**Review of Vic strata laws**

**Issues Paper 2, March 2016**

**Owners Corporations**

**Submission 21st April 2016**

**About Strata Community Australia (Vic) Inc.**

SCA (Vic) is the pre-eminent professional association of the owners corporation industry, and was formed in 1990 to provide a forum for improved standards and education in the industry. Supporting more than 80% of all owners corporation managers it is the only organisation solely focused upon representing this increasingly significant industry, and reaches and represents 530 owners corporation professionals who manage approximately 375,000 lots. It also represents industry suppliers and owners corporations, making it the voice of all with an interest in the management of owners corporations. Members benefit from representation, promotion, establishment of professional practice guidelines and ethical standards, and professional development through education seminars, conferences and regularly publishing bulletins on items of professional interest. SCA (Vic) is a Corporate Member of SCA, which represents practitioners throughout Australia. The national and all state and territory strata industry bodies around Australia have the same brand and names, and continue toward increasing national alignment, co-ordination, collaboration and integration. More information about the Associations is available at [www.vic.stratacommunity.org.au](http://www.vic.stratacommunity.org.au) and [www.stratacommunity.org.au](http://www.stratacommunity.org.au)

**About the owners corporation or strata title industry in Victoria**

Changing lifestyle choices of Victorians and demographic shifts have led to rapid growth in higher density dwellings and the owners corporation industry. With 88,475 owners corporations and 747,336 lots in Victoria and about 1,500,000 Victorians or 1 in 4 people living in or affected by owners corporations, it represents the management of property worth $300 billion. More than $1 billion per year is collected and spent. They comprise residential properties ranging from 2 units in a suburban street to many hundreds of units in inner city apartment buildings. Owners corporations also encompass commercial, retail, lifestyle resorts, retirement villages, car parks, storage facilities, industrial and, increasingly, mixed developments comprising more than one form of development.

The prevalence and importance of the strata sector is increasing. In 2014, the Vic Government’s Plan Melbourne strategy says we need an extra 1.6 million dwellings by 2051 and 66% of these would be apartments or townhouses. That is, 66% is to be strata and only 34% would be detached houses.

50% of all plans registered by Land Victoria in 2013-14 were strata ie owners corporations.

Owners corporation managers facilitate the management of:

- People in a community living environment

- Billions of dollars of other people’s money on an on-going and not a single transaction basis

- Entire communities and their current and future assets and facilities

**About the owners corporation or strata title industry in Australia**

The industry continues to grow rapidly in Australia with around 270,000 owners corporations comprising 2,000,000 lots Australia wide. It represents the management of property worth $1.2 trillion\*. There are approximately 3,300 owners corporation managers in Australia; with 3.5 million people living or working in owners corporation schemes. Conservatively, it is estimated 20,000 Australians work in and derive their income from the strata title industry. Urban planning policies around Australia are targeting annual growth of more than 10% for the next 15-25 years, so the prevalence and importance of this sector is increasing.

\*In comparison, the total value of Australian superannuation is $2t, and Australian listed stocks is $1.7t.

**Background**

Minister for Consumer Affairs, Jane Garrett, announced at the CHU SCA (Vic) Symposium on 21 Aug 2015, a full review of the operation of the Owners Corporations Act 2006.

This is a post implementation review, about 8 years after it was completely changed, and will be a full public review.

Our full Policy Position document covers the SCA (Vic) position on all owners corporation matters. These policy positions proactively inform and assist this review with possible areas of improvement and research to support the suggestions.

There will be 3 separate pieces to the review. Each piece will involve a process that includes, firstly, an Issues Paper, then secondly, an Options Paper. These 3 pieces are:

1. Issues Paper 1, Dec 2015: Conduct & institutional arrangements for estate agents, conveyancers & OC managers;
   * Note: this re-presents issues from a previous review whose outcomes were contained in the draft 2014 Bill regarding the review of the regulation of strata managers.
2. Issues Paper 2, Mar 2016: Owners Corporations [general]
3. Issues Paper 3, Mar 2016: Sale of land; this is relevant to us because it includes pre-contractual and contracts of sale issues eg OC Certificates, etc

As noted, there was a previous review of the regulation of strata managers, resulting in the Consumer Affairs Legislation Further Amendment Bill 2014 [2014 Bill]. But the 2014 Bill was never passed by Parliament.

SCA (Vic) publishes an endorsed Contract of Appointment - Owners Corporation Manager [CoA]. All SCA (Vic) members are entitled to use this at no cost as a benefit of membership and as a key differentiator between members and non-members. 93% of members use it. Though the proposed regulatory changes in the 2014 Bill regarding strata managers were never enacted, nonetheless, SCA (Vic) has decided to adopt most of the changes in order to ‘raise the bar’ with appropriate professional practice guidelines and ethical standards. A new version of the SCA (Vic) CoA was recently published. This up to date version of the SCA (Vic) CoA is version 4.

The issues paper is available on the CAV web site [consumer.vic.gov.au/consumerpropertylawreview](http://submit.consumer.vic.gov.au/ch/25390/2d56f3h/2158729/930ce14961.html)

This submission should be read in conjunction with the issues paper.

**Functions and powers of owners corporation**

1. **Are the current constraints on owners corporations’ power to commence legal proceedings appropriate?**

No.

The SCA (Vic) Policy Position on the power to bring legal proceedings is reproduced below. SCA (Vic) recommends the power to bring legal proceedings should be able to be resolved by ordinary resolution. The Owners Corporation would remain protected under existing requirements of the OC Act in regard to their authority to raise funds to pursue legal proceedings; ie a special resolution is required where funds are twice the annual budget. Alternatively, for the above to be adopted, consideration may be given to establishing, when, type and under what circumstances, legal proceedings may be resolved by ordinary resolution and when it is appropriate for a special resolution. For example a tiered system, dependent on type of proceeding and/or monetary or nonmonetary value being claimed; such as that determined for applications to VCAT.

The Magistrates Court is only used for things such as fee recovery because of the inequity of the costs of fee recovery.

The SCA (Vic) Policy Position on the costs of fee recovery is also reproduced below.

Costs of all types of strata legal proceedings should be able to be recovered. The cost of legal proceedings to process fee recovery is just one important but narrow example. There are many other examples where owners corporations incur legal costs that they are at present unable to recover from the defending or challenging party, ie expenses incurred to manage/enforce breaches of rules, expenses incurred to defend complaints/allegations made against OCs by vexatious litigants (at least until proven vexatious), or simply from individual owners creating issues for owners corporations.

The OC has to defend these claims, and at times can make a claim against their OC insurance. The insurer may end up paying many thousands on such issues. These costs against the claims history of the OC can lead to a premium and excess increase. The insurer should be able to recover these costs in full if the OC is deemed to be in the right. There have been instances of the same individual OC member commencing multiple actions against an OC.

# Power to bring legal proceedings

The requirement to have a special resolution is too restrictive. The power to bring legal proceedings should be able to be resolved by ordinary resolution.

s18[1] needs to change “special resolution” to “ordinary resolution”.

**SCA (Vic) recommends the power to bring legal proceedings should be able to be resolved by ordinary resolution.**

One such example to support SCA (Vic)’s recommendations is the instance where an OC requires a resolution to take action against a developer in a court of legal jurisdiction; but where the developer is still in ownership of 46% of the total lot entitlement of the plan of subdivision and thwarts a special resolution by submitting an opposing vote.

## Costs of fee recovery

**SCA (Vic) recommends legislative changes be made to provide that OCs effectively recover all costs to bring a proceeding against a defaulting owner, from that defaulting owner in the process of debt recovery.**

**Third Party Support:**

Supported by the owners group, OCNV (Owners Corporations Network Victoria).

Broadly supported by LIV (Law Institute of Victoria).

*“The LIV supports the SCA (Vic) position to the extent that an OC should be entitled to recover all reasonable costs incurred by the OC bringing proceedings against a lot owner for recovery of fees payable by a lot owner to the OC.”*

**Why?**

This action will remove the inequity of the current debt recovery process.

Whilst this unfairness has been previously recognised, changes to date have not been successful in achieving the desired outcomes.

In 2010, changes introduced by Consumer Affairs Legislation Amendment (Reform) Act (CALARA) empowered the Victorian Civil & Administrative Tribunal (VCAT) to award costs at their discretion. VCAT Rules in 2013 provide that if the Tribunal makes an order as to costs, a default scale applies.

The result is that recovery of costs is still not guaranteed. And there is no clear outline as to what costs and the extent of costs, under what circumstances, may be awarded. It has also been evidenced that, if at all, costs are awarded, they appear to be only a fixed minimal and limited amount; i.e. there still appears to be no correlation to the amount or type of costs incurred which are recoverable.

This results in a hit and miss process, often leaving OC’s out of pocket and placing an unfair financial burden on other lot owners of the OC that do comply but have to fund the additional costs of bringing proceedings against recalcitrant owners.

***Background:***  **Owners Corporations Act 2006 – Understanding the current Issue**

The Owners Corporations Act 2006 provides that an OC may recover any money owed to the OC. The legislation stops short however of classifying ‘money owed’ to include costs incurred by the OC to recover the debt.

The OC Act provides only for the recovery of fees charged by lot liability, or levied upon the principle of benefit, and/or reimbursement of costs incurred for the benefit of that lot or a few (as opposed to the majority).

This means that those owners who do comply by paying their ‘money owed’, must contribute additional funds to cover action necessary to enforce compliance on recalcitrant owners.

***Background:***  **Changes Made – VCAT Rules (Amendment No 6) 2013**

One significant and welcome change introduced with new Rules of VCAT, as at 1 July 2013, is that there is a now a default scale of costs.

Unless the Tribunal otherwise orders, if the Tribunal makes an order as to costs, the applicable scale of costs is the Scale of Costs in Appendix A of Chapter I of the Rules of the County Court.

***Background:***  **Changes Made - Consumer Affairs Legislation Amendment (Reform) Act 2010 (CALARA)**

Changes introduced by the Consumer Affairs Legislative Amendment Reform Act (CALARA) empowers VCAT to award a much broader range of costs to owners corporations and lot owners in disputes around arrears of fees. It inserts clause 51ADA into Schedule 1 to the Victorian Civil and Administrative Tribunal Act 1998to confer discretion on VCAT to award a broader range of costs, including costs incurred, either directly or indirectly, by lot owners and owners corporation managers [including the costs of professional and volunteer managers], in disputes about arrears of fees and charges imposed by owners corporations. Costs awarded are not limited to costs incurred by a professional advocate.

***Background*: Petition to Minister for Consumer Affairs for recovery of outstanding fees and charges by an OC 2008**

SCA (Vic) campaigned on this social justice issue since the end of 2008. In response to the concerns of owners, we distributed via managers a petition, for owners to complete if they want to make their position known to government. SCA (Vic) sent 549 petitions from lot owners on the costs of fee recovery to the Minister.

Successful lobbying came in the format of changes being introduced by the Consumer Affairs Legislation Amendment (Reform) Act 2010.

***Background*: Change to fee recovery process with the introduction of the Owners Corporations Act 2006**

Under the Body Corporate regulations 2001, all debts were recovered in the Magistrates court, where costs were awarded on a court scale. A body corporate only required an ordinary resolution to proceed.

The current position under the Owners Corporations Act 2006 is, that the owners corporation can only go to VCAT with an ordinary resolution and may require a special resolution to go to Magistrates court.

1. **Are there any other issues relating to the power to commence legal proceedings?**

Yes.

Defects are a significant and systemic issue and owners corporations need to issue legal proceedings seeking damages being the costs to fix the defects.

In response to just one of many systemic defects issues, regarding flammable cladding, recently the Building Ministers Forum outlined steps, such as the possibility of mandatory accredited third party certification of cladding and other sensitive building materials. This is necessary but likely not sufficient.

The Victorian government should change the laws about defects.

It should improve warranty insurance. It is inequitable that warranty insurance is exempted for high rise apartments [more than 3 storeys]. There is no reason there should be a difference between a stand alone home versus apartments. [Supported by the owners group, OCNV (Owners Corporations Network Victoria).]

It should consider what NSW has done. NSW has changed its strata laws such that developers have to pay a 2% defects bond for surety. Also, the developer has to fund a defects report in the first 2 years, done by a qualified independent inspector.

It should improve building and design standards, because many issues in strata can be traced back to this source eg defects, odour, noise, car parking. The SCA (Vic) Policy Position on improving building and design standards is reproduced below.

## Improved building and design standards

**SCA (Vic) supports any improvements to building and design standards.**

**Third Party Support:**

Supported by the owners group, OCNV (Owners Corporations Network Victoria).

**Why?**

Many issues in owners corporations can be traced back to this source. For example, defects, odour, noise.

SCA (Vic) believes that builders and developers should deliver a product made with quality workmanship and free from defects. SCA (Vic) supports legislation and regulations concerning defects that adequately balance the rights and responsibilities of owners corporations, their committees and owners, and of builders and developers.

More rigorous processes for mandated final inspections and issuance of completion certificates, including certificate of occupancies, should be enforced.

In particular SCA (Vic) would support the introduction of mandatory ‘waterproofing’ inspections; providing a clearer direction of responsibilities and warranties. Failed or inadequately applied membrane is one of, if not the most, commonly identified defect giving rise to disputes with builders and developers.

***Background:* Research project - Managing Major Repairs Report**

Research was undertaken by UNSWat the City Futures Research Centre on managing major repairs and maintenance in the residential strata sector in New South Wales. The aim of this study was to undertake research into the attitudes towards, and practice of, funding major repairs in the strata sector. The findings will provide strata owners, owners’ corporations, strata managers and policy makers with new and systematic information on the nature and scale of issues surrounding the provision for major repairs in strata in NSW. It is expected that this research will directly inform best practice, policy innovation and educational programmes for practitioners and policy makers in the sector.

The most common problems identified were building defects. Of the respondents who owned a property that was built since 1997, almost two-thirds owned a lot in a scheme with ongoing defects in the building. The defects most commonly identified by survey respondents related to water ingress.

1. **Should owners corporations be able to deal with water rights, including water that falls on common property?**

SCA (Vic) recommends provision is made for water rights and that an OC retains the rights to any water that falls on its property. The SCA (Vic) Policy Position is reproduced below.

Positive sustainability measures are often imposed on a strata community during the development phase by the planning scheme and include capture of stormwater from private or common surfaces and reticulated for irrigation and/or for cisterns.

During drought conditions, many rooftops both private and common were utilised to capture water and water stored for irrigation purposes.

**Water Rights**

Water rights are an increasingly important aspect in owners corporations. Provision needs to be made for this. Section 3 definition of “common property” should include water rights.

Further, s16[4] Power to acquire and dispose of personal property, should include reference to water rights.

**SCA (Vic) recommends provision is made for water rights and that an OC retains the rights to any water that falls on its property.**

1. **Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?**

Whilst not directly related to this question, there is an issue about the functions and powers of owners corporations, relating to building community. The SCA (Vic) Policy Position on building community is reproduced below.

# Functions of an owners corporation - building community

Owners corporation laws completely fail to recognise a role for an owners corporation to actively build a sense of community within a scheme. The consequence of this is to deny the owners corporation the right to spend money on this activity. To overcome this problem rules and other workaround solutions must be used to expand the functions of an owners corporation to include community building.

The functions to be expanded to include:

* Strategic Planning 5 to 10 year plan, to assess their current reality, identify existing challenges and brainstorm, discuss and ultimately create a forward-looking vision of the community’s future.
* Develop community spirit and the ability to encourage interest groups, provide seed funding to those groups.

**SCA (Vic) recommends the Act be changed to expand the functions of an owners corporation to include community building.**

A number of large master plan communities consisting of 2000 to 4000 lots have been completed and many are in development stage. Very few are being created with a sense of community or a vision of what that sense of community is. The result is a large number of residents living together in separation without a common goal and “us and them” fractions between limited OCs, tenants and owners, the unlimited OC and developers (particularly in a staged development). Planning permits include obligations for owners corporations to manage public open space, encourage community use in the public open space and manage heritage buildings and facades and provide access to historical societies to engage in the community.

Owners corporations of the future are not only a vehicle for embedded energy networks, decentralised water systems, marina management, and luxury resort management; they also have a social obligation. They will be the preferred choice of living for those over 55 years, families, DINKS, singles, immigrants, low income and high income, a real social mixing pot.

Maintaining social harmony will be and should be the number one priority.

***Background:* “Building Community”**

This paper by Gary Bugden was delivered at the August 2007 “Strata and Community Title in Australia for the 21st Century II Conference”.

“A sense of community has to be created it will not just happen. Creating community within a large real estate development requires a governance and management structure capable of driving the process, adequate communal facilities to support a range of recreational, educational and social activities, good lines and means of communication, an appropriate level of funding and a genuine commitment by everyone involved. The process needs to be planned strategically and be tailored to the socio economic make up of the particular community.”

***Background:* “Ups and downs in a new development”**

This article by Susan Wellings was published in The Domain

“COMMUNITY

Another priority in the first three years of Arc has been fostering a sense of community among owners and tenants. There's a noticeboard for minutes and announcements, a regular newsletter and a register of all email addresses.

"Apartments can be quite isolating, but we haven't found that to be true of here," Tornai says. "People mix in the gym, we've had some community barbecues and people get on very well. We've had our challenges but I've been pleasantly surprised how successful apartment-living has proved."

