

PROPERTY LAW
BUSINESS LAW
OWNERS CORPORATIONS
WILLS & ESTATES
RETAIL LEASES
CONVEYANCING
CIVIL LITIGATION
DISPUTE RESOLUTION
DEBT RECOVERY

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Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

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Dear Panel Members

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

I serve on the subcommittees of the Law Institute of Victoria and the Real Estate Institute of Victoria in respect of the above review. The respective boards of these institutions sign off on their final recommendations that have yet to be determined. Accordingly, I present my own submission as a solicitor and owners corporation manager. Your options publication is excellent and I hope that the eventual changes to the Act are significant, workable and appropriate.

Licensing v Registration of OC Managers

Page 11 of the Options Paper states that there are currently 11 individual estate agents who are also registered owners corporation managers. That is not a correct assessment as a number of estate agents operate their owners corporation business under a different corporate name.

1. Option 1A.

The practicality of formal training is a planned curriculum that covers all relevant topics. A system of professional training and legislative sanctions for improper conduct improves discipline and manages risk that produces competence and output. The benefits of a structured program outweigh the costs of implementing that program.

2. As with estate agency, managers should serve an apprenticeship before they become self-employed.

An estate agent should not be required to pay an additional fee if the agent also manages owners corporations. When completing an annual registration, an estate agent should tick a box that indicates its role as an owners corporation manager.

3. Professional indemnity insurance should be increased.

Maintaining Knowledge & Skills of OC Managers

4. Option 2A.

Only a mandated CPD program can guarantee performance. Information programs must be an adjunct to CPD and not a replacement. The annual statement to the Business Licensing Authority should provide a declaration from the licensee that CPD compliance has occurred.

5. Evidence is difficult to obtain and/or quantify but the choice between the two options is easy. Managers cannot be trusted to undertake learning unless it is a requirement of their practising certificate or organizational membership.
6. Adopt similar procedures as with other professions. Not aware of any.
7. Publish decisions of misconduct charges.

Unfair Terms & Termination of Management Contracts

8. There is no reason for not having both options but Option 3A is more important.

The Australian Consumer Law should be amended to include management contracts. Furthermore, for the avoidance of doubt, examples of unfair terms should be listed in the OC Act.

Property management contracts held by real estate agents can be terminated without notice. There is no compelling reason for owners corporation management contracts to be different.

9. Other than termination of managers only at a general meeting, the examples given in the options paper appear to correctly identify unfair terms.

Managers should manage in the interest of all owners and not merely act as a rubber stamp for the committee that might be guided by self-interest. Accordingly, legislation should provide that termination of a manager be decided at a general meeting and not by the committee.

The OC Act allows for the immediate termination of a manager. Once terminated, the manager may sue for damages for the unexpired term of the contract. Those damages are limited to loss of profits and not loss of fees. Accordingly, requiring an OC to pay a predetermined fee by way of liquidated damages may be an unfair term if the fee is high in the order of a penalty. Consideration might be given to a maximum percentage of the management fee for the unexpired term being, say, 25% of the annual management fee and 0% for additional fees listed in the management contract.

10. Notice of 4 weeks is reasonable under Option 3B. In such event, s 127 should be amended to state "28 days of notice of termination of appointment" for the return of records etc.
11. The best and fairest way to exercise the termination right under Option 3B is only after the first year of the contract and by ordinary resolution at a general meeting which the manager would be entitled to address.

Duties & Obligations of OC Managers

12. Yes.

If managers are permitted to operate pooled accounts, they must disclose the amount of interest that they earn that is not passed on to the owners corporations that they manage. Preferably, pooled accounts should be banned. There should be penalties under the act and an immediate right of termination of the manager for undisclosed commissions or

income.

Where commissions can be expressed in percentage terms that should be efficient disclosure without the need to express a dollar amount.

