**Owners Corporations Regulations 2018 - Regulatory Impact Statement Comments**

Dear Sir or Madam,

This submission is made in response to the invitation for public comments regarding the proposed regulations referenced above.

The comments submitted refer particularly to the proposed model rules 5.2 and 5.3 which are added to the current rule 4.1 under the Owners Corporations Regulations 2007, but re-numbered as section 5 in the proposed update.

Models rules are used by owners corporation committees of management regularly and usually as a first, and often only, point of reference when they are trying to resolve issues. Committees seldom have the knowledge, skills and experience to properly consider the Owners Corporations Act 2006 (the Act) or its associated regulations, and almost inevitably do not go further to consider other legislation, or interactions with other legislation, such as the Subdivision Act 1988, the Building Act 1993 or their associated regulations.

This leads to confusion, disputes and often unlawful building works and other activities, usually with some detriment to other members.

Set out below are some of the key issues that cause this confusion and disputation, often with unlawful outcomes.

1. **The Question of Lot Boundaries**

It appears that the added rules 5.2 and 5.3 pre-suppose that the boundary of the lot that may be subject to this rule is the external face of the perimeter walls. But there are a large number of owners corporation lots where the perimeter boundaries of lots where external appearance is relevant are either:

1. At the median of the perimeter wall of the lot, or
2. At the inside face of the perimeter wall of the lot..

In these circumstances, the wall is common property either in part or in full, and the application of this rule will conflict with other provisions of the Act, particularly sections 52 and 53.

1. **Section 140 of the Act**

Section 140 of the Act deals with the matter of rules being inconsistent with law. Section 140 states that “*A rule of any owners corporation is of no effect if it . . . is inconsistent with or limits a right or avoids an obligation under . . . this Act . . . or [various or any other Acts or regulations]*.”

The Model Rules are therefore subsidiary to other legislation including for example the Owners Corporation Act 2006.

1. **Section 52 of the Act**

It has been argued in the past that, under certain circumstances, lot owners are not subject to section 52 of the Act if they wish to make changes to common property because this clause refers only to the obligations of the owners corporation and not lot owners. However, it is useful to be aware of section 52 obligations along with section 53 which does apply to lot owners.

1. **Section 53 of the Act**

Section 53 applies to both lot owners and the owners corporation and a special resolution is required for *“. . . upgrading, renovation or improvement of the common property where . . . the works require a planning permit or building permit . .* .”.

The circumstances of costs exceeding twice the annual fees or works covered in the maintenance plan are not relevant to the proposed rule which is for a lot owner to change the external appearance of their lot and for which the lot owner would be fully responsible for the costs.

However, if a planning permit is necessary, which may be likely if the change to the external appearance is of any visual, amenity or other planning consequence, then a special resolution of members will be required.

Furthermore, if a building permit is necessary, and which will certainly be the case if there is any issue of structural integrity (the words used in proposed Model Rule 5.2(2)), then a special resolution of members will be required.

The quick interpretation of the proposed rule and without reference to any other legislation could, and probably will in many cases, result in committees of management making a decision to give approval to a lot owner when they are not entitled to do so.

1. **Building Permits and Structure**

The Victorian Building Authority (VBA) is explicit in its Practice Note 32-2018 ‘When is a Building Permit Required’ were they say that *“. . . any building work which involves work to structural or load bearing elements of an existing building, regardless of cost, will require a building permit*”.

It is likely that whilst a committee may give approval subject to “structural integrity”, that concept is not defined and is even less likely to be understood in its proper context. This will in turn lead to lot owners undertaking unlawful works if they do not obtain a building permit even if they do own the full width of the wall (boundary at the external face), and more importantly they would likely not obtain the necessary special resolution if the lot boundary is either the median or internal face of the wall.

1. **Effect of the Proposed Changes**

Whilst minor changes to the external appearance of lots may not be captured by section 53 of the Act, or require planning or building permits, there will be a large number of proposals that must be subject to those wider considerations. The additional rules are likely to encourage more problems than they seek to resolve.

Where lot boundaries are either at the median or the inside face of perimeter walls these issues will be exacerbated because the owners corporation must necessarily be a planning and/or building permit applicant as a part or full owner of the building element, and in anything other than brick veneer buildings there will likely be structural integrity issues.

1. **Existing Problems with Proposed Model Rule 4..3(2) (previous MR 3.3(2))**

The matters outlined above are current problems with existing Model Rule 3.3(2) because of the lack of definition of the word “structure”. For the reasons outlined in items 2, 4 and 5 above, any modification to building ‘structure’ (that is, any ‘service’ providing support as defined in section 12(2) of the Subdivision Act 1988 and referenced in section 47(3) of the Act) requires a building permit, and it follows, a special resolution of members. However, a ‘building structure’ may also be considered to mean the overall fabric of the building rather than only load bearing elements. These words are not well defined in any relevant legislation, although VBA practice notes and guidelines do assist.

The word ‘structure’ in the context of existing rule 4.3(2) is probably intended to mean any part of the building providing ‘support’ or that is ‘load bearing’, and this would include both vertical and lateral support. However, this could likely sustain a number of lawyers in a number of courts for some time and still not be resolved.

In summary, the existing model rules are causing difficulty due to confusion, misunderstanding and incomplete consideration of the issues, and the changes in the proposed model rules 5.2 and 5.3 will likely make this worse.

The proposal to better define and manage changes to external appearance of lots is flawed and would benefit from further review.

Kind regards,

Ian Warren

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