TOP FIVE TIPS FOR SUCCESS

\* Elect an executive committee of people with diverse and complementary skills, who are prepared to share the workload.

\* Educate yourself, as much as you're able, about everything to do with how your building works.

\* Negotiate contracts with service providers on the basis of what you want them to deliver, not on what they might deliver.

\* Foster good relations with your builders, developers and retail owners and tenants.

\* Take steps to improve your building and turn it into a harmonious community.”

1. **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?**

Yes.

Any improvements would be welcomed, because the current situation is totally unsatisfactory.

OCs essentially have no way of dealing with this. OCs do not have the right to tow away abandoned vehicles. OCs are not permitted to clamp or immobilise vehicles. OCs have no power to issue fines. Neither will the police enforce the removal or clamping of an offending vehicle, or take any action against the owner of the offending vehicle, when the vehicle is on common property.

It’s no panacea, but in some municipalities it may be possible to enter into an agreement with the local council to enforce parking restrictions against offending vehicles, but generally this may only be available to large scale or commercial properties, where the parking is not underground.

With high rise apartments increasing and few car parking spaces, the current laws are inadequate and do not cater for this escalating issue.

Not to mention the new strata titled properties, such as broad acre communities / housing developments in which the roads are partly or fully owned by the owners corporation; including nature strips. In such instances, Council do not get involved at all, whether it be the estate residents who are in breach of illegally being parked or the public who also have access and ability to use the roads, parks and facilities.

Wheel clamping should be re-allowed. The OC should be able to service both common property car parking and private car spaces of those residing in the building or within an estate

OCs need to be able to effectively enforce parking infringements, which is one of the known biggest causes of frustration and disputes in OCs.

OCs also need the power to remove what is evident to be unwanted goods dumped on the common property, generally experienced when residents move out of the property. The cost to have the items collected and stored in the vein that the residents will return to retrieve it is an unnecessary and unfair burden on the finances of the OC. As referenced in q22 the OC does not have the power to recover expenses incurred as a result of an alleged offender, even where that offender may be identifiable in person or to a particular lot. Refer q22 and the SCA (Vic) Policy Position on Ability to levy extraordinary fees when expenses are created by owner(s).

1. **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 SCA (Vic) Policy Position on the common seals is reproduced below.

# Common seals

A common seal is a rubber stamp, which can be arranged through stationery shops. All owners corporations must have a common seal, which is the signature of the OC, but there’s no limitation on who can get one made up, unlike for example master keys.

So are common seals still serving their purpose effectively? No. For a long time companies have not had to have a seal under the corporations law.

The submission of the LIV says:

“The LIV considers that requirements for original signatures on a paper document and physical seals are antiquated given the digital and electronic advancements which are now regarded as part of common business practice.”

Statutory authority certificates are issued electronically and have the seal applied electronically.

**SCA (Vic) recommends the antiquated requirements of common seals be removed.**

**Financial management of owners corporations**

1. **What are your views about the operation of the benefit principle? What is the experience of your owners corporation in applying the benefit principle?**

Leave as is. No change is necessary.

SCA (Vic) generally agreed when the government changed the law in Dec 2013.

We recognise there are divided opinions on this vexed issue. We appreciate that the intent is that it is not precise formula but rather an assessment of where the benefit lies. The application of such a principle in fact, may be limited in nature.

More guidance/certainty may therefore not actually assist, but as an unintended consequence may confuse the situation further.

1. **Should an owners corporation 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.

The SCA (Vic) Policy Position on the costs of fee recovery is reproduced at q1.

Broadly supported by both OCNV and LIV, SCA (Vic) recommends legislative changes be made to provide that OCs effectively recover all costs to bring a proceeding against a defaulting owner, from that defaulting owner in the process of debt recovery, to remove the inequity in this process.

When considering ‘all the costs’ that may be recovered by the OC in the debt recovery process, it should include any additional costs incurred by the OC, for the additional services required of the professional OC manager.

1. **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?**

If costs are awarded at VCAT, they are much less than the actual costs incurred.

The recovery of costs is not guaranteed. There is no clear outline as to what costs and the extent of costs, under what circumstances, may be awarded. It has also been evidenced that, if at all, costs are awarded, they appear to be only a fixed minimal and limited amount; i.e. there still appears to be no correlation to the amount or type of costs incurred which are recoverable.

This results in a hit and miss process, often leaving OC’s out of pocket and placing an unfair financial burden on other lot owners of the OC that do comply but have to fund the additional costs of bringing proceedings against recalcitrant owners.

Applications via a court are subject to mandatory scale of costs and fees which may be claimed by counsel and solicitors; therefore providing clearer outcomes.

*Perverse and unintended outcome of the current situation*

Insofar as the process of debt recovery itself is concerned, owners corporations determine the threshold of unpaid fee instalments that warrants debt recovery action proceeding to VCAT. This threshold may be described either in terms of the number of the fee payments missed or in terms of a specified cash figure. In setting the threshold owners corporations are mindful of the costs involved in pursuing debt recovery action, not least because VCAT will not be minded to award costs against an indebted lot owner if those costs are only marginally less than the debt being pursued. For example for a small scale OC fees may be $300 per quarter per lot, so any particular lot owner would need to be in arrears for at least 2 years to exceed a $2,000 debt. Whereas a large scale OC whose lot owners fees are approximately $2,000 per quarter would be in debt $16,000 if a debt was not pursued for 2 years. In this same vein a budget shortfall in any given year for a small scale OC, would impose heavier financial burdens on the remaining lot owners who are paying and trying to cover the debt until it is paid.

1. **Should owners corporations be able to apply a discount for the timely payment of fees or charges?**

No.

It’s a “zero sum game” and there are still budget implications, because the only monies an OC has, is raised from owners. Rather, OCs should be able to ‘penalise’ for late payment.

Currently, and appropriately, due to its strict obligations under the Act, the owners corporation has no authority to discount or waive fees.

NSW has recently changed its strata laws to allow strata schemes to garnish the rent from apartments where the owner has decided not to pay levies.

1. **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?**

No.

As VCAT decisions have noted, there is NO defence to non-payment of validly struck fee notices. Even if there are other issues, non payment of fees is not the appropriate response. Instead, the fees must be paid, and separately agitate whatever the other legitimate grievances are.

This suggested addition to the debt recovery process will only lead to additional expenses and financial burden on the OC (which includes the remaining lot owners doing the right thing and making their payments to protect their property), not to mention the present inequity which does not allow the OC to recover costs to pursue defaulting owners, Only increasing the inequity.

1. **Are there any other issues relating to payment of fees or charges?**

Yes, payment plans.

Prior to proceeding to enforcement, the owners corporation or the indebted lot owner, may seek to enter into a “payment plan” by which the debt is paid off. SCA (Vic) recommends to our members that any decision on whether to enter into a ‘payment plan’ should be agreed upon and endorsed by the committee of the owners corporation and recorded in the committee’s minutes. Due to the many issues with informal arrangements, such ‘payment plans’ should be in the form of a legally enforceable contract and be in a common format. Whilst an owners corporation may recover any money owed to the owners corporation under a ‘payment plan’ in any court of competent jurisdiction as a debt due to the owners corporation, it is nevertheless the case that an owners corporation must not bring legal proceedings otherwise than in VCAT, unless it is authorised by special resolution to do so. The costs of drawing up the ‘payment plan’ should be met by the indebted lot owner and incorporated into the sums recovered under the agreement.

1. **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?**

No action is necessary; on the questions raised.

The OC Act and Regulations, through the Model Rule 2.1(1), already addresses this issue.

Many owners corporations have existing arrangements with suppliers of bulk services for electricity, gas, water, etc. As a separate issue, OCs are often left unable to recover any charges from tenants because there’s no individual metering of the service.

Turning to the specific issue raised in the question, regarding electrical embedded networks, there have been issues in the past by some embedded network providers. But other relevant laws already deal with this - must provide customer choice [ie cannot require someone to use it, they are free to go elsewhere]. And new laws around this have been made and commence 1 Dec 2017 – must be registered with and provide access to the Ombudsman, must be Market Participants, must be registered with AEMO, and must operate MSATS to facilitate consumer choice.

**Maintenance**

1. **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.

The only exception to this is that a distinction is still required for auditing, which would be cost prohibitive for small OCs.

The SCA (Vic) Policy Position on maintenance plans and maintenance funds is reproduced below. Note, this position has just been amended. It now recommends it should be mandatory for all OCs to have maintenance plans and maintenance funds.

# Maintenance plans and maintenance funds – required for all OCs

**SCA (Vic) recommends requiring maintenance plans & maintenance funds for all OCs.**

The threshold of prescribed owners corporations determines a number of requirements - for maintenance plans and funds, auditing of accounts, and valuations for insurance purposes.

The definition of “prescribed” owners corporations is those with annual fees in excess of $200,000, or more than 100 lots.

It must also be remembered that there is not necessarily a straight line correlation between the size of the owners corporation [ie number of lots] and its budget. That is, a smaller owners corporation may have a higher budget than its size would indicate due to more facilities, or conversely a larger owners corporation may have a lower budget than its size may indicate.

**Third Party Support:**

A significant lowering of the threshold, at the least, is broadly supported by LIV (Law Institute of Victoria) and the owners group OCNV [Owners Corporations Network Victoria].

**About the Issue:**

* **Maintenance funds for all OCs**

SCA (Vic) is aware of the divergent views of various stakeholders regarding this issue. Some believe it would be over-regulation and that any cut-off point will be arbitrary and not result in satisfactory control. Others believe the threshold should be much lower to capture a greater proportion of owners corporations. Consumer Affairs Victoria (CAV) sets these levels with the lightest regulation possible in order to protect consumers.

The government’s preferred light handed approach is the minimum regulation necessary to achieve policy objectives, but SCA (Vic) believes it is unlikely that the objectives will be achieved at the current threshold levels of when maintenance plans and maintenance funds are required.

It is not the largest owners corporations that generally have the biggest problems. Many “prescribed” owners corporations are newer constructions and usually have professional managers well aware of the need for well-thought out maintenance plans and funds. In comparison, many of the other 99% smaller non “prescribed” owners corporations tend to be older properties and are the ones that often do not plan for such things as maintenance.

It is these smaller owners corporations that often have maintenance issues, but little provision to replace major items and protect owners assets. Over time, this neglect can lead to other issues such as OH&S “slips, trips and falls” and subsequent liability claims. As noted in the RIS, owners corporations play an important role in maintaining property and sustaining residential property values in Victoria. Discerning purchasers factor in maintenance fund surpluses/deficits into how they value a unit.

**Precedent:**

The situation in NSW is that maintenance [ie known as “sinking” in NSW] plans were phased in over a 3 year period as a requirement for all owners corporations regardless of size. An important difference, although there is a requirement to prepare a 10-year maintenance plan report, it is not a requirement that owners corporations have to act on the plan and implement a maintenance [ie sinking] fund. So the situation in NSW is that all owners corporations have to undertake a maintenance plan but none of them have to implement it with a maintenance fund.

The intention of the Victorian regulations was for prescribed owners corporations to be required to do both – maintenance plans and maintenance funds. Thus NSW have a much lower threshold for maintenance plans but no requirement to fund the plan via a maintenance fund.

Note, that opinions vary in NSW on whether owners corporations have to implement and adopt their sinking fund plan. Some observers conclude that when the legislation is read in conjunction with the second reading speech, owners corporations are required to raise funds to meet the estimates set out in their sinking fund plan.

The situation in Queensland since 1997 is that all owners corporations have been required to have maintenance plans and funds. The ACT and SA also require them.

Perhaps in Victoria a more palatable approach to achieve mandatory maintenance plans and maintenance funds for all OCs as recommended by SCA (Vic) may be to phase it in over a multi-year period similar to NSW.

For example,

* by end of year 1, for owners corporations with greater than 50 lots
* by end of year 2, for owners corporations with 10-50 lots
* by end of year 3, remaining owners corporations with <10 lots

This means that only those owners corporations above the threshold, and of a size in the relevant band, have to comply by the corresponding date.

1. **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?**

Currently it is totally inadequate.

The only reason OCs turn their minds to maintenance plans, is because they have engaged a strata manager. Recent SCA benchmarking reports show that owners are more likely to have ready access to a sinking fund of 27% of the annual administration fees saved for projected and rainy day expenses, under the guidance of professional SCA strata managers.

1. **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?**

Yes.

The SCA (Vic) Policy Position on mandatory maintenance plans and maintenance funds is reproduced at q14.

In reality all buildings have capital items that will need to be repaired and replaced to maintain the value and integrity of the building for the benefit of all owners and residents. A maintenance plan and fund would only ever include the works and costs that correspond with the size, structure and facilities of the building so would be directly proportionate to the properties needs. Therefore all costs would be expected and valid expenses at some point in time. For owners to save for that rainy day and avoid the financial burden of immediately payable one off levies to enable urgent repairs to be carried out, is good governance and should be encouraged.

1. **What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements?**

Quite simply, ensure both are mandatory, and without any loopholes.

The SCA (Vic) Policy Position on whether OCs actually require a maintenance fund is reproduced below.

The SCA (Vic) Policy Position on what a maintenance plan contains is reproduced below.

## *Do “prescribed” OCs actually require a maintenance fund, as was intended? No.*

Another issue is whether in fact a “prescribed” owners corporation actually requires a maintenance fund.There is little doubt the intention is that it does and this is clear in both the Final Report [Proposals 14 and 15] and the 2nd Reading Speech by Mr. Hulls:

*“Prescribed owners corporations will be required to establish a maintenance plan and a maintenance fund.”*

However, the reality of the Act is that a “prescribed” owners corporation:

1. Must prepare a maintenance plan
2. A maintenance plan has no effect unless it is approved by the owners corporation
3. Unless a maintenance plan is approved by the owners corporation there is no obligation to establish a maintenance fund.

Thus to comply with the legislation all a “prescribed” owners corporation has to do is to prepare a maintenance plan.  The plan can then sit on the shelf forever totally ignored!

**It is recommended this be changed to ensure the OC Act says what it was intended to say.**

## *Maintenance plan – what it contains*

The list at Section 37 of what a maintenance plan must contain is not nearly as extensive as the one proposed in the previous submission of SCA (Vic), as necessary for the protection of the owners’ investment, residents safety and integrity of a building.

**“Prescribed class” should include other items such as structure, roof, walls, windows, fire services, sustainable measures, etc.**

1. **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.

With the same requirements as currently exist; ie by an ordinary resolution to approve an amendment to the maintenance plan, or by a special resolution to authorise an extraordinary payment

There will always be unforeseen needs.

1. **Should funds for implementing the maintenance plan come only from the maintenance fund?**

No.

Legislation currently provides adequate flexibility for OC’s to fund works from the maintenance fund or via a special levy. The current legislation does not appear to prevent an OC that is in a sound financial position to consider transferring some surplus administrative funds into the maintenance fund to support its future maintenance plans.

Although, as per the previous section, this question becomes a moot point, so long as OCs have to have maintenance plans and funds [without loopholes].

Thus funds would only need to come from the maintenance fund and not from a special levy.

1. **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?**

Yes, contingency funds are necessary.

All OCs should have them.

They should be funded as part of annual fees [ie by lot liability]; funds should be able to be used for any purpose; and the purpose should be determined by ordinary resolution.

The SCA (Vic) Policy Position on contingency funds is reproduced below.

# Contingency funds

The need for the appropriate maintenance of the common property assets of owners corporations is a major and ongoing concern for SCA (Vic) and all professional owners corporation managers.

The introduction of legislative change to require the establishment of maintenance funds has, appropriately, received considerable attention during the legislative reviews.

SCA (Vic) believes that a similar focus should be given to the recognition of the role of contingency funds within the budgets of owners corporations. While maintenance funds provide a mechanism to support the long term maintenance of an owners corporation. a contingency fund provides the capacity to meet the equally important shorter term and unplanned expenses.

These two issues, while requiring differing responses, have significant impact on the operation of owners corporations and the maintenance of asset value and the lifestyle of owners.

Professional owners corporation managers always advise owners corporations to include a ‘contingency fund’ line within the annual budget. The fund is designed to enable, for example, critical maintenance to be undertaken in a timely manner when there is insufficient time to raise a special levy. For example, in cases such as water pipe failure, fire service failure or trees that have fallen and require immediate removal. In such cases, the owners corporation manager is obliged to pay a tradesman within the standard business terms of 30 days. In many instances there would be insufficient balance within an owners corporation account to cover costs if the owners corporation has not elected to set aside funds for this purpose.

Contingencies requiring rapid response are common occurrences. For example, a residential property of 8 units in Box Hill experienced a burst fire service. Yarra Valley Water issued a notice requiring it to be fixed within 3 days or the utility would undertake the repair and issue the bill to the owners corporation. The repair cost $11,000. An owners corporation without an adequate contingency fund would have to issue a levy on the 8 owners of approximately $1,375 each for immediate payment. In these cases, owners corporation managers often encounter a difficulty in collecting the levies, as indeed many owners find it difficult to pay at short notice.

The need for contingency funds is most keenly felt in smaller and newer owners corporations which have not established a workable and realistic account balance; where there are ongoing problems with owners being in arrears with their fee payments which results in accounts with zero or extremely low balances in owners corporations; where some or all owners place extreme pressure on owners corporation managers and other owners to slash budgets to an unrealistically low level.