13. Yes.
14. Option 4C is unnecessary. The use of trust accounts should be optional, not mandatory. Many share the false belief that a trust account will diminish fraud and misappropriation. The options paper understands that it will not. The consequence of mandatory trust accounts is that the interest earned will be kept by government or diverted to a fund and lost by the owners corporation. Owners corporations may have many hundreds of thousands of dollars save for contingency measures and expect to earn interest on these funds. There could be an unintended consequence of resistance of owners to accumulate funds if they are denied interest on those funds.

Responsibilities of Developers, Occupiers & Committee Members

15. The enhanced general obligations under Option 5A are not sufficient because the current general duties are not specific and only apply while developers own a majority of the lots and for a relatively short period of 5 years.

It is imperative that their obligations are specified for a period of 10 years irrespective of their ownership.

16. Option 5C should be supported in the manner presented in the options paper, namely, the NSW approach plus the additional developers' obligations under Option 5B.
17. Option 5D should be included in addition to Option 5B and 5C as this measure has been made necessary by the shoddy building practices to the detriment and frustration of innocent and unsuspecting purchasers.

Responsibilities of Developers, Occupiers & Committee Members

18. (a) Yes
(b) Yes.

The Act requires a lot owner to inform the owners corporation in circumstances where a building or planning permit is required. In such circumstances, the owners corporation should be provided with architectural drawings and engineers specifications if any wall or structural element is proposed to be altered and the owners corporation should be allowed reasonable access for the purpose of inspections by qualified people representing the owners corporation.

Note that in the absence of registered rules, the model rules do not discuss the external appearance of lots. It would be useful to have a model rule that prevents a lot owner from changing the outward appearance of a lot without the consent of the owners corporation and this includes a change to the colour of the external paint. Otherwise, inappropriate appearance and lack of uniformity could affect the value of other lots.

19. No.

Responsibility for Compliance with OC Rules

20. Yes. Currently, owners and agents representing owners avoid responsibility for tenants' conduct and advise that the problem lies with the owners corporation, e.g. nuisance from loud music and noisy guests, drunken behaviour and inappropriate disposal of rubbish.
21. The traditional presumption against making one person liable for the acts of another is not sacrosanct. For a precedent of joint and several liabilities of landlords and tenants, see s 14 Part 11A Occupiers' Liability, the *Wrongs Act 1958* (Vic).

22. The expansion of the existing duties of committee members would be sufficient but the adoption of a complete reformulation of obligations and responsibilities would be preferable as it would give mandated specific direction to committee members beyond their personal interests.

Community Building, Water Rights & Abandoned Goods

23. None that is apparent.
24. Adopt the provisions under the *Australian Consumer Law and Fair Trading Act 2012* as this provision is broader than goods left in rented premises.
25. The ability to legally remove the goods that block access on both common and private property is a benefit. To avoid risks, the word “reasonable” must be defined. Privacy laws prevent ascertaining the ownership of a registered vehicle and Vic Roads or police will not divulge information without a court or tribunal Order. Thus, attempts to identify an owner of a motor vehicle are problematic and can only be done accurately when advised by Vic Roads. The legislation must address when a vehicle can be removed in circumstances when the owner cannot be identified without such Order.

Decision Making within OCs

Before addressing issues of decision making, it might be important to note inconsistencies and whether they should be addressed in any legislative change. Some plans of subdivision include car park bays as part of a specified lot. Other plans have separate lots for car park bays and storage areas. Our company manages a complex with 96 apartments having no car parks as separate lots. That complex is not a prescribed owners corporation. Another block has 46 apartments and 100 car park lots. That complex is a prescribed owners corporation.

For the purpose of classification of owners corporations according to lots, the term “occupyable lot” or “residence” might be used. For the purpose of voting, the status quo would suffice, however, if voting at a meeting according to lot entitlement, there should not be a requirement for the vote to be in writing as that causes unnecessary delay.

The terminology of “inactive owners corporations” on page 34 under Option 9B is unfortunate. The paper talks about inactive owners corporations where no one, other than the manager, attends a meeting. That is not what “inactive” means. The definition of “inactive” is found in s 32F(2) of the *Sale of Land Act 1962*. An owners corporation having a manager is highly likely to be active.

