has been set is required to be lodged when the Plan is lodged for Registration. The statements I have seen do not provide adequate detail.

I consider that this statement needs to be more detailed so owners can be properly appraised in the future on how units of entitlement and liability were arrived at. should be adequate if completed property and the basis appears to be reasonable. Land Victoria, when considering Registration of a plan, could check the form and sign off on it.

Units of entitlement and liability should be established by professional experts and not by untrained developers. Building surveyors are the most competent to undertake this work.

##### RECOMMENDATIONS:

1. Responsibility for setting units of entitlement and liability be placed on the building surveyor.
2. The statement to be submitted when registration of a plan is applied for must be more detailed and be reviewed by Land Victoria for adequacy and reasonableness.

#### 7.2.2 Current provisions for changes to lot liability and entitlement

##### COMMENT:

The impact of errors made when allocating units of entitlement and liability, or of deliberate under estimating can be significant on individual owners. While it appears that the threshold of a unanimous resolution is unrealistically high, in virtually all circumstances an Application is made to VCAT. A lot owner may apply to VCAT to alter the units of entitlement and/or liability so, to that extent, the threshold is quite low.

Such cases are expensive to run, requiring extensive expert witness evidence, and that accounts for there being relatively few cases.

##### RECOMMENDATION:

No change is required