**It is recommended that the OC Act be changed to require owners corporations to establish and pay a contingency fund fee as a mandatory component within the annual budget. Also that the owners corporation establish and document the rationale for the formula used to establish the level of the contingency fund and that this rationale be considered at the annual general meeting. Not with standing this process, the contingency fund established should not be less than 15% of the value of the other components of the annual budget, but may exceed this amount if required. An owners corporation could vote to vary the levy downwards once the accumulated balance in the contingency account had reached 150% of the total annual fees of the owners corporation.**

Qualification: It is valid in appropriate circumstances, that funding is provided by way of special levies and/or borrowing.

1. **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?**

No change is necessary.

Lot owners can, and do, already apply to VCAT for an order

1. **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?**

The SCA (Vic) Policy Position on the ability to levy extraordinary fees when extraordinary expenses [such as damage to common property] are created is reproduced below. It outlines the inadequacy in the OC Act to enable an OC to recover expenses it unfairly incurs to repair damage caused by an owner, occupier or their guest.

It should also be noted that the OC Act is not conducive to an OC being able to recover any expense from a lot owner, occupier or their guest in the process of doing so; ie cost to engage lawyers, experts or the like to pursue such costs or support or defend claims made by/against the OC.

We generally support the thrust of the quoted NSW legislation empowering a solution to this issue.

In terms of lot owners or occupiers wanting to ‘alter’ common property, there is no need for the Act to say anything – a lot owner or occupier can’t, and should not, be able to unilaterally do anything to common property.

# Ability to levy extraordinary fees when expenses are created by owner(s)

An owners corporation by virtue of the Act, is not provided with the ability, either directly or indirectly, to charge and/or recover from an owner or occupier an expense incurred by an owners corporation to reinstate damage as a result of the accidental, wilful or malicious damage by an owner or occupier or their guests.

Invariably all if not most owners corporations incur extraordinary costs as a result of the action or lack of action of an owner or occupier.  ie dumping excess rubbish on common property for the owners corporation to clear, damaging walls whilst in the process of moving in or out, damage to common property whilst an individual owner’s or occupier’s tradesperson is traversing the common area to a private lot, vandalism or carelessness of an owner or occupier or their guests.

In particular circumstances an owners corporation may recover expenses via an insurance claim. Whilst this may be an option, the event is recorded on the owners corporation’s claims history and adversely affects the owners corporation’s premium and/or claims excess. The result is an unnecessary and an unfair financial burden on the owners corporation.

**SCA (Vic) recommends the OC Act be changed to provide the owners corporation the ability to levy extraordinary expenses on a lot owner and to recover extraordinary expenses incurred as a result of the actions of an owner, occupier or their guests.**

The Act provides a lot owner may be liable to pay or contribute to the funds of the owners corporation on a basis other than lot liability where the repairs, maintenance or other works are undertaken by the owners corporation on common property or a lot and which are wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation.

Repairs, maintenance or other works required to be undertaken by the owners corporation as a result of accidental, wilful or malicious damage is not recoverable under this provision as it contemplates matters that are ‘beneficial’ to the ‘some, one, but not all, of the lots affected by the owners corporation’.

To protect the owners corporation from unfair disadvantage, the Act must provide the ability for an owners corporation to recover expenses incurred for an act(s) conducted by a person which detrimentally affects an owners corporation and/or its property.

1. **Are there any other issues relating to repairs to common property or services?**

**-**

1. **What are your views about the type and level of insurance cover that should be required?**

Currently inadequate.

To ensure protection of an OC and its property is maximised there are many additional types of insurance, that are currently not required under the Act, that if not taken out, leave an OC exposed to unnecessary risk and financial burdens in the event of an unfortunate event.

The following list forms part of the SCA (Vic) Policy Positions; (these are explained in more detail below):

* Common contents insurance
* Public liability insurance
* Insurance valuation of buildings
* Natural disaster insurance
* Insurance for shared services
* Office Bearers Liability cover

In addition to those types of cover outlined above

* it should be a mandatory requirement for an OC to have the fidelity guarantee option on their insurance policy; and
* where applicable, consider machinery breakdown cover (ie an OC which owns plant and machinery, garage doors etc.)

SCA (Vic) supports the continuation of the existing insurance requirement that includes the requirement for full reinstatement and replacement insurance cover for all buildings. This requirement should be mandatory for all owners corporations; single storey, multi-level, or master planned estates.

However, attention is drawn in particular to the current wording of the Act which creates anomalies for some OCs, and provides the ability for an OC to opt out of collectively insuring. This is in the case of single storey dwellings. In this type of development for example a row of townhouses with party walls would not require collective insurance, and would leave the OC and all individual owners exposed if one lot owner or both failed to take out building insurance or even insufficient cover. The consequences at a minimum could mean that one owner has to rebuild at their own expense, whilst the other owner can claim against the building insurance for their lot. From a different perspective it could mean that one lot is rebuilt efficiently as a claim against the lot owners building insurance, whilst the adjacent lot remains in disrepair unable to be rebuilt or sold as a consequence of lack of owners funds or ability to claim. Such a scenario not only adversely affects the individual owners and their lots but also the value and amenity of the property as whole.

Similarly the current wording of section 61 of the OC Act for ‘multi-level developments’, suggests that in the case of a master planned estate, with even just one of its buildings on common property, the Act triggers the obligation for ‘all lots’ on the plan to be included in the mandatory cover; ie whether each lot be a standalone home of single, double or three storeys on private property which is delineated as a lot on the plan of subdivision or the lot be the gymnasium, pool or café owned by the OC which is on common property.

Whilst collectively insuring is the preferred option, payment in accordance with lot liability in such an instance and as required by the Act is not appropriate. The proportion each lot will benefit from is in accordance with lot entitlement. As per the OC Act, ongoing annual maintenance costs such as insurance expenses must be charged according to lot liability; which can and does in many plans differ to the proportion of lot entitlement. Neither can recurring charges for insurance premiums be charged according to the benefit principle.

The insurance component of levies should be charged by lot entitlement [rather than lot liability], as is the case in Queensland.

Failure of an OC to cover all lots (including such private dwellings) under the OC policy may potentially be argued as a breach of its obligations and possibly expose an OC to unacceptable risks.

## 

## Common contents insurance

Although it is enabled by ordinary resolution, it is not mandatory to take out insurance for common contents. It should be mandatory that common contents be insured. Eg carpets and artwork in foyers.

**SCA (Vic) recommends it should be mandatory that common contents be insured.**

***Background:* The value of Common Property Contents**

CHU Underwriting Agencies Pty Ltd, experts in the strata industry confirm their support of this policy position of SCA (Vic); that insurance for common contents be mandatory for OC’s.

CHU advise that the vast majority of denials for Common Contents claims (where cover has not been taken out) relate to damage to common area carpets in areas such as entry foyers, stairways, passageways etc.

“The cost of rectification or replacement can often be in the thousands of dollars. Obviously, if insurance cover isn’t in place the OC members will need to fund the loss” says CHU.

“CHU support SCA’s position that insurance for common contents be mandatory for OC’s.”

Common contents includes items such as carpets, floating floors, temporary wall, floor and ceiling covers within hallways and lobbies; pot plants, mirrors and other decorations in common areas. Also included are washing machines and dryers owned by the OC and used by all unit owners and housed in common laundries. Any barbecue equipment, gardening equipment and garden or indoor furniture owned by the OC should be insured as common contents.

## Public liability insurance

The $10M minimum public liability insurance cover required by most Victorian owners corporations is no longer sufficient and could leave lot owners with substantial exposure.

With increased exposure in particular, to those in a 2-lot subdivision who are removed from the requirement to take out public liability over common property at all. The area, facilities or condition of common property is not restricted in any way by a development being a 2-lot subdivision. The potential for an injury or damage to occur on common property is no less likely or directly related to such types of developments ie as opposed to risks associated with common property of a multi-level development where such cover is compulsory.

**SCA (Vic) recommends the amount of cover prescribed for owners corporations should be $20 million.**

**SCA (Vic) also recommends that 2-lot subdivisions not be excluded from the requirement to take out public liability insurance.**

[Also, any reference to “public liability” should be replaced with “legal liability” as per current practice. This is an out of date terminology.]

The current requirement, where it applies, requires $10 million cover [s60], unless another amount is prescribed.

The OC Act excludes 2-lot subdivisions [s7(1)(a)] from the obligation to take out public liability insurance at all.

Increasing the minimum to $20 million for prescribed owners corporations would be consistent with the requirements of most local and state government contracts which in many cases requires a limit of $50 million.

***Background:* NSW Bill to double public liability**

A Bill introduced into NSW Parliament in December 2010 addresses many matters.

One of these was to double to $20 million the minimum level of public liability insurance.

***Background:* WA to increase public liability to $20m**

As part of its strata law review, the WA government announced in early 2016 that it going to increase the minimum strata public liability insurance from $5m to $20m.

## Insurance valuation of buildings

Prescribed owners corporations must currently obtain a valuation by a registered valuer every 5 years or earlier [s65]. Thus ensuring prescribed owners corporations have sufficient replacement and reinstatement insurance cover for the building.

**SCA (Vic) recommends that all OCs must have valuations [whereas currently this is just for prescribed OCs]; and the time period should be lessened from 5 years to 3 years [for all OCs].**

Moreover, considering current practice of differentiations between full “site valuation” versus annual “desk valuation” [ie an indexation], we recommend the definition of valuation here be tightened as a full site valuation.

## Natural disaster insurance

**SCA recommends that any program to support access and availability to disaster insurance should include the strata and community title sector on equitable terms relative to any assistance to households in detached properties, while recognising the different characteristics of this market.**

## 

## Insurance for shared services

The changes introduced by the Consumer Affairs Legislation Amendment Act 2010 updated the definition of building within the OC Act to include ‘any shared services’; clarifying and expanding insurance obligations of the OC.

It does not appear that all related sections of the OC Act have been updated to acknowledge this change.

In particular, the OC Act provides that by unanimous resolution an OC may resolve, where there is no common property, that each lot owner must arrange for the lot owner’s own insurance. [s63]

This provision of the OC Act may be deficient in that it does not stand to reason that where there is no ‘common property’ there are no common services.

Failure to recognise and take out cover for these services leaves the OC exposed.

**SCA (Vic) recommends that the OC Act be clarified so that insurance is still required where there are common services.**

## Office Bearers Liability Cover

Although it is enabled by ordinary resolution, it is not mandatory to take out insurance for office bearers liability. SCA (Vic) believes such cover should be mandatory where a committee exists. ie It would not be required by OCs who are not obligated, and choose not to, appoint a committee, under the provisions of the OC Act. (ie Where an OC consists of less than 13 lots and resolves not to have a committee.)

Office bearers liability does not protect the OC. It covers certain individuals who are doing things on behalf of the OC (dependent on insurer policy wording).

**SCA (Vic) recommends it should be mandatory for all OC’s that have a committee to have office bearers liability insurance.**

***Background:* The value of Office Bearers Liability Cover**

Whilst office bearers liability cover is not compulsory (under the Owners Corporations Act 2006) it is important. And it may be costly for an OC committee member not to have this cover as part of the OC insurance.

The OC Act provides that the committee has, and can be delegated the decision making powers of the OC. Section 113 provides that a resolution of the committee of an OC in respect of any matter has effect as a resolution of the OC.

Despite this provision of the OC Act, a third party (which can include other members of the OC) may choose to take action against any or all committee members as individuals. And decide not to sue the OC. Action could be taken for either an alleged and/or wrongful act; under circumstances where the third party may have, or appear to have, suffered a loss as a consequence of decisions made. Failure for the OC to take out this cover would leave the committee exposed to all costs associated with any such action.

Recognising too that positions on the committee are voluntary, such exposure could discourage members from nominating. Which in turn, could lead to the inefficient running of the owners corporation, and a situation where owners refrain from making their vote count.

And whilst S118 of the OC Act provides ‘immunity of committee members’; for anything done or omitted to be done in good faith and the exercise of a power or the carrying out of a function under the OC Act or its Regulations, it does not stop other parties from making allegations which committee members will be required to defend. As ultimately, a Court will decide what “good faith” means in that particular matter.

***Background:* What is Office Bearers Liability Cover?**

Office bearers liability insurance is actually a professional indemnity policy for the committee members. It is designed to provide protection against losses arising from an alleged act - it does not need to be a wrongful act.

Office bearers liability insurance does not cover fraudulent acts committed.

It may also extend to cover legal expenses incurred to defend a claim against committee members.

Terms, inclusions and exclusions vary amongst insurers.

The owners corporation itself, does have cover under most specialist strata insurances, for the payment of legal fees incurred when the OC has to defend itself against action. There will likely be a specific excess, policy sublimit and need for insurer approval in advance. Owners must read their insurers product disclosure statement (PDS). This cover however, is distinct to cover offered by office bearers liability which is cover for the individuals.

It is also important to understand that other individuals in the OC may be undertaking work on behalf of the OC, even though they have not formally been elected to be a committee member. This will often include the strata manager or subcommittee members. So it is important the OC clearly understands; what their insurers define as an ‘Office Bearer’. And whether cover is dependent firstly on a person being an elected committee member, and secondly, extended to a person who may be performing duties of the committee even though that person may not have been officially elected.

1. **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)?**

No.

The SCA (Vic) Policy Position addressing the insurance ‘opt out’ issue is reproduced below.

## Building insurance

All owners corporations must take out reinstatement and replacement insurance for all buildings.

Sometimes lot owners individually take out insurance rather than as the collective entity of the owners corporation.

This creates problems. Some of the disadvantages of individual insurance are:

* Individuals may not renew the policy, leaving all owners of the owners corporation exposed to unlimited liabilities.
* The policies purport to cover [that owner’s share of] the common property but the risk is that insurers not well versed in owners corporations may not have policies that adequately insure what must be insured.
* It is more expensive than the owners corporation taking out the insurance. In one example of a Master Planned Estate which SCA (Vic) is aware of, the saving to each lot owner was greater than 50%.
* In the event of a claim, there will be to and fro between insurers over who is responsible, and who should pay in the event of a successful claim.
* In many insurance claims situations, time is of the essence and there is no luxury to procrastinate particularly on “make safe” issues.
* Many OC’s who share party walls experience problems with the co-ordination of repairs/reinstatement being managed by separate insurers and repairers.

**SCA (Vic) recommends the owners corporation be identified as the entity required to take out insurance [not individuals].**

**SCA (Vic) recommends the introduction of this obligation be complemented by administrative guidelines for staged subdivisions, greenfield master planned estates and the like.**

SCA (Vic) recognises the administrative concerns experienced by an owners corporation of greenfield master planned estates, large scale subdivisions and the like, due to their staged nature.

An OC is not always informed immediately if at all, of the progressive completion of lots and/or stages which may expose the OC to unnecessary risk of insufficient cover. By introducing mandatory administrative procedures for the individual lot owners, developers and owners corporations, essential information should be available to ensure adequate insurance is in place at any given point in time.

1. **What are your views about lot owners’ responsibilities for any excesses or increased premium payable by the owners corporation?**

The SCA (Vic) Policy Position on insurance claims excess is reproduced below.

The issues paper says that lot owners, whose use of their lot increases the insurance premium, cannot be levied a differential amount to cover the increase. Certainly, OCs with multiple OCs can currently charge a lot owner a greater proportion of the cost if the use of that lot increases the insurance premium. Multiple owners corporations help to share rights, responsibilities and costs. They would be formed when there is a mix of units and shops within one complex (i.e. higher maintenance and insurance costs for a portion of lot owners). At any rate, we agree with the thrust of the NSW strata laws cited.

The SCA (Vic) Policy Position on multiple OCs is reproduced below.

## Insurance claims excess

There are currently two opposing practices in the sector with regard to payment of an excess on insurance claims by owners corporations. The legislation is unclear as to where the actual responsibility for payment lies and requires clarification.

One option is for the owners corporation to be liable for the excess on each and every claim on the owners corporation policy. This unfairly disadvantages the owners corporation in such cases where it is possible to identify the cause of the claim damage and it is not the responsibility of the owners corporation and/or the party responsible for the damage can be identified, or, where the claimant is not the owners corporation but rather one or a few members of the OC only. The result of any and all unnecessary claims against the owners corporation insurance cover is an increased risk category placed on the owners corporation and affects directly the financial burden on the owners corporation; increased risks means increased premiums and application of and increase to excesses payable.

The alternative option is for the claimant(s), where all lots of the owners corporation or common property are not affected, to be responsible for payment of the excess on that claim.

**SCA (Vic) recommends where a claim is made on the owners corporation insurance policy any excess would, where it relates to one lot only - be payable by the owner of that lot. Where it relates to more than one lot but not all lots – be payable in proportion by the claimants to the loss. This provision should apply except where the OC determines by ordinary resolution that it is unreasonable for the lot owner(s) to pay the excess.**

***Background:* Insurance Excesses in Tasmania**

Where a claim is made on the body corporate insurance policy any excess would, where it relates to one lot only, be payable by the owner of that lot. This provision applies except where the body corporate determines by ordinary resolution that it is unreasonable for the lot owner to pay the excess, for example where a broken window is caused by a structural fault in the wall of the building. Where the claim relates to more than one lot the body corporate is responsible for the excess.