26. No effect.
27. Amending the Act under Option 9B-2 is a more direct approach.
28. One must weigh the advantage against the risk, which would appear to be small.
29. Given that the manager must act in good faith and the difficulty of an interested membership, the relaxed special resolution should be treated as “passed”.

Committee Size & Processes

30. More committee members provides for a greater divergence of opinion. Most committees are less than 12 so the requirement to reduce the number for the sake of facility of decision-making is not convincing.

It is reasonable for a committee ballot to be arranged by the chair or secretary of the committee.

Dispute Resolution & Legal Proceedings

31. VCAT will initiate mediation or a compulsory conference in appropriate circumstances even if the dispute resolution process was followed. In the recent Supreme Court of Victoria decision in *Shearman v Owners Corporation No 1 PS417405Y*, His Hon Bell J said that an owners corporation may dispense with the dispute resolution process and initiate proceedings if the respondent fails to make a complaint. It would be difficult to imagine a circumstance where a lot owner would make a complaint against him or herself, that being the situation where a proceeding is initiated by the owners corporation.

Most managers would have discussions in an attempt to strike an accommodation with a party and if litigation is commenced, the dispute resolution process seemingly had little chance for success.

Options 11A and 11B are legitimate and worthy assessments of the issues. Thought must be given to the referral of disputes for expert determination as this is an obvious opportunity for delay in the absence of strict rules to prevent delay.

Civil Penalties for Breaches of OC Rules

32. One benefit of increased penalties is to raise the awareness of the seriousness of the matter in dispute.
33. Option 12C.
It would seem reasonable for the owners corporation to retain civil penalties as the amount received for legal costs is embarrassing.

Many at Consumer Affairs Victoria (CAV) are not aware that VCAT can make penalty orders for payment into the Victorian Property Fund in matters where the director of CAV is not represented. Who monitors that compliance with the orders has occurred?

The owners corporation should not decide the penalty. There must be consistency provided by the Tribunal regarding the sum imposed. Otherwise, it would be interesting sport to compare results from different cases.

Initiating Legal Proceedings

34. Option 13A.

Additionally, many owners corporations have absentee owners living overseas making a special resolution difficult to achieve. There is nothing to suggest that the commencement of legal proceedings should be decided on any factor other than the democratic right of the majority and that is achieved by a simple majority rather than a higher impost.

The safeguard of a special resolution should remain if the estimated costs are more than twice the annual fees. That should be made clear in the event that this option succeeds.

35. Yes, an example being that in the event that a manager does not comply with s 27 of the Act to return files of the owners corporation following termination, the owners corporation must commence legal proceedings against the manager and that would require a special resolution under s 18. That might be difficult to obtain given that the manager holds records of the contact numbers and names and addresses of members of the owners corporation. In such circumstances, the Tribunal would allow a single lot owner to make an application on behalf of the owners corporation under s 165(1)(b) of the Act.
36. No.
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Differential Regulation of Different-sized OCs

The comments made above regarding car park and storage lots (prior to answer to Q26) apply to this block of questions.

It is well known in the industry that prescribed owners corporations must have a maintenance plan but there is nothing in the Owners Corporations Act requiring that they be carried out. If legislators intend the implementation of a maintenance plan, the Act must demand it.

37. Option 14B.

The exemptions for 2-lot subdivisions should continue to apply but the current exemptions are not entirely satisfactory as there is no legislative requirement for public liability on common property. If Option 14B is chosen, this omission should be corrected in line with Option 14A.

38. Yes.

Finance, Insurance & Maintenance

39. Legislation should allow an owners corporation to offer discounts for payment on time but it should not be mandatory. Although the options paper says the system has had little support, it works well in Queensland and in the Northern territory. It can be remarkably effective if used correctly. It should be noted that some utility companies currently adopt it.

Perhaps the legislation could allow for a number of options to be implemented at the will of the owners corporation. Members could make special rules that allow the adoption of specific measures that may be applied against a lot owner with a history of non-compliance. "Non-compliance" might be defined in the Act or in the registered rules.