# Surveyors & multiple owners corporations

**SCA (Vic) has concerns over surveyors setting up some simple small owners corporations as multiple owners corporations and unnecessarily complicating them.**

What needs to be taken into account is that the costs associated with the set-up and maintenance of multiple owners corporations may far exceed any possible benefit to any owner.

Multiple owners corporations help to share rights, responsibilities and costs. They are typically only formed when either there is a mix of units and shops within one complex (i.e. higher maintenance and insurance costs for a portion of lot owners) or to separate a common property area used exclusively by a minority of lot owners (i.e. a penthouse swimming pool shared by two lot owners). Multiple owner corporations should effectively have benefits that outweigh the costs. In the vast majority of cases, only one owners corporation is required where there is one building in a residential complex. For example it has occurred where a Plan of Subdivision is created to consist of three owners corporations (one unlimited and two limited) in a complex that only consists of four lots. In this instance it appears to have occurred as there are two separate entrances, one entrance leading to two lots and the other entrance leading to the other two lots. Yet they all have similar facilities. The surveyor has set up the unlimited OC (known as OC 1) which all lot owners are members of, followed by two limited OCs (OC2 & OC3) the latter OCs each consisting of only two lots. Recognising the Act identifies each of these OCs as entities in their own right, this complex is therefore obligated to have three ABN’s, three AGM’s, three sets of minutes, separate financials etc. This is extremely costly for the owners corporation to manage and absolutely unnecessary.

The converse is also a problem, when multiple owners corporations are not set up when in fact they should be.

In this way, SCA (Vic) is trying to help achieve better outcomes for all involved – developers, surveyors, the owners corporations, lot owners, and owners corporation managers.

Surveyors feel they ae forced to establish multiple owners corporations to segregate costs based on a benefit principle, because of the inflexibility in section 28, and narrow use of section 24 of the OC Act.

**Meetings and decisions of owners corporations**

1. **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?**

The obligation under section 68 of the Owners Corporations Act should be extended to developers who maintain control of an owners corporation by holding a majority of the lot entitlements [not simply the majority of lots].

Also, s68(3) says it applies for a period of 5 years from the registration of the plan of subdivision. This time period should be extended to 10 years.

We strongly agree with the Queensland strata laws cited such that developers owe duties to both current and future members.

We strongly agree with the NSW strata laws cited such that developers are explicitly prohibited from voting on building defects matters.

The SCA (Vic) Policy Position on delineating common property is reproduced below. For example, this recommends that the developer’s ability to enter into leases, licences or agreements etc. for which the developer is a beneficiary be limited to 3 years.

# Delineating common property

Owners corporations can be severely and unfairly disadvantaged financially, where an area required/designed for the use and/or enjoyment of the owners corporation is created as a private lot on the plan of subdivision and then leased back to the owners corporation for such purpose. In such witnessed instances, such a lot is inappropriately retained by the developer. It is more appropriate just and fair, the area be identified as common property.

An example of such an instance is the designation of riser cupboards as a private lot and ownership being retained by the developer. The owners corporation was therefore obligated to enter into and fund the leasefrom the developer to use the cupboards for their built purpose; to accommodate services to all lots such as telephone and foxtel cables. S4 of the Act clearly identifies the responsibility for the repair and maintenance of such services as that of the owners corporation, and it is therefore more appropriate the ownership of the riser cupboards be that of the owners corporation and be created on the plan of subdivision as common property.

A further example is a private lot on a new plan of subdivision which will be owned by a developer and then leased back to the owners corporation so they could receive the benefit of the pool and gym facilities for which it was designed. The lease entered into transferred the responsibility for all outgoings on to the owners corporation.

Whilst this second example is a reasonable business proposition for the owners corporation to enter into, it may not be on favourable terms for the owners corporation.

Another example is the developer entering into a peppercorn 99 year lease of common property for the purpose of advertising signage, mobile phone towers and car parks, for which he receives a large ongoing financial benefit for.

This is despite s68 of the Act imposing obligations on the initial owner to act honestly and in good faith and with due care and diligence in the interests of the owners corporation in exercising any rights under the Act.

**SCA (Vic) recommends the Subdivision Act 1988 be changed so that, where an area is required and/or designed for the use and/or enjoyment of the OC, it is classified on a plan of subdivision as common property.**

**SCA (Vic) recommends that the developer's ability to enter into leases, licences or agreements etc. for which the developer is a beneficiary be limited to three years.**

1. **What other changes should be made to developers’ obligations?**

We strongly agree with the new NSW strata laws such that developers have to pay a 2% defects bond for surety. Also, the developer has to fund a defects report in the first 2 years, done by a qualified independent inspector.

We strongly agree with the new NSW strata laws that a developer is liable if they don’t set realistic budgets. It provides for compensation from developers who lure unwary buyers with unsustainably low levies. Developers promise fantastically low levies which are a fantasy and deliberately mislead purchasers over the real level of fees.

The SCA (Vic) Policy Position on requiring disclosure in off-the-plan sales is reproduced below.

***Vertical integration: Both developer and strata manager***

There are increasing numbers of vertically integrated companies, where the developers also have owners corporation management arms of the business. This legitimate strategy does allow for ongoing relationships and a developer’s reputation is keenly protected. Does the developer have a role in the ongoing operation of the owners corporation? The legislation includes safeguards to ensure they act appropriately, and this submission recommends strengthening this with a number of additional safeguards. There are challenges to ensure they carry out their fiduciary responsibility and be arms length from the developer. There are the pros and cons to this strategy; and issues to be managed related to the initial appointment.

But it is a step too far to entirely prohibit developers acting as strata managers – it would “throw the baby out with the bathwater”.

On balance, we disagree with the part of the new NSW strata laws that anyone connected to the developer cannot be appointed as the strata manager until 10 years after the creation of a scheme.

To assist a fair and equitable transition within the OC, from initial owner to purchasers who become the individual lot owners within the OC, SCA (Vic) also recommends that additional documentation be provided at the first annual general meeting to enable the OC to efficiently and effectively, and with the least amount of stress, carry out its functions. Along the lines of the NSW new strata laws, which now require the building maintenance manual and all necessary information for the running of the scheme. Typically required are things such as the Asset/Maintenance Register, and building documents such as: the building contract[s], contract specifications, contract/architectural plans, building permit[s], occupancy permit[s], engineering drawings and computations, the Certificates of Warranty Insurance for each lot, soil reports, any building defect reports, stamped/approved plans, any Building Notices or Orders issued, and Certificates of Compliance [plumbing and electrical].

## Off-the-plan sales – remove the gap by requiring disclosure from initial owners [developers]

A vendor’s obligations on the sale of land in Victoria are set out in the Sale of Land Act 1962. An owners corporation certificate is required to be attached to the Section 32 statement of the contract of sale.

When the land is sold “off the plan”, generally, that land will not yet be affected by an owners corporation. Therefore, the obligation to include an owners corporation certificate in the Section 32 statement does not arise. The obligations under section 32 are not ongoing after the date of sale. Once the plan is registered, there are no additional obligations for the vendor to disclose matters regarding the owners corporation and the vendor is not required to obtain an owners corporation certificate for “off the plan” transactions.

The Legal Practitioners Liability Committee has also identified this anomaly in the legislation. It stated:

“The Act does not directly address certification requirements for off the plan developments. Owners corporations are defined under the Act to mean body corporates incorporated by registration of a plan of subdivision. Given that off the plan developments do not have a registered plan of subdivision at the time s32 statement obligations arise, they appear to escape the certification requirements imposed in sub-s32(3) of the Sale of Land Act 1962 (Vic).”

It should not be left so that only informed purchasers conduct due diligence in relation to land [eg ordering rates, land tax, VicRoads, heritage and other certificates] and order owners corporations certificates prior to settlement.

**SCA (Vic) recommends that if an owners corporation will be created in an “off the plan” sale, then to the full extent known, the contract of sale should require that purchasers receive the same information as that required for an owners corporation certificate in an existing owners corporation.**

***Background:* Developers presales budgets found wanting**

Many developers go to market with presales documentation budgets that are poor and inadequate for the first year of an owners corporation. Developers have an incentive to set low fee levels as it aids in the marketing of a building [potential buyers will negatively view high fees].

Some use rules of thumb to gauge what the minimum level of an adequate first budget of an OC should be. For example, 0.9% of the value of the building in large OCs with extensive facilities such as pools, gyms and lifts. Or 0.5% of the value of the building in normal OCs. Regardless, it is common that developers, in order to secure sales, try to keep the fees at levels far under what is reasonably required.

The owners rightly cry foul when the second year budget is prepared by the manager and is double the developer’s first year budget.

**It is essential that developers of new properties provide a defensible and best-estimate of the first full and typical year’s owners corporation expenditure. Further, the first full year estimate should *not* include the savings afforded to new properties where warranties on significant items such as lifts, essential services and air conditioning will result in, for example, lower maintenance costs than will be experienced in subsequent years.**

The initial owner-developer should fully disclose the forecast maintenance and management costs of the property.

1. **What is your experience of voting and the use of proxies within an owners corporation?**

Confusion is common with voting and proxies, so any published guidance by CAV would be useful. eg who has to sign a proxy if more than one owner on the title? Is a company which owns the title to a lot required to provide a proxy form for someone to represent it at a general meeting? Etc.

About six years ago, regarding proxies for committee meetings, SCA (Vic) disagreed with the practice of allowing committee members to appoint proxies to represent them at a committee meeting in ones absence. Of concern is the requirement that committee members must be appointed by resolution of owners at a general meeting, but then that this formality can be compromised when the successfully appointed representative can simply have someone else stand in their place, Ultimately, CAV decided to at least progress with giving OCs the power to make a Rule limiting the practice.

Although as highlighted in many sections of this submission, the ability to achieve a special resolution to pass a Rule is difficult. This can therefore leave such common requirements/needs formally unaddressed. Consideration should be given to updating the Model Rules to establish minimum guidelines and/or the authority be given to the Committee within the OC Act to establish voting by proxy at committee meetings as part of regulating its own proceedings s112(11).

Furthermore in regard to committee members being represented by a proxy at a committee meeting, clarification would be beneficial that the Act does not permit a person appointed to the committee by proxy to have the ability to appoint a proxy in their absence. The Act clearly states that the holder of a proxy cannot transfer it to a third person. Section 87(c).

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

No.

Proxy farming is not a significant issue.

If changes are to be made to limit proxy farming, as in NSW, then consideration must also be given to how OCs will be able to make decisions if insufficient numbers are able to be in attendance at meetings or available to vote in a ballot..

Section 89, as it currently exists, purports to restrict persons from demanding proxies for the purpose of voting.

1. **What are your views about the adequacy of the provisions that set out the Chairperson’s voting rights?**

It is adequate as is.

No change necessary.

1. **Should a contract of sale be able to limit the voting rights of lot owners?**

No.

That would just be a loophole to the provision in the Act prohibiting the requiring/demanding of a proxy/power of attorney.

1. **What has been your experience of voting within an owners corporation?**

It is adequate as is.

The biggest problem experienced in the industry is apathy of some lot owners; to either attend meetings and cast votes, and/or respond to ballots.

An alternative that may be proposed, but which SCA (Vic) would disagree with, as it may simply lead to increased angst and disharmony within an OC, would be for the voting process to recognise non-returned votes as either consent for or against a motion. Such a measure would not provide a true indication of the individual lot owners vote.

As a side, and whilst it’s not specifically related to only the area of voting, OCs are experiencing bullying behaviour within their collective, not simply from outside sources. It may therefore be an issue that would benefit from additional resources and guidance.

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

It is adequate as is. As and where an issue, relevant to specific decisions of the OC, ie termination, these matters have been raised elsewhere in the SCA (Vic) response to this Issues Paper.

It is worth considering however the difficulties to obtain a special resolution. Owner apathy is one of the biggest problems experienced and results in unsuccessful decision making processes. For example where the number of votes cast at a meeting and/or returned via a ballot are insufficient to reach the quorum required for an outcome to be reached in favour/or against the motion. In some states to counteract such instances legislation provides for motions without dissent.

1. **What are your views about the adequacy of the provisions for convening meetings?**

It is adequate as is. Although consideration could be given to clarify the following two issues outlined below.

Whilst the OC Act recognises as notations that notice of meetings may be given electronically any attempt to modernise the Act and provide clear guidance on the use of technology to support meetings is welcome.

For instance, section 80 of the OC Act provides that a lot owner may participate in a general meeting in person, be teleconferencing in accordance with the regulations, by proxy or in another manner provided for by the regulations.

In this example, whilst it appears that the intent of this section is to recognise attendance by skype or other virtual means, the existing regulations remain silent on prescribing what is acceptable as a ‘teleconference’ or to provide for ‘any other manner’.

Consideration may also be given as to what a fair outcome may be if no-one turns up to a convened meeting. In a professionally managed OC can the Manager by default make decisions to ensure the interest of the OC is protected; to the extent that the decisions are fair and reasonable.

The need to re-convene a meeting may simply incur additional costs for the OC, and result in the same outcome of no one attending and no valid meeting being held; but decisions still needing to be made.

SCA (Vic) recognises that technically two people must turn up to in fact enable a ‘meeting’ of attendees to occur. In the absence of any attendees with voting rights, (and no proxies), the person conducting a general meeting (either volunteer manager or paid professional manager) should have the authority, or ability to be delegated the authority to conduct the meeting and in line with the requirements of a meeting to which a quorum is not present, issue the minutes with interim decisions and the current provision for same. This will ensure owners have the ability for 25% of owners (lot entitlement) to call for a special general meeting if there is any concerns raised, to revisit the agenda items of the meeting that are in dispute.  To protect owners it may be acceptable to insert a clause that prevents a meeting held under such circumstances to increase/decrease a budget by greater than 10%. This is as practiced in other states.  The current Vic Act already has provisions that would prevent a person such as an OC Manager from using a proxy given to them by a lot owner to vote on their own appointment so protections are already in place in this regard. [Section 87(4)]

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

**Minutes**

Do not prescribe how minutes must be distributed. With modern forms of electronic communication, many have online access to all sorts of records at any time from online portals.

Best practice of professional OC managers dictates that minutes should be sent quickly after meetings, while fresh in people’s minds. A relatively recent and at first glance seemingly innocuous amendment to strata laws now inadvertently means that minutes are sent twice – once soon after the meeting, and as mandated with the agenda documents ahead of the next meeting. ie If a quorum was present at the previous meeting there is no provision within the Act that the minutes be distributed sooner then prior to the next meeting. This latter requirement as per Section 72 of the Act makes no sense and should be removed; ultimately it could be 15 months before an owner receives minutes of an AGM.

An alternative simple solution may be to include a statement in the agenda that minutes of the last meeting are available upon request. This right to view or request a copy is already covered in the Act, and will allow OCs to save money by distributing the minutes only once if they choose, and/or providing electronic access to records where feasible.

1. **How can the views of tenants be most effectively shared with the owners corporation?**

No change is necessary.

OCs are legally made up of owners rather than tenants. If a tenant has an issue, the technical avenue open to them is to raise it with their landlord lot owner.

Practically, though, strata managers currently also deal with tenants. Although strictly speaking tenants are not the strata managers ‘direct’ customer, they are an ‘indirect’ customer who will raise the alert to, for example, common property maintenance issues, rule breaches, etc.

Unhappy tenants mean unhappy owners, and conversely happy tenants mean happy owners. The interests are already aligned such that it’s in everyone’s interest to ensure tenants are happy.

Certainly, OCs want to communicate with and get feedback from tenants, and that already happens to varying degrees through such mediums as physical noticeboards, newsletters, social media platforms, etc,

But, there is no problem to solve here. This would be a solution in search of a problem – in terms of unintended consequences.

Do not be prescriptive. Allow flexibility and discretion for OCs to deal with this when and how required, such as a tenant requesting permission to address a meeting.

If tenants were to be treated like owners, and hence had to be served with notices of meetings for example, then the cost to owners in the OC will increase by more than 50%, because more than 50% of lots are rented out [in inner areas the proportion of renters is much higher – 80%].

**Committees**

1. **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?**

SCA (Vic) recommends the OC Act should be amended to require the establishment of a committee when there are 8 or more lots in an owners corporation.

SCA (Vic) also recommends that the maximum size of the committee is 7 people, with the ability to expand it by an ordinary resolution at a general meeting. This is of particular benefit to better cater for multiple owners corporations; ie where an Owners Corporation consists of multiple OCs, each OC is required to establish its own committee. In such instances the committee of the unlimited OC works in the best interest of all to ensure it includes a representative from each of the limited OC’s. It ensures the interest of all OCs is considered and accounted for in the decision making process. This is currently not possible where an OC has more than 12 limited OCs within the plan and provides increased challenges in a plan consisting of more than four limited OCs.

The full SCA (Vic) Policy Position explaining our recommendation on the threshold when a committee is required and the maximum size of the committee is reproduced below.

In the absence of any agreement with the maximum size of the committee recommended above, consideration should be given to granting clear powers to the OC to limit the numbers by resolution at a general meeting. The boundaries for these numbers could be as legislated; ie 3 to 12.

In addition to the above recommendations, benefit could be gained by clarifying that the appointment of the chairperson and secretary may be at either a general meeting or a committee meeting. It is commonly misunderstood that it can only be at a general meeting.

The only mandated requirement for a general meeting is the appointment of the committee where required, or where an OC may choose to have one, and the appointment of a Chairperson should an OC choose not to appoint a committee.

The Act also provides that if a chairperson or secretary is appointed at a committee meeting, then they can be removed at the respective level, ie committee meeting or general meeting.

Additional clarification of who may conduct a committee ballot may also be of benefit; noting that the existing provisions do not qualify this. In this instance, maintain same level of authority as per general meetings.

It is recommended that the Act remain silent on mandating distribution of committee meeting minutes. It is an industry best practice of professional OCMs to distribute or make such minutes available to owners after a meeting either by post, electronically or at time of request, as per decisions of the OC. Mandating this requirement may simply attribute to additional and unreasonable costs to the OC.

SCA (Vic) also recognises great benefit in the education of the committee; including chairperson, and secretary. Whilst we appreciate mandating the requirement is too onerous we would welcome and encourage access to training resources. Refer to the SCA (Vic) Policy Position also noted below: Education for committee members – to be voluntarily accessible. The essential skills and particular expertise a committee should have may be summarised as those required to execute its key responsibilities; financial literacy, strategic planning, policy making, community engagement, facility management.

# Committees – threshold when committee is required & maximum size

Committees help the effective functioning of owners corporations. SCA (Vic) advises managers to encourage committees in owners corporations regardless of size – no matter how small they are.

The current legislation requires that owners corporations with 13 or more lots must have a committee. SCA (Vic) believes that this threshold requirement needs to be reduced to reflect the value and complexity of many smaller owners corporations.

The current legislation requires the maximum size of a committee to be 12 people. It is commonly accepted from academic research that there is an optimal size where groups function most effectively. Both too small and too large groups results in sub-optimal outcomes. The maximum size of the committee of an owners corporation should be set to reflect this optimum size. The table below shows that most jurisdictions already recognise this, and set a maximum size of 7 people.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | **SA** | **VIC** | **NT** | **WA** | **QLD** | **NSW** | **TAS** | **ACT** |
| Are there  limits on  committee  size? | No | Yes  S103  OCAct | Yes  Part 2,  s5 of  Regulations | Yes  Sch 1, cl 4  STA | No | Yes  Sch 3 cl 2  SSMA | No  But  minimum  number of 3  s79 STA | No limited  S84 UTA |
| What is the  maximum  committee  size? | N/A | 12 people  S103  OCAct | 7 people,  More if by  Special  resolution  s49 UTA | 7 people  Sch 1, cl 4  STA | 7 people | 9 people  Sch 3 cl 2  SSMA | N/A | 7 people  (can be expanded by special resolution) |
| What is the  minimum  committee  size? | Not  stated | 3  S103(1) | 2  Part 2, s5  Regulations | 3  Sch 1, cl 4  STA | Dependent on size  but must include  chairperson, secretary  and treasurer.  Regulation 9 (BCCM) | Sch 2, cl 18  SSMA | 3  S79(3) STA | All 3 members are on committee if 3 or less lots.  Above 3 lots, not limit as decided by OC .  S85 UTA |

**SCA (Vic) recommends the OC Act should be amended to require the establishment of a committee when there are 8 or more lots in an owners corporation. Also, that the maximum size of the committee is 7 people, with the ability to expand it by special resolution [to cater for multiple owners corporations].**

# Education for committee members – to be voluntarily accessible

There is no question that informed owners make for a better functioning owners corporation.

Some have called for mandatory committee member training,

Given Governments’ commitment to light handed regulation, mandatory training seems too onerous for lot owners who volunteer to be committee members of their owners corporation.

Analogous to the findings of the Cooper Review into SMSF [Self Managed Super Funds], rather than making education compulsory for committee members of owners corporations, educational resources should be made available online, though committee members who breach the owners corporation laws should be compelled to undertake education.

**Mandatory training of committee members is too onerous and should not be adopted. SCA (Vic) recommends educational resources should be made available online, though committee members who breach the owners corporation laws should be compelled to undertake education.**

Currently available from CAV in Victoria is a Guide for owners corporations - “Owning, managing and living in a unit or apartment: Guide to owners corporations”. Printed copies are available or it can be downloaded from the CAV web site. The CAV Education Campaign for the Guide, in the post new laws period, resulted in the highest response rate to a CAV campaign ever, with 33,000 guides sent out in the first half of 2008. CAV also have on their web site a range of information and sample documents about running an owners corporation. The BLA / CAV have also published a guide for registered managers.

CAV should continue to fund and promulgate information via print, web, forums and by telephone.

***Background:* What are the other jurisdictions doing?**

The Qld government has made available online training materials for lot owners in owners corporations.

SCA (Vic)’s equivalent body in NSW, the SCA (NSW), was successful in a government grant from the Office of Fair Trading to develop an online education course for OC committee members.

***Background:* VPF Government grant – OC Information Forums 2008**

As the pre-eminent professional body for the industry SCA (Vic) received a substantial government grant in May 2008. The project started mid 2008 and ran through to the end of 2008. The funding for this project was provided from the Victorian Property Fund on the approval of the Minister for Consumer Affairs. The purpose of the project was to deliver 16 free public information seminars throughout metropolitan Melbourne and regional Victoria to improve participants’ levels of awareness of their rights and obligations in respect to owners corporations.

Including:

-roles and responsibilities of owners corporations,

-responsibilities of individuals who rent or own owners corporation properties, and

-changes arising from the introduction of the *Owners Corporations Act 2006* (‘Act’).

600 members of the public attended the 16 forums and they were well received. 100% of returned evaluation form rated the forums as valuable, very valuable or extremely valuable. Attendees were provided with a copy of the presentations, and encouraged to take a copy of the guide for fellow members of their owners corporation and neighbours. Additional copies were also provided to other professional stakeholders for distribution to their clients.

**Issues Arising out of the public information forums**

Many attendees were elderly owner occupiers who have borne the brunt of compliance in the past and continue to do so under the new Act and Regulations. Many expressed concern that fellow lot owners are unwilling to become involved in the OC.

The majority of self-managed owners corporations are not ‘active’ and generally only interact about insurance responsibilities. In practice, one owner will obtain quotes OR just renew the existing policy without re-valuation. Other lot owners make out a cheque for their share of the lot liability to the insurer. The majority of attendees reported they do not meet as an OC on a regular basis, nor did they under the previous regime.

Annual General Meetings have not been held and many consider the act of calling meetings onerous.

Failure to achieve quorum at meetings was cited as the greatest challenge and lot owners were not aware of provisions set out in Section 78 of the Act relating to interim resolutions.

The vast majority of self-managed OCs had not established an OC register by 30 September 2008 as required. Many expressed concern about the whereabouts or existence of records, past and present.

Of immediate concern is the incapacity of many OCs to provide an OC Certificate – particularly within the specified time.

Anecdotal evidence suggests that some real estate agents are listing lots in OCs for sale without providing advice regarding the OC certificate requirement to the vendor.

As a result, disputes can arise between the vendor and other lot owners, when the OC certificate is not forthcoming.

Solicitors and conveyancers are finding it difficult to produce a certificate as many self-managed OCs have an ad hoc approach to record keeping and storage.

The majority of lot owners were unaware of the existence of model rules.

Many expressed concern about how to establish grievance procedures and the capacity of the OC to resolve disputes.

Lot owners and practitioners familiar with the Residential Tenancies Act are confused by the VCAT process. For example, the requirement for a new application each time fees or levies fall due. In the Residential Tenancies Tribunal, the Order is made for the arrears to the day of the hearing.

The question of costs was also raised. Those who pay fees and levies on time resent subsidising recalcitrant lot owners and believe it is unfair for the OC to incur costs for debt recovery. They believe this cost should be borne by the debtor and form part of the VCAT order.

**Rights and duties of lot owners and occupiers**

1. **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?**

See the answer to q46, as well as its ‘Background Box’ providing guidance for owners.

In addition we note that OCs on the whole do recognise the right of individual lot owners to effect repairs/works on their own private lot, but there are definitely times when an OC needs to maintain control. This is not just for the purpose to enable quiet enjoyment of other private lots and use of common property, but also to remain in control of the structural integrity, risks and impact that works on private lots may have on the value of the property.

Examples such as the installation of individual air conditioners, change of flooring within multi-level developments, change of colour of external façade, installation of storage cages, placement of bicycle racks. The Act needs to provide clear authorities under which OCs can establish and enforce rules which the owners collectively have agreed is acceptable to protect their investment.

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

Again, see the answer to q39 above, and q46.

Also, see the answer to q22.

1. **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?**

No change is necessary to add specific requirements.

Note that there are circumstances where, for example, it may be appropriate that lot owners relinquish rights to access [eg pools, gym, car park, etc] where they have leased their apartment out and those rights of access, correctly, are now the tenants.

**Rules of the owners corporation**

1. **Who should comply with, and be bound by, the rules? Should ignorance of the rules be a consideration?**

The SCA (Vic) Policy Position on owners versus occupiers is reproduced below.

As per the cited NSW legislation, ignorance of the rules should be no defence to a breach.

# Duties & Responsibilities – Owner versus Occupier

Ultimate responsibility to comply - and enforce compliance - with the Owners Corporations Act and its Regulations should remain with the owner of the lot, not the occupier.

The duties of occupiers of lots [s137] as introduced by the changed laws in 2006, is a regression that places the obligation to comply with rules of the owners corporation on to the occupier.

Similarly, who is bound by the rules [s141] includes sub-lessees and occupiers.

Issues of enforcing compliance arise as there is no contractual or proprietary relationship between an owners corporation and occupiers.

The general rule is that the landlord, or rental agent/property manager, can via a provision in a lease put an end to a tenants ‘nuisance creating conduct’ on the premises leased, and that they must do so, if any other tenant complains of the conduct.

**Whilst SCA (Vic) agrees sub-lessees and occupiers should be bound by the rules [as per current duties and obligations of the OC Act], SCA (Vic) recommends that ‘ultimate responsibility to ensure compliance’ be placed on the owner; the party who has the contractual relationship with the occupier.**

The situation in New Zealand is that the Residential Tenancies Act introduced changes in 2010 which added weight to the New Zealand laws governing body corporates; the Unit Titles Act. It recognises body corporate rules must be a part of a tenancy agreement and validates body corporate rules as terms of the tenancy agreement. This in turn provides the power for a landlord to enforce the body corporate rules.

This requirement and process is further supported by the Residential Tenancies Act requiring that any landlord who is out of New Zealand for longer than 21 consecutive days, must ensure that the landlord has an agent in New Zealand. Non-compliance is recognised as an unlawful act. Any agent appointed under this circumstance has, as against the tenant, all the rights and obligations of the landlord.

1. **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?**

People should be responsible for their own breaches, to the extent possible.

Then, where it’s not attributable, ultimate responsibility should be passed ‘up the line’.

Ultimate responsibility should be placed on the owner, as per the Policy Position in the previous answer to q42.

It should not matter whether or not a breach was ‘permitted’. The person ‘up the line’ can ultimately seek recompense where appropriate.

1. **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)?**

*Pets*

This issue is easy.

No change is necessary.

There is already a default model rule regarding pets. Pets are allowed, unless it has been resolved not to allow an animal because it’s a nuisance or poses a danger.

Animal-friendly multi-storeys are on the rise. There is a trend towards pet-friendly apartment living. This trend will only increase with the ageing of the population, where companion animals will be important. 63% of Australian households own a pet - one of the highest rates of pet ownership in the world. The inner city has thousands of registered dogs and cats.

Definitely, do not adopt the choice of the 3 default pet rules, as per the NSW legislation cited. These are horrible.

Consider, for example, rules that implement blanket restrictions on pets or pet restrictions based on size or weight. The freedom to keep a companion animal is central to many people’s lives and well being, and the inability to keep a pet is a source of significant distress and subsequent litigation in strata schemes. If we are committed to the values of liberal democracy we must concede that our own view of pets is irrelevant to the question of whether someone else is allowed to keep one. What others do in their own home is their business. The only way that it will become our business is if what they do disturbs us. So, if their dog barks continually, this is an other-regarding act that we can legitimately regulate, but if they have a goldfish, a cat that never leaves the house, or even a Labrador who lies comatose on the sofa all day, it is no concern of ours. As a tenant, keeping a pet would be a use of property that affects the landlord’s reversion and could rightly be regulated in a lease, but it is not automatically a use of property that affects the apartment next door, or the common property in any meaningful way. In a democracy, most people do not expect to be able to control what their neighbours do in the privacy of their own home and so a property right that allows people do to that, without adequate justification, must be called into question. Strata title runs the very real risk of fostering intolerance.

*Smoking*

This issue is more vexed.

On balance, the health issues mean that changes should be made to deal with this issue, as per NSW new strata laws.

NSW has just passed new strata laws and it allows OCs to make rules in relation to nuisance, and specifically notes that smoke drift can constitute a nuisance.

As a guide consideration could be given to section 16 of the Water Act 189 which identifies legal liability arising out of the unreasonable flow of water. Applying similar guidelines to determine responsibility may assist establish rules as to who, how and under what circumstances an OC may have the authority to establish control measures to manage the nuisance and potential health issues of smoke drift.

1. **Are there any other issues relating to the coverage of the Model Rules?**

Consider differing Model Rules for residential properties than that for commercial, industrial, high-rise, multi-use, etc.

A model rule is needed that owners advise their tenants of fire safety and responsibilities for fire alarm systems. This will ensure tenants receive information and follow guidelines, given that OCs and/or their secretary or manager is not currently required to be advised when new tenants move in.

The Model Rules have shortcomings regarding sub-committees [refer comments made at q54].

Below are some big picture general comments on rule making and the need to balance privacy versus personal autonomy.

**Rules – balancing privacy and personal autonomy**

Strata titles raise fundamental and complex questions about the things that matter to us most in life. Questions about our homes and businesses, about social and neighbourly relations; questions about individual autonomy and freedom; questions about community and society, our immediate physical environment and the wider landscape of our cities; questions about big government and small; questions about capitalism and democracy.

There is a reason the catch-cry of the English middle classes during the Glorious Revolution of 1688, the birthday of the democracy under which we all now thrive, was “Life, liberty *and property*”. That is because after one’s life and freedom, it is property that matters most.

Strata rules go beyond the ordinary principle of land regulation to prevent harm to others, controlling private, self-regarding acts. These divergences from orthodox property law have the potential to cause serious economic and social harm.

Caution should be used drafting rules so that they do not offend the principle of negative liberty, thus fuelling dispute and undermining the value of tolerance in our liberal, democratic community.

To make an extreme point, without trying to exaggerate, racially restrictive covenants that only allowed Caucasian people were commonplace in the USA throughout the 20th Century. Imposed on large swathes of the American suburbia, it racially segregated cities and societies. Individual instances, multiplied thousands of times, created a social and political apartheid which endures to this day and remains endemic.

Property law creates “externalities”. When the law allows some people to have certain rights to land, by definition that will mean that other people are excluded from land or their rights to use that land are reduced. We need to be attentive to these externalities. Some externalities will be acceptable, for example that my neighbour cannot use my backyard. However, some will not be acceptable, for example that people of a certain race are excluded from residential land.

The question is not, “Is it OK for two people in a transaction to agree to X or Y?”; the question must be, “What if thousands of people agree to X or Y and it affects thousands of land titles?” Good rules of property create good societies, now and in the future; bad rules will cause problems for decades to come.

1. **What are your views about owners corporation rules that prevent lot owners installing ‘sustainability’ items in or on their units?**

We agree that OCs should not be able to have restrictive rules that prevent ‘sustainability’ items.

The SCA (Vic) Policy Positions on sustainability are reproduced below:

* Changes to accommodate sustainability measures,
* Eligibility of owners corporations for sustainable initiatives,
* Requiring mandatory disclosure of sustainability on sale of lot.

## Changes required to OC laws to accommodate sustainability measures

SCA (Vic) agrees with recent Qld law changes on 1 January 2010 [Building and Other Legislation Amendment Act 2009] that now mean the Rules cannot say no to sustainability initiatives unreasonably, where the lot owner owns the structure. For example; to preserve the external appearance of the building. Where the structure is common property, permission should be based on a just and equitable solution for all lot owners.

**SCA (Vic) believes similar changes should be made to Vic OC laws as was made in Qld.**

In the Victorian Parliament on 11/03/2010, using some information SCA (Vic) had given him, the Greens Greg Barber asked the Environment Minister a question without notice on this issue. His supplementary question was ruled out of order, but it is likely the issue of reform was raised with his ministerial colleagues. SCA (Vic) wrote on 15/03/2010 to Tony Robinson, Minister for Consumer Affairs, saying we would welcome the opportunity to discuss this issue with him [or his staff or CAV staff] some options to advance this reform.

There are adverse media articles on this issue, such as “Ugly solar panels don’t get any time in the sun” in the Melbourne Times 03/03/2010, which wrote that Melbourne flat and unit dwellers are being prevented from installing solar panels and rainwater tanks due to concerns about the aesthetic value of the equipment.

***Background:* Environmentally friendly strata by-laws for NSW**

Owners in NSW strata schemes who want to make apartments more environmentally friendly are being given a helping hand.

The NSW government has announced a guide that will provide strata owners with alternative by-laws [ie rules] on common issues including rainwater tanks, ceiling insulation and other environmental modifications.