40. The lodgement of bonds should not be mandatory; otherwise, there will be much resentment from the majority of lot owners who pay fees on time. The obligation appears to be cumbersome and unworkable. A person in arrears often runs up debts for a number of quarters. Furthermore, most owners are long-term owners. How is the bond to be indexed? The amount of any fee bond should not be left for the owners corporation to set because the amount likely to be agreed by the majority of responsible members will be too low to produce the desired affect against a recidivist debtors.

41. Yes; 12 months.

42. Any bond should be held by the owners corporation but this system will necessitate extra management fees as the process will be administered by the manager.

43. Costs should be commensurate with the work done independently of the size of the debt.

44. Option 15E.

Insurance

45. I believe that the increase in public liability premium from \$10m to \$20m is less than \$100.

46. There will always be different opinions in a democracy and these decisions should be addressed at a general meeting and form part of the registered rules.

47. It should be left for the aggrieved lot owner to apply to VCAT for any remedial order. The owners corporation will be advised by insurance brokers or underwriters regarding risks and will likely act in good faith in having risks assessed.

Maintenance Plans & Maintenance Funds

48. Options 17A and 17B. The options paper discusses the issues well but my preference is Option 17B for all owners corporations as I believe that all owners corporations should have a maintenance plan.
49. A general obligation rather than a legislated fixed proportion.
50. An ordinary resolution and it should be stipulated in the Act that the designated part of the fees must be adequate to fund the plan.
51. Fixed proportion of fees: this option should not apply.

Increased Expenditure from Lot Use

52. An insurance assessor may be able to estimate increased risk in a commercial setting, for example, if a food outlet introduces an oil fryer or an industrial use contains combustible items such as carpentry. Other examples of increased wear and tear would be difficult to assess and if the Act allows such recovery, then the owners corporation must attempt to seek agreement with the lot owner and failing that, make a submission to VCAT.

Part 5 of the Subdivision Act

53. None.

Procedure from Setting & Changing Lot Liability & Entitlement

54. The issue of fairness should be paramount when setting lot liability and entitlement because the community impacted by this decision must feel that no other member is financially disadvantaged. This setting forms part of the developer's fiduciary obligations to the owners corporation.
 55. Option 20D.

The decision must be correct when the plan of subdivision is registered and the best way of ensuring correctness is the adoption of a checklist of specified criteria rather than discretion. A land surveyor is licensed and would be expected to have undertaken formal training and continuing professional development and face sanctions for unprofessional conduct. A developer is less likely to have those skills and impositions.
 56. None.
 57. The criteria for setting out units of liability and entitlement should form part of the application for certification of the plan of subdivision and should be a compulsory requirement that the criteria be produced at the first meeting of the owners corporation and be annexed to the minutes of that meeting.
 58. No. There should be no time limit to lodge any changes.
 59. When claims are legitimate, the rights of the majority lot holder must have preference over the majority of lot owners. That is democracy and the cost of communal living. When claims are not legitimate, the losing party should be protected. It is the duty of the court or tribunal to test the legitimacy of any situation.
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Sale & Development of Apartment Buildings

60. Option 21B [Less restrictive NSW model]
Reducing the threshold to 75% is fair and increasing the threshold of the special resolution to 75% of total lots, not just lot entitlement makes this option democratic and preferable to the NSW model. The non-mandatory application to VCAT adds flexibility.

I do not support a threshold based on building age or use.

61. –

62. –

63. –

64. The reforms add flexibility and fairness to the decision making process regarding a building's longevity.

Retirement Villages with OCs

65. Option 22B

Adopting separate meetings is formal recognition of the different functions of each Act.

66. If Option 22A is selected, the first sub-alternative appears to be a better option as the form of future meetings is not subject to change at the will of the operator, is more structured and different voting rights are acknowledged.

Yours faithfully
LAW INK PTY LTD

Norman Mermelstein
Principal

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