“Owners corporations can choose to adopt, change or cancel any by-law if it is supported by 75% of votes at an owners’ meeting,” says Minister for Fair Trading Virginia Judge.

“However, while neighbours could reach agreement about installing rainwater tanks or solar panels, they may never move forward because of the costs of having a special by-law drafted.”

Judge’s proposal aims to assist in this by-law change process, without the heavy expense of a lawyer.

Another issue to be further clarified in the guide was the hanging of clothes over balconies as opposed to using the tumble dryer.

“Public debate about the environmental implications of apartment owners using dryers prompted a recent review of this approach,” the Minister says.

***Background:* Sustainability and Unit/town house living - Guidance for owners**

So you have decided to install solar hot water or solar PV, or want to put in a rain tank, add sun shades, should you just go ahead and do it?

When you live in an owners corporation property, you can’t just go and do as you please. There are Rules, Regulations and an Act of Parliament that control how you carry out additions to common or private property. Unfortunately the new Owners Corporations Act 2006 did not address any sustainability measures (energy or water), leaving it up to lot owners to accept or reject any sustainability measures.

Before you do anything, you need to know what you own. This can be determined by looking at your Subdivision Plan (Title) that you received when you purchased the property. The Title defines the boundary of your lot. If you are in an apartment block, the outside wall and the roof is most likely the common property. If you are in a townhouse it is likely that you own the outside wall and roof. If you don’t know how to interpret the plan, you should seek expert advice.

Once you have established who owns what, you will need to proceed as follows:

Roof and walls and land are common property: At the next meeting called by the Owners Corporation, seek exclusive use of part of the common property and to lease or licence the area you desire placed on the Agenda. This will require a special resolution (75% of lot owners to vote yes). At the meeting you will need to “put” your case and convince the other lot owners to give up their right to use that part of the common property. You should come to the meeting prepared with drawings and photographs of your proposal. The cost of drawing up a lease or licence for the use of the common property will be your responsibility and you should seek legal advice. If you gain a financial benefit from the lease or licence the Owners Corporation may decide that a fee per annum is applicable for the use of the common property.

Roof and walls and land are your property: At the next meeting called by the Owners Corporation, seek permission to install the equipment if it can be seen from the public area, for example the driveway or the front nature strip or if the Rules require you to do so. This will require an ordinary resolution (a simple majority voting yes). At the meeting you will need to “put” your case and convince the other lot owners that your proposal will not change the outward appearance in a negative way or devalue the other properties. You should come to meeting prepared with drawings and photographs of your proposal.

Once you have your permission, you can proceed with the installation. You should notify the insurer of the addition and make sure there is safe access for maintenance of the equipment. Once installed, you will become responsible for the repair, maintenance and replacement of the equipment.

***Background: Review of easements and covenants – sustainability issues***

In October 2010 the Moreland Energy Foundation provided comments to the Victorian Law Reform Commission in relation to its review of easements and covenants in Victoria.

MEFL is an innovative not-for-profit organisation established by the City of Moreland to reduce greenhouse gas emissions. MEFL work within and beyond the Moreland community to implement a range of energy efficiency and greenhouse gas abatement programs, including behaviour change programs, research and demonstration projects and advice and information services. Based on their expertise in this field the recommendations as submitted (extracts below), support the recommendations of SCA (Vic).

MEFL proposed consideration of the law relating to covenants in Victoria. Recommending they be amended to restrict the use of covenants that inappropriately limit householders’ ability to take measures to improve the energy, efficiency, energy consumption or environmental impact of their homes. These recommendations were provided on the findings of the research project conducted by MEFL that focused on two significant and inefficient uses of electricity in households – hot water and air conditioning systems – including barriers to the uptake of more efficient and sustainable systems such as solar hot water. A copy of the report is available via <http://www.mefl.com.au/news/178/>.

Within their submission, under the heading of ‘Reforms in other jurisdictions’ MEFL also noted that other jurisdictions have taken steps to address these issues. In particular supporting the legislative amendments in Queensland (the *Building and Other Legislation Amendment Act 2009 and Building* and *Other Legislation Amendment Act 2010)* which invalidate certain decisions and rules (including restrictive covenants and owners corporation by-laws) that inappropriately restrict sustainability measures. These amendments apply to decisions and rules that:

\* Restrict

The use of light roof colours;

The use of energy efficient windows or window treatments;

The installation of a solar hot water system or photovoltaic cells, merely for the purposes of preserving the external appearance of a building.

\* Require

Minimum floor areas;

A minimum number of bedrooms or bathrooms;

Orientation of a house in a particular way

MEFL recognised too that New South Wales has implemented legislation to address this issue, in the form of s28 of the *Environmental Planning and Assessment Act 1979* (EPAA). Section 28 allows for the ‘suspension’ of regulatory instruments that are inconsistent with prescribed types of sustainable development.

## 

## Eligibility of owners corporations for sustainable initiatives

In new and existing residential stock, initiatives to improve environmental performance have been targeted at individual households. A coordinated precinct scale approach, which extends beyond individual boundaries, tends to be missing in sustainable initiatives directed at the city’s existing built environment.

Yet studies on residential stationary energy consumption indicate that greater energy use and greenhouse gas emissions are attributable to this housing form, particularly its high-rise stock, on both a per capita and per dwelling basis. At the same time, current regulations, incentive schemes and rebates for implementing sustainable initiatives in the residential sector tend to be geared towards individual and detached households, with variable application to multi-unit housing.

**SCA (Vic) recommends that regulations, incentive schemes and rebates for implementing sustainable initiatives in the residential sector be developed so that owners corporations are eligible to apply, rather than requiring an individual owner to apply and subject to approval of the owners corporation.**

***Background:* $3.9b Energy Efficient Homes Scheme: Free ceiling insulation**

The Australian Government was to provide free ceiling insulation to the 40% of existing homes not insulated, which comprised 2.2 million owner-occupiers and 0.5 million renters, worth $1,600 and $1,000 respectively. The program was for both houses and flats.

Owners of lots in owners corporations are eligible, even though commonly the roof space of lots in owners corporations is common property, not the private property of the individual. Regardless of the boundaries of common property it’s the individual owner that applies, but will need approval of the owners corporation.

***Background:* Research project - Facilitating greenhouse gas abatement in existing multi-unit housing**

This is a minor thesis by Belinda Strickland at RMIT University in November 2008. Here is the abstract [with emphasis added]:

“An increasing population, the impacts of climate change and the prospect of a resource-constrained future present concurrent challenges to the 21st century city environment. To address these challenges, sustainable solutions need to be found in the existing built environment of our cities. Urban consolidation is increasingly being pursued by cities as a means to curtail urban expansion and meet the demands of growing populations*. In new and existing residential stock, initiatives to improve environmental performance have been targeted at individual households. A coordinated precinct scale approach, which extends beyond individual boundaries, tends to be missing in sustainable initiatives directed at the city’s existing built environment.*

The precinct scale of a multi-unit housing block provides the opportunity to explore the application of such an initiative. It is this concept that is examined in this research paper, as a means of abating greenhouse gas emissions for this sector.

Multi-unit housing, commonly referred to as medium or high-density housing, has come to comprise a significant and growing proportion of Australian residential stock. *Yet studies on residential stationary energy consumption indicate that greater energy use and greenhouse gas emissions are attributable to this housing form, particularly its high-rise stock, on both a per capita and per dwelling basis. At the same time, current regulations, incentive schemes and rebates for implementing sustainable initiatives in the residential sector tend to be geared towards individual and detached households, with variable application to multi-unit housing*.

The defining characteristic of multi-unit housing is the existence of common or shared facilities, such as stairwells, car parks and lifts, managed by a body corporate or owners corporation. As the governing body for this common property, owners corporations potentially hold a facilitative position in mitigating greenhouse gas emissions in their properties. Technologies and solutions for mitigation measures in multi-unit buildings are available now. The means to put these measures into effect can be provided by the owners corporation, by virtue of their existing institutional framework. With the dedication of strategic support and resources, this is an area of opportunity that has the potential to dramatically improve the sustainability performance of the multi-unit housing sector, in turn, contributing to the long-term sustainability of the city environment.”

***Background:* The NSW Home Saver Rebate for Apartments**

The brochure for the NSW Home Saver Rebate for Apartments, details arrangements for claiming rebates where the unique circumstances of strata management and shared services apply.

## 

## Mandatory residential disclosure of sustainability on sale of lot

Qld law changes on 1 January 2010 [Building and Other Legislation Amendment Act 2009], but which are now being scrapped, meant that a sustainability declaration was required to be given to buyers on sale of lots in Qld. This required sellers of residential property to complete and supply a sustainability declaration – a two page form which assesses the energy, water, safety and access aspects of a property. This move followed the mandatory disclosure of energy consumption by sellers of residential property in the ACT, established since 1999.

The mandatory sustainability declaration is intended to increase community awareness of sustainable building features, encourage sellers to improve the value of their homes by adding sustainable features, and allow buyers to have regard to sustainability features when buying a home.

**SCA (Vic) agrees with the planned introduction in Victoria of the mandatory disclosure of the sustainability of residential lots.**

Consideration does still need to be given to which model is best as the Qld [now scrapped] and ACT approaches are different. SCA (Vic) believes the simpler approach of Qld as it was required before being removed, is preferable to that of ACT.

Thought also needs to be given to how it would best work. For example, who has to do the sustainability declaration where the sustainability feature is owned partly by a private lot and partly by the owners corporation via common property.

Any penalties for not providing a sustainability declaration, or not completing it correctly, should not include making a sales contract invalid.

1. **What are your views about civil penalties for breaches of owners corporation rules?**

The civil penalties for breach of rules should be increased from $250 to be similar to the quantum cited under NSW laws.

Such penalties should provide an indexation mechanism – they should be expressed in ‘penalty units’ rather than dollar terms that do not keep pace with the passage of time.

It remains appropriate that such civil penalties continue to be paid into the Victorian Property Fund.

OCs should be able to fine

OCs should have the power to fine [with appropriate consumer safeguards such as an appeal mechanism]. Without a streamlining that empowers OCs to more effectively manage themselves, an inordinate amount of time and effort continues to be wasted in OCs trying to enforce their rules.

1. **Are there any other issues relating to the rules of owners corporations?**

Overcrowding

Appropriately, regulation of overcrowding is done by government.

OCs don't have the power to deal with this issue, and those that have tried have been found to be acting beyond their power.

OCs have been told 'they are not planning authorities', so the responsible authorities need to act.

State Government needs to ensure the laws give sufficient powers for local councils to control this issue. Local councils need to ensure sufficient resources are applied to enforce compliance with the laws.

Overcrowding raises issues such as health and safety, emergency evacuation procedures, fire risk, heightened use of lifts, security of building as foot traffic increases, as well overuse of common property resulting in excessive wear and tear.

Use of lot

There have been many recent incidences receiving media attention where the use of the lot has been brought into question by the OC; eg brothels, tattoo parlours, motorbike clubs. It is recognised that such examples of use increase the risk all owners are exposed to, financial, health and safety wise, yet an OC is restricted in its authority to even put rules into place to protect itself, its amenity and use of the common property and private lots.

**Owners corporation records**

1. **What are your views about owners corporations’ and managers’ obligations regarding availability of records and about limitation on lot owners’ inspection rights?**

May versus must

The change to the Act that created this anomaly was a mistake.

It should say, that a copy of the records must [instead of may] be provided upon payment of a reasonable fee.

Should fees for copies of records also apply to the list of owners names and addresses?

Yes. There’s no compelling reason for an exception.

Is clarification required that, whilst the OC may be charged, the individual cannot be charged for inspections?

The current Act is clear [and able to charge the OC].

Separately, SCA (Vic) recommends the Act be changed to allow individuals to be charged for inspections.

The Vic laws in this regard have the balance wrong. It should be user pays – the OC shouldn’t have to bear the cost. SCA (Vic) wants people to be educated, but it must be acknowledged this comes with a cost. NSW strata laws for example, allow the strata manager to charge the person inspecting.

Access to bank statements

SCA (Vic) recognises that some professional OCM’s are concerned with providing access to copies and or viewing of bank statements. This is generally the case where an OC manager runs pooled bank accounts, as is the practice of Real Estate Agents, and providing access will also provide access to the transactions of other OC deposit and withdrawals. There may therefore be some limiting factors to when such financial records may be accessible that should be recognised. SCA (Vic) is adopting the practice proposed by the previous Bill that access should be provided up to 3 years prior upon the reasonable request of an OC.

In considering the general issue of inspection of records, the following statistic is insightful to the scale of the issue.

81% of Vic strata managers have less than two inspections of OC records per year, recent academic research has found in a survey responded to by 83 strata managers. It is much higher in some other interstate jurisdictions.

1. **Are there any other issues relating to owners corporation records you wish to raise?**

Yes. There is concern amongst professional OC managers, that lot owners are giving agents, as their representative, the right to obtain copies of the OC register, for the purpose of marketing to all owners.

1. **What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?**

No.

Do not include additional information on short-term letting in the OC Certificate.

If disclosure is required it may be more relevant via the Sale of Land Act 1962; and disclosures required in accordance with section 32C.

For example, SCA (Vic) is aware of some developers who are already prohibiting short-term letting by registering covenants on title; which in line with section 32C, requires disclosure of covenants or other restrictions affecting the land placed on it (registered or unregistered).

There was a full review of s32 only 2 years ago. As part of the outcomes of that s32 review, amendments were made to the Sale of Land Act 1962 that provided for the creation of a new Due Diligence Checklist for residential property sales. From 1 October 2014, the checklist is to be made available in hard copy at open for inspections and electronically on vendor and agent websites. The checklist is designed to encourage potential purchasers to think through some of the issues and responsibilities associated with home acquisition and ownership. It also provides the address of a web page at Consumer Affairs Victoria which contains links to specific resources and sources of advice that potential purchasers may find helpful. One of the things listed on the two page checklist is planning controls.

Separate to the arguments posed above, the OC Certificates cannot require details of short-term lets to be disclosed, as the OC Act does not obligate an OC to even maintain this type of information. It does not form part of the requirements of the OC records or the register. Ultimately as there is no obligation for an owner to disclose / report this information to the OC or its manager, there can be no responsibility taken by the OC or its manager for the accuracy of any details disclosed. At best it would be a guess or shared information of any prior experience or evidence of issues raised against that or any other lot.

Separately, we do believe that amendment of planning laws is required to address the issue of short-term letting, even though the issues paper notes it is beyond the scope of this review. SCA (Vic) is still eagerly awaiting the government’s decision on the recommendations of the short-stay serviced apartment’s government panel reviewing the regulation of short-term letting; as well as the government’s adoption of a broader reform package (considering going at least someway further than the panel recommendation), including making the lot owner liable for the conduct.

Short term letting is another example where an OC incurs additional costs to the maintain the common property for the benefit of all, but the excessive wear and tear and repair costs, which are as a result of the activities pertaining to the use of the lots for short term lets, cannot be recovered from those owners/occupiers or their guests that generate the works/increased needs; ie increased traffic in and through common areas, use of amenities, potentially and seemingly less regard to protect and maintain the condition of the common property, its facilities, or consideration of residents. As referenced in q1 and throughout this document.

The SCA (Vic) policy position on short-term letting is reproduced below.

**Short-term letting**

**SCA (Vic) seeks to amend planning laws for peaceful co-existence.**

**SCA (Vic) wants the issue of short-term letting to be overcome with variations to planning laws whereby such apartments can co-exist within a residential building.**

Solutions for new buildings could include allocation of whole floors within a building to serviced

apartments. These apartments would have separate lifts, garbage services and an entrance from a

different street or different side of the building.

The building can even provide for increased share of outgoings by such serviced apartments due to increased wear and tear. This permits the use for which there is obviously market demand but

provides a separation to group “like with like” to minimise the potential for conflict to occur and

provides the mechanism for the building itself to manage the conflicts that do arise.

**Why?**

Much to the chagrin of owner-occupiers. “Overnight” accommodation use of apartments in residential buildings can cause angst to residents living within the owners corporation. Imposing experiences range from unacceptable levels of noise to offensive behaviour, as well as intentional damage through to unreasonable wear and tear on an owners corporations property.

And whilst it may be said ‘it’s not always the case’, there are many and ever increasing incidents

receiving a lot of media attention and identifying particular buildings as ‘party pads’ frequented for

events such as bucks and hens parties, footy fans and schoolies; with a flagrant lack of respect and regard for other occupants and property, being displayed by the short term renters.

**Precedent:**

Currently, in other jurisdictions there are planning controls in the City of Perth, and Central Sydney.

It is also worthy of noting that issues relating to limiting, controlling and/or restricting short term letting have now been tested in various courts and tribunals, with mutual outcomes or resolutions yet to be achieved.

SCA (Vic) therefore welcomed Labour’s election victory commitment to establish a government panel to review the regulation of short-term letting and enable a clamp down on 'party pads' from Airbnb. The Greens’ Ellen Sandell, who won the seat of Melbourne, plans to change the law to support residents. She promised to introduce a bill to amend the OC Act 2006 to regulate serviced & short-stay apartments, while protecting the use of Airbnb by genuine individual residents who call Docklands home.

The panel consisted of seven members representing a wide range of interests impacted by these issues; including an SCA (Vic) expert panel member. The report was published 27th July 2016 – an extract of the Report follows.

***Background: Independent panel on short-stay accommodation in CBD***

***apartment buildings - Executive Summary***

In February 2015, the Minister for Consumer Affairs, Gaming and Liquor Regulation, Jane Garrett MP, and the Minister for Planning, Hon Richard Wynne MP, appointed the independent panel on short-stay accommodation in CBD apartment buildings to recommend ways to improve the regulation of CBD residential buildings, so property is protected from unruly ‘short-stay’ parties.

The panel met six times between 6 March and 28 May 2015 and considered 13 discrete options for reform. The terms of reference required that any reform:

- maximise the amenity of living in apartment buildings; and

- minimise interference with property rights and any negative impact on the Victorian tourism industry, investment in Victoria and the Victorian economy generally, and divisiveness within owners corporations in apartment buildings.

Five members of the panel consider that the appropriate regulatory approach to deal with unruly parties in CBD apartment buildings is to:

- make providers of short-stay accommodation responsible, to a limited extent, for such parties in the apartments they let, and

empower owners corporations to deal with the problem using existing powers, prescriptions and processes under the Owners Corporations Act.

Those members (one with several qualifications) therefore recommend that:

* owners corporations be empowered to serve a ‘notice to rectify breach’ on providers of short-stay accommodation (whether the owner of the apartment, or their lessee or agent) regarding breaches of the owners corporation rules by their short-stay occupants, and
* the orders that VCAT can make in determining disputes based on such breach notices should include an order prohibiting the use of the relevant apartment for short-stay accommodation for a specified period or until the apartment is sold to someone unconnected to the provider.

Those members also consider that this regulatory option should be complemented by self-regulation by industry through implementation of the Holiday Rental Industry Association’s *Holiday Rental Code of Conduct*, with assistance from Tourism Victoria and the City of Melbourne.

One member of the panel considers that the appropriate regulatory approach is to prohibit short-stay accommodation in CBD apartment buildings, and one member considers that a regulatory approach is unnecessary, with the appropriate approach being industry self-regulation.

One member of the majority position also considers that the Owners Corporations Act should also be amended to empower owners corporations to make rules to deal with the issue as they see fit.

Owners corporations do currently have rule making power in Victoria although in question is the ability for an OC to make valid and enforceable rules that all occupiers and owners are obligated to comply with, and that deal specifically with the control of short term letting within their building.

It therefore stands to reason that an alternative, additional and possibly better, solution to this increasingly pressing problem of serviced apartments, especially to holiday-makers, is to amend the planning laws. In a long term case, which ended up at the Building Appeals Board in 2013, the impact of short term letting was assessed together with the definition of the applied Building Code, prescribed use and class of the lot. It was argued by Melbourne City Council that serviced apartments fall within the Class 3 classification under the Building Code of Australia which is relevant to hotels and rooming accommodation, and not Class 2 which are residential buildings.

The concern from this perspective focuses on the safety of the short term occupants themselves. With no prior knowledge of the building they are at greater risk of failing to evacuate or knowing where and how to evacuate in the case of an emergency. Unlike hotels, motels and other class 3 buildings, it is not mandatory for residential apartments to have evacuation plans on hand or posted in visible locations, nor to have frequent mandatory inspections to sign off smoke detectors or the like, are in working order. This may therefore expose occupants to greater safety risks in the unfortunate event of an incident.

1. **Are there any other issues relating to owners corporation certificates?**

Yes.

Section 151(4)(a)(viii) and/or the Regulations outlining the prescribed information Regulation 11(j) could be clarified to identify the minimum details that should be contained within the certificate itself; relating to contracts, leases, licenses or agreements affecting the common property. It currently poses a discretionary disclosure that may benefit from clarity.

The SCA (Vic) Policy Positions on OC Certificates are reproduced below:

* Requirement to include OC Certificates within the Contract of Sale,
* Ability for OCs to be disclosed as inactive
* Prescribed form - Statement of Advice and information for prospective purchasers and lot owners

## Requirement to include OC certificates within the Contract of Sale

**SCA (Vic) is concerned with the potential for error and/or insufficient disclosure which can cause unnecessary hardship for the thousands of Victorians buying into owners corporations. SCA (Vic) recommends mandatory inclusion of Owners Corporations Certificates (in accordance with Section 151 of the Owners Corporations Act 2006) in all Contracts of Sale (section 32 of the Sale of Land Act 1962) for the sale of lots within an Owners Corporation.**

* There were 57,870 sales of strata lots that are part of an owners corporation in 2013, according to the 2014 Victorian Government’s Regulatory Impact Statement.
* Owners corporations play an important role in sustaining residential property values in Victoria.

Yet still, to date, the vast majority of consumers are unaware of the implications of living within an owners corporation. And for those who buy in, it’s not long before they are left out of pocket and mentally anguished.

The certificate is an important and legal document that must be accurate, is accountable and there may be consequences for non-compliance. Its purpose is to enhance the transparency of owners corporations. To disclose matters such as rules, fees, levies, liabilities and activities affecting an owners corporation. Fees can be considerable outgoings and therefore affect a purchaser’s ability to live within their financial means.

The results are far reaching; not only adversely impacting the individual and their family, but also all other lot owners when insufficient funds are at hand to protect their collectively shared investment. The issues are also known to create ill feelings between neighbours, and is seen impinging on the socio-economic mindset of Victorians.

Legislative changes introduced 1st October 2014 to section 32 of the Sale of Land Act 1962 provides that vendors may themselves disclose information pertaining to their owners corporation. However if you look closely at the issues that must be disclosed, you will see the unrealistic expectation that an owner may actually be aware or able to access a majority of the information. The details required are not all available on-line or accessible by searches.

The option to self disclose can invariably lead to insufficient, or incorrect information being passed on, and, a misconceived or ill informed decision being made by the purchaser.

Below are examples of just a few mandatory obligations that an owners corporation certificate must contain, and a vendor too if they choose to self disclose the required information:

* Fees and charges that are imposed and proposed to be imposed on the lot
* If correct figures are not disclosed adjustments cannot be accurately made at the time of settlement. The underlying issue is that fees and charges accrue against *the lot*, so if the vendor does not disclose unpaid fees the responsibility to pay falls to the purchaser.
* An individual lot owner can include ‘known’ details, as per invoices or minutes. However it is not reasonable to expect an owner be aware of issues about to give rise to expenses. Particularly in instances where a professional manager is engaged, or a committee is actively pursuing issues. In such cases details may not be publicised to all lot owners until investigations are finalised, or even quotes received.
* The funds held by the owners corporations
* The account of the owners corporation is and should not be accessible by the lot owners as individuals, therefore the current status of the account is not known at any given time. Generally annual or possibly quarterly statements may be received, with financials having been prepared by an external source at the expense of the owners corporation.
* Liabilities and contingent liabilities
* Once again individual lot owners are generally only informed of such issues at the time decisions are to be made and all information is at hand. Individual lot owners would not be across issues which although are currently pending, have not seen action taken. Yet these contingent liabilities are required to be disclosed.

Inevitably the ability to identify details of such circumstances will lead to misinformation or lack of information being disclosed by an individual lot owner. Self disclosure is an unreliable source.

The subtle difference is that a lot owner has an expectation to cover their own living expenses, but generally limit this expectation to expenses for property and services internal to their lot. They fail, or are disassociated with, the condition and needs of the common property, which is the often overlooked, shared responsibility of all lot owners.

Ensuring a section 151 Owners Corporation Certificate is included within each Contract of Sale will ensure that the person providing the information is the person best suited to be across, and have access to, all the information required; either the professional OC Manager or the Chairperson, in the case where a professional manager has not been appointed.

***Background:* Disclosure certificate as part of contract of sale around Australia**

Information (usually in the form of prescribed certificates) must be provided by schemes in all jurisdictions except Tasmania. Comparing strata laws in one area, being disclosure, shows that:

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Searches & Disclosures** | **SA** | **VIC** | **NT** | **WA** | **QLD** | **NSW** | **TAS** | **ACT** |
| Does information (searches, disclosure statements, etc) need to be provided for sales by schemes? | Yes.  S139  CTA | Yes.  S151(4)(b) OCAct  Prescribed  information & owners  corporation  certificate in  vendor’s  statement | Yes.  UTR Sch6 | Yes.  S69 STA | Yes.  S206 BCCMA | Yes.  S109 SSMA | No. | Yes.  S72 UTA |
| Can schemes charge a fee for providing information? | Yes  S139 CTA | Yes  S151 OCAct | Yes  S37 UTA | Not stated | Not stated | Yes  S109 SSMA | Not applicable | Yes  S75 UTA |

## 

## Ability for owners corporations to be disclosed as inactive

**SCA (Vic) is concerned that new provisions within the Sale of Land Act 1962, create an easy opt out for owners who fail to comply with their mandatory obligations of their Owners Corporation, under the Owners Corporations Act 2006. The ability to simply disclose to a new owner that the OC is ‘inactive’ leaves potential purchasers uninformed of their pending obligations, and misses the opportunity to reduce the exposure of the owners corporation; which impacts new and pre-existing owners.**

* There were 57,870 sales of strata lots that are part of an owners corporation in 2013, according to the 2014 Victorian Government’s Regulatory Impact Statement.
* Owners corporations play an important role in sustaining residential property values in Vic

Yet still, the newly introduced provisions of the Sale of Land Act 1962, appears to say ‘it’s okay’ for an owners corporation to fail to comply with the statutory duties imposed on them as an individual and as a member of the collective body known as the owners corporation.

The Owners Corporations Act 2006 was introduced to protect the collective and common property of all individual owners and their interests as a member of an OC. It provides the functions, powers and duties the OC needs to maintain and ensure protection of the OC, by implementing and managing its accounts, carrying out maintenance, managing its assets, and its administrative duties. Which include obligations to take out insurance as well as to create, comply and police rules for the health, safety and enjoyment of those using the common property and their lots.

The new legislation states an individual owner can simply disclose to a potential purchaser in the section 32 statement (of the Sale of Land Act 1962) that their OC is ‘inactive’. When you refer to the definition of ‘inactive’, it clearly indicates that the OC is given permission to flout their obligations to administer the common property, maintain its funds and/or have insurance to protect the property and liability of the owners corporation.

Section 32F Information relating to any owners corporation to be disclosed in section 32 statement

32F (2) In this section a reference to an owners corporation that is inactive includes an owners corporation that has not, in the previous 15 months—

(a) had an annual general meeting; and

(b) fixed any fees; and

(c) held any insurance.

The purpose of the Owners Corporation Certificate is to enhance the transparency of owners corporations. To disclose matters such as rules, fees, levies, liabilities and activities affecting an owners corporation. Fees can be considerable outgoings and therefore affect a purchaser’s ability to live within their financial means. Failure to have an ‘active’ OC exposes a purchaser to risks that they may unfortunately be unaware of under ‘active’ circumstances. It allows a sale to proceed with an owner who has limited, if at all any, idea of what it means to live in an owners corporation and their impending obligations.

As mentioned previously when we discussed the provision for owners to self disclose all activities of their OC, the impact of disclosing inaccurate or insufficient information is far reaching. It adversely impacts the individual and their family, but also all other lot owners.

SCA (Vic) continues to recommend the removal of the legislated ability for self-disclosure at the time of a sale and the ability for an OC to be ‘inactive’.

# 

# Prescribed form - Statement of Advice and information for prospective purchasers and lot owners

The statement of advice and information for prospective purchasers and lot owners is contained in Regulation 12, Schedule 3 of the Owners Corporations Regulations 2007.

The wording omits two key statements and fails to address multiple OC’s and the implication to lot owners. It needs to say that OC’s that do not have a professional manager and are self-managed (ie, run by a ‘volunteer manager’) are still subject to, and need to comply with obligations under the Act and Regulations.

And it omits that the role of a professional manager typically includes assisting owners with the administration, management, finances, meetings, maintenance and insurance of common property.

**SCA (Vic) recommends that the existing form needs further information about obligations of an owners corporation to comply with the Act and outline the administrative duties of a professional manager.**

***Management of an owners corporation***

An OC may be self-managed by the lot owners or professionally managed by an OC manager.

If an OC is self-managed, the lot owners must undertake the duties and obligations contained within the Owners Corporations Act 2006 and Owners Corporations Regulations 2007.

If an OC chooses to appoint a professional manager, it must be a manager registered with the Business Licensing Authority (BLA). The manager assists in the administration of the affairs of the owners corporation.

**SCA (Vic) recommends that the existing form be expanded to include information about multiple owners corporations.**

This is particularly important for sales off the plan in what will be large prescribed owners corporations.

***Multiple owners corporations***

The lot you are considering buying may be part of a multiple owners corporation. A Limited Owners Corporation may have been created to manage the common area that affects your lot including but not limited to the residential ground floor entrance, lift lobbies and corridors on each floor, lighting and cleaning to the common areas. You will receive a levy notice to contribute to the maintenance of the common property based on your lot liability.

You are also automatically a member of the Unlimited Owners Corporation called OC1. All lot owners from any Limited Owners Corporations belong to this owners corporation and contribute to the management of OC1. The management of OC1 may include but not limited to building insurance, public liability insurance, fire and safety management, rain water tank management, lift maintenance, cleaning of the basement, security maintenance and legal compliance. You will receive a levy notice to contribute to the maintenance of the common property based on your lot liability.

Some or all of the functions and obligations of the Limited Owners Corporation may have been delegated to the Unlimited Owners Corporation to manage on behalf of the Limited Owners Corporation. The plan of subdivision will reflect the obligations of each owners corporation on the plan.

**Dispute resolution**

1. **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?**

We agree with the thrust that OCs that have discussed an issue and decided to pursue a potential breach on its own initiative are not hampered by the internal dispute resolution process.

Currently VCAT at its discretion can recognise when this must have taken place and dismiss a hearing where it believes the full internal dispute resolution process (according to the Model Rules) should have been complied with. For example if an OC deems it to be dangerous to meet physically with the alleged offender, or due to potential confrontation or unmanageable behaviour that has led to the dispute.

Separately, there are practical difficulties associated with the current time requirements within which the parties to a dispute must meet to discuss the matter in dispute. Currently it’s required within ’14 days’ of ‘coming to attention’. It should be within ’28 days’ of ‘receipt of complaint’. This will provide more opportunity for members of the grievance committee and complainant to find a mutually agreeable time to meet, as well as prevent, a grievance committee or OC from unnecessarily delaying the handling of a complaint.

1. **Are there any other issues relating to dispute resolution?**

Yes.

We recommend consideration of improving the dispute resolution process, as per that contained in the SCA (Vic) standard Contract of Appointment [CoA].

It provides for dispute resolution and sets out the procedure to be adopted. Whilst complying with Part 10 of the Act it improves the Model Rule process by better defining the process and parties.

Further, it gives the parties the opportunity to refer the dispute to an Expert for determination. The decision of the Expert shall be final and binding upon the parties. The Expert must act as an expert, not as an arbitrator.

We also recommend the Act provide recognition of automatic delegations to a grievance committee, where one is appointed, (similarly to that of the committee), and that the role and function of a grievance sub-committee be provided for within the Model Rules. This will avoid the need for an OC to pass a special resolution to adopt rules that will allow their grievance committee to operate.

Currently, whilst the Act recognises that a grievance committee may be formed and outlines its purpose as a party to the internal dispute resolution process , it stops short of providing ‘rules’ by which this subcommittee can function.

In accordance with Section 116, subsection 1 & 2, the committee may appoint sub-committees in accordance with its rules, with those rules providing for its role and function. This therefore means that a sub-committee may not be appointed where rules are not first approved by the OC and registered against the plan.

There may also be benefit gained from changes to the Act to recognise and/or work alongside the Residential Tenancies Act, ie to resolve any conflict with notice periods when the resident in breach is a tenant (ie not owner/occupier).

It may also be considered if this same complaint/dispute resolution process, and hence the approved form, is to include the appropriate mechanism for owners to raise complaints in regard to decisions made by their OC. Currently the complaints can only be brought against a lot owner, occupier or manager.

**Applications to VCAT**

1. **What factors should VCAT consider in determining disputes about the validity of an owners corporation rule?**

In considering rules, VCAT should consider all of the factors ie both the rule itself, and the resolution authorising the rule.

Also, VCAT should consider the intent of the rule. Whilst the rule may be poorly drafted, the rest of the strata community have been relying on the rule, and an adverse ruling could cause a larger inequity. Consideration for the greater good should prevail.

Any additional guidance on establishing rules to ensure their validity would also be of assistance.

1. **Are there any other issues relating to applications to VCAT?**

Yes.

The SCA (Vic) Policy Positions on Default Judgements and Individual Standing of Owners at VCAT are reproduced below:

## Default judgments

There are over 3,000 applications to VCAT per year and this is increasing. Around 85% are applications for fee recovery. A high proportion is undefended. This translates to something over 2,600 fee recovery applications per year and increasing.

Whilst managers and owners corporations prefer a default judgement process, which would allow the obtaining of orders about fees without attending a hearing, the legislation does not allow for this. So, even though the majority of fee recovery applications are undefended, evidence must still be provided and the case must still be proven.

Changing the VCAT Act 1998 to allow for default judgements in undefended matters and enabling adjudication on the papers would greatly lower the costs for owners corporations.

**SCA (Vic) recommends changing the VCAT Act 1998 to allow for default judgments in undefended matters and enabling adjudication on the papers.**

Planning for and managing money is a critical issue for schemes and managers. For almost all schemes the only source of money for their operating costs is the owners so how they raise and collect levies and fees is critical.

Here is a comparison of strata laws in a number of different areas; one of which is default judgments. As can be seen in the table below every state, other than Victoria, has a default judgment procedure for recovery of levies and fees.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Default judgments** | **SA** | **VIC** | **NT** | **WA** | **QLD** | **NSW** | **TAS** | **ACT** |
| Does the Act specify a Court or Tribunal  to hear disputes? | Yes  Magistrates Court (or  District Court) S41A STA | Yes, VCAT | Local Court  S106 UTA | Yes, State  Administrative  Tribunal | No | Some disputes  to adjudicator, some to CTTT | No,  The Recorder  S105 STA | Yes, ACAT |
| In what Court/Tribunal are levies and fees recovered? | Not stated | From the lot owner in VCAT, others in Magistrates’  Court  after special  resolution.  S30 & 18 OCAct | Not stated | Not stated | Not stated | Not stated | Recorder of  Titles may  order payment | Not stated |
| Is there a default judgment procedure for levy and fee recovery? | Yes | No, not in VCAT | Yes | Yes | Yes | Yes | Yes | Yes |

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# Individual standing of owners

A change introduced by Consumer Affairs Amendment Act 2011 is giving “standing” to individuals, which is an unwelcome change.

The common law rule since *Foss v Harbottle* in 1843 was that in the case of a wrong to a company only the company itself could sue, not the individual shareholder-members of the company. The Corporations Act in 2000 modified this rule and now the OC Act has done the same, meaning that individual lot owners now have “standing”. It was approved by the government to abrogate the rule so that anyone who can apply to VCAT has standing, because it was never their intention for it to be restricted in this manner. The law was changed because of VCAT decisions and one of these decisions, speaking about Parliament’s intentions, said “*The fact that such a statutory response similar to that in the Corporations Law was not included in the OC Act leads me to the conclusion that this was no mere oversight and that the rule does apply to owners corporations”.* Well, the government then said it was an oversight and that was not their intention.

The SCA (Vic) position on this issue was and remains:

* SCA (Vic) disagrees with giving ‘standing’ to individual lot owners. There should not have been a change. The law as it stood prior to 1st September 2011 was appropriate.
* The OC is the appropriate entity to sue after obtaining a special resolution. The changes to this law may now lead to the perverse situation where s18(1) of the OC Act is easily overcome by the owners agreeing that one or more of the owners sue a third party instead of the OC suing the party – without the need for a special resolution.
* This is all notwithstanding the fact current and previous laws, quite appropriately, did and do not prevent, in the case of a wrong to an individual low owner, that lot owner suing.

**SCA (Vic) disagrees with the recent change to the OC Act to allow an individual lot owner to apply to VCAT on behalf of an owners corporation to resolve an owners corporation dispute.**

**Owners corporations in retirement villages**

1. **What are your views about how annual meetings under the Owners Corporations Act and under the Retirement Villages Act should be conducted in retirement villages with an owners corporation?**
2. **What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?**
3. **How can the views of retirement village residents who do not own their units be taken into account in managing common property within the owners corporation?**

**Combined answer to questions 57, 58 & 59**

SCA (Vic) supports the outcomes of the previous review whose outcome was the 2014 Bill, which addressed all these issues.

As noted, proposed regulatory changes in the 2014 Bill were never enacted.

The 2014 Bill dealt with owners corporations that are retirement villages – clarifying the interaction between these two Acts, the obligations of managers, removes anomalies, and improves terminology.

**Part 5 of the Subdivision Act**

1. **What are your views about the process for the sale/development of apartment buildings?**

The prevalence and importance of the strata sector is increasing. In 2014, the Vic Government’s Plan Melbourne strategy says we need an extra 1.6 million dwellings by 2051 and 66% of these would be apartments or townhouses. That is, 66% is to be strata and only 34% would be detached houses.

50% of all plans registered by Land Victoria in 2013-14 were strata ie owners corporations.

Note, the issues paper cites WA is considering the ‘tiered voting’ approach. WA has now changed its mind regarding its approach and is to become the third jurisdiction proposing [strata](https://twitter.com/hashtag/strata?src=hash) law reform re [termination](https://twitter.com/hashtag/termination?src=hash) and it will be a 75% majority threshold [for schemes of 4 lots or more. For 2 or 3 lot schemes, a majority of owners will be required].

Also worth remembering is that planning laws may prevent rebuilding with as many lots as exist currently.

The SCA (Vic) Policy Position on renewal/termination is reproduced below - we support termination being a less than a 100% unanimous agreement. Our Policy Position is one which has a ‘tiered voting’ threshold approach.

But, there’s already too much divergence in state and territory strata laws. Jurisdictions should harmonise strata laws wherever possible. Considering the issue of termination is a brand new consideration, SCA (Vic) is more than open to harmonise on a common approach across jurisdictions ie the 75% threshold approach of NSW and WA.

## Harmonisation of strata laws

There is a much needed systemic reform, through greater national harmonisation of laws. It is required to address overlaps and inconsistencies between state jurisdictions. As ever more business activity occurs nationally, there is an increasingly compelling case to introduce uniform regulations across Australia. The property sector is a multi-billion dollar industry which, by quirk of history, faces markedly different regulatory regimes. This frustrates investment and makes Australia less competitive internationally. In an age of globalisation and instant communications, the inevitable delays, red tape, and cost to trade and commerce caused by discrepancies in property law can no longer be justified. To keep the country as an attractive destination for national and international investment, Australia’s antiquated approach to property law must be overhauled.

In the first instance, at least, make the terminology more consistent across jurisdictions. What’s in a name? Well maybe plenty when you consider how many different ways the same things in strata and community title schemes are called around Australia. Although some words are very commonly used (like lot) most are not, with one or more jurisdictions opting for an alternative word. It’s hard to see why and it makes no sense. In some cases the same word is used by different jurisdictions but with different meanings (like unanimous resolution). By being aware of the differences it is hoped more jurisdictions will start using the same words.

What does an oil field in the USSR have in common with the City of Ballarat? As an interesting case note, VCAT ordered its first winding up of an OC in the case of *Owners Corporation CS1728U v City of Ballarat (Owners Corporations) [2015] VCAT 533.*

## Renewal/termination of subdivision developments

**SCA (Vic) seeks renewal/termination of subdivision developments – to be less than 100% unanimous agreement.**

There should be better consumer protection during the demolition-to-construction period [regardless of height of building].

**SCA (Vic) recommends the lower than unanimous threshold of an appropriate majority of owners to decide to proceed with a redevelopment of the owners corporation should be:**

**Age of building Threshold**

**< 10 yrs old 100%**

**10 – 25 yrs old 80%**

**> 25 yrs old 75%**

**For owners corporations of 10 lots and over, SCA (Vic) recommends the government consider legislative amendments that mirror Corporations Law requirements that enable compulsory acquisition of the remaining 10% shareholding in a listed company.**

**Third Party Support:**

Broadly supported by PCA (Property Council of Australia) and UDIA (Urban Development Institute of Australia).

The owners group, OCNV, supports 100% for up to 25 years, and 80% for those over 25 years, and that should have to be justified on the basis of condition.

**Why?**

Termination of owners corporations debates the balance between protecting a person’s home versus the economic and sustainable imperative of redevelopment.

It is estimated 35% of all owners corporation buildings in Victoria will need to be redeveloped or refurbished over the next 30 years.

These owners corporations are reaching the end of their economic life, either because they have not been properly maintained or because they occupy such prime positions that redevelopment is economically preferable to refurbishment. The unanimous agreement for redevelopment of these types of schemes is very difficult, in most cases impossible, to obtain. Pressure is mounting to come up with a provision that enables redevelopment of older schemes.

Any such provision is likely to have an adverse impact on persons who resist redevelopment because of a desire to continue to live in the particular property. These people are often elderly and have been living in the property for a substantial period of time.

With urban growth and change, there is a need to allow for a lower than unanimous threshold of an appropriate majority of owners to decide to proceed with a redevelopment of the scheme, provided provision is also made for consumer protection, fair compensation of owners not supporting it, appeal rights and transitional arrangements.

Many residential buildings constructed in the 1960’s and 70’s are now in need of redevelopment or refurbishment to meet current lifestyle needs, improve sustainability and to update the building’s appearance.

Walk-up residential buildings, typically built between the 1950s-1970s, form a significant proportion of the residential buildings in Greater Melbourne.

Many of these buildings were built at minimal cost during a period with few planning controls and limited regard for aesthetics or internal amenity, and have a 30 – 60 year life span. Due to poor design and maintenance, it is estimated that 35% of all owners corporation buildings will need to be redeveloped or refurbished over the next 1- 30 years.

Many are in need of immediate refurbishment to meet safety and maintenance requirements or to meet the changing needs and lifestyles of residents and this represents an opportunity to guide and encourage design excellence and environmental performance in the refurbishment of these buildings.

**Precedent:**

The approach in other countries include Singapore [80% if greater than 10 years old, and 90% if less than 1 years old], New York & Washington are both 80%, Hong Kong has discretion to 80%, and Japan also has 80%.

NT currently leads Australian jurisdictions, and is the first to have made strata law reforms that allow termination to be done with less than 100%. The NT Act has passed and commenced 1 January 2015.

NSW followed and has changed their laws to be a 75% majority threshold.

WA is to become the third jurisdiction proposing [strata](https://twitter.com/hashtag/strata?src=hash) law reform re [termination](https://twitter.com/hashtag/termination?src=hash) and it will be a 75% majority threshold [for schemes of 4 lots or more. For 2 or 3 lot schemes, a majority of owners will be required].

The issue has been the subject of a number of media articles.

***Background:* Northern Territory Termination of Units Plans and Unit Title Schemes Act**

NT recently passed the Termination of Units Plans and Unit Title Schemes Act, and its Regulations that came into force 2nd January 2015. The understanding is that these additional laws work in conjunction with the Unit Title Schemes Act, and provide additional circumstances by which a corporation can be terminated. These include:

Part 2 - general rules to support the Termination of development; and further options set out via:

Part 3 - termination by unanimous resolution

Part 4 – termination by vote of required percentage of owners

Part 5 – termination by Tribunal

In brief if the building is older than 15years and has more than 10 lots, then the corporation can pull it down with 80%-95% majority.

***Background:* Research project – Governing the Compact City**

There is a research project underway on strata management challenges by UNSW and funded by ARC [Australian Research Council]. One of the aims is to look at “*The role and effectiveness of strata management in higher density residential developments*”. It has a NSW focus but will inform practice and policy development on a national scale. The first in a series of ‘Strata Data’ publications, based on analysis of the NSW LPMA’s strata database, one of the findings is: In an approximation, 21% of residential strata schemes in NSW were registered 30 or more years ago (prior to 1979). There was a higher concentration of older strata schemes in the Sydney metropolitan area (28%) than in the rest of NSW (7%).

***Background:* VCAT decision: Butten [2010]**

This is of great importance where an OC wishes to undertake an improvement to its property but cannot obtain the unanimous resolution which is required but clearly if the improvements took place, it would benefit 90% of all the occupants and owners of the OC. The decision dilutes the control of dissenting owners.

1. **What are your views about:**
   * + **who should set the initial lot liability and entitlement, and any criteria that should be followed**
     + **how lot liability and entitlement should be changed, and**
       - **any time limits for registering changes to the plans of subdivision with Land Victoria.**

The SCA (Vic) Policy Position on defining the procedure for setting of lot entitlements and lot liabilities is reproduced below.

Consideration should also be given to appropriately determining the use and application of Units of Liability and Entitlement with regard to charging fees to individual lot owners. As previously mentioned, SCA (Vic) recommends that insurance premiums (although a recurring charge and levied according to Units of Liability), should in fact be levied by Units of Entitlement. By this means at least one of a number of the pressures of inequity in the application of Units of Liability, may be solved. Refer q24.

# Define procedure for setting of lot entitlements & lot liabilities

Currently the setting of the initial Unit of Entitlement (UOE) and Unit of Liability(UOL) is left up to the Developer to determine. This has been the case over the history of owners corporations and is one of the key complaints within a subdivision community.

The guidelines provided in Section 27F & 33 of the Subdivision Act 1988 are not sufficient to prevent the following problems:

1. Developer retained lots with the lowest UOL and highest UOE

2. UOL set based on estimated sale price, which includes location and amenity.

3. UOL set as equal despite all lots not being equal.

4. UOE set as equal, despite all lots not being equal (penthouse versus 1 bedroom).

A unanimous resolution is required by an owners corporation to alter the details on the Plan and as one or more people will be disadvantaged, usually a court of law or tribunal must determine if the values should change. This is a very expensive process that could be avoided if there were guidelines in how to set the UOE and UOL. Therefore it is critical that the value for UOE and UOL be set correctly and consistently.

The UOE represents the lot owners share in the common property, such as:

* wound up (insolvent or renewal of building)
* destroyed (insurance – earthquake, fire)
* income distribution (received from use of common property)
* physical share of the Common Property (tenants in common)
* the lot owner’s influence in the voting procedure at meetings

Reference Section 27F & 33 Subdivision Act 1988.

The UOL represents the fair amount that a lot owner should contribute to the day to day running expenses of the owners corporation. Reference Section 27F & 33 Subdivision Act 1988.

Section 27F & 33 of the Subdivision Act

Section 27 F of the Subdivision Act 1988 sets out that the plan must state how UOL and UOE was determined but fails to provide any guidelines in setting of the values.

Land Victoria in their “Your Guide to Lodging an accompanying document for a Limited Owners Corporation” and “Your Guide to Lodging an accompanying document for a Unlimited Owners Corporation” suggest that the following wording be used:

1. *In determining the lot entitlement, regard has been had to the value of the lot and the proportion that value bears to the total value of the lots affected by the owners corporation.*
2. *In determining the lot liability, regard has been had to the amount that is just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation.*

This wording is based on s33 of the Subdivision Act 1988 and still doesn’t provide any guidelines for how the number will be determined and by whom and is being copied and pasted into every form lodged.

**With respect to UOE** does “*value of the lot”* mean market value, capital improved value or unimproved value and shouldn’t a specialist have to provide that valuation? Does “*that value bears to the total value of the lots affected”* mean the value is set for all lots at the same time? If so what method should be used for a staged development, where the staged development is a 10 year project?

In a 10 year project how does the value of say a two bedroom apartment in year 1 or stage 1 stay relative to the same two bedroom apartment in year 10 or stage 10. The same applies to mixed use and what other considerations there maybe eg co-generation, heritage overlays etc that may not affect all members of OC1 equally. If a formulae is derived that reflects this development, a record should be kept.

**SCA (Vic) recommends that Unit of Entitlement is determined by a licensed surveyor and is based on market value at the time the Plan is lodged for a single owners corporation (including any Limited Owners Corporations).**

**SCA (Vic) recommends that for Unlimited Owners Corporations in multiple and/or staged developments a formula is developed having regard for:**

* **Value on day one and value on last day of development**
* **Use (residential, mixed commercial, retail, office etc)**
* **Services used (co-generation, embedded networks, fibre optics etc)**

**So that it satisfies “*and the proportion that value bears to the total value of the lots”* (s33)**

**With respect to UOL** *“Just and equitable”* is a confusing term and its interpretation is not clear. Society as a whole is divided on “*just and equitable”*. We have tax, council rates, registration of motor vehicles, all set based on a wealth system and those who can pay, pay more and then we have services provided - toll roads, train fares, electricity, gas, water consumption based on user pays.

Which society value system is applicable to owners corporations in determining “*just and equitable”*? Is it “user pays” or “value”?

These costs should be borne in proportion to the benefit, not in proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services.

Unfortunately the determination of UOL is more complex. All of the elements that influence the UOL are:

* Occupancy
* Size of lot
* Use of lot
* Consumption of Common Utilities (gas, cold water, hot water)

On the whole, size (area) and occupancy (number of bedrooms) equate fairly except for penthouses and mixed use and possibly common utilities depending on extras included (like spa baths).

Two court/tribunal cases in Victoria have examined the alteration of UOL. Both cases determine that there are no guidelines for “just and equitable” and that it is a complex matter. When attempting to change UOL regard has to be given to the other lots as well. While these case raise good points they are based on a specific circumstance and do not provide a methodology to use as a guideline when initially determining how to set the UOL.

Guidance for the four key steps has been sought from legislators around the world to assist in setting the policy framework as follows:

1. Set as equal unless it can be demonstrated that it is just and equitable for there to be inequality – Queensland BCCM Act

2. Set based on area unless it can be demonstrated that type of use has bearing – South Africa Sectional Titles Act

3. Set based on Occupancy where the number of occupants has greater bearing than area – mostly used where there are common utilities for water and hot water.

4. Set based on use (area x factor) – Singapore Land Titles Act, Kuala Lumpur Strata Title Act

**SCA (Vic) recommends that a user pay system for services provided by the owners corporation is used to determine Unit of Liability; by a licensed surveyor.**

**SCA (Vic) recommends that in determining the value that 4 tests are satisfied:**

**1. Set as equal unless it can be demonstrated that it is just and equitable for there to be inequality. eg all the same type of residential apartment, (then choose one of 2 or 3 or 4).**

**2. Set based on area unless it can be demonstrated that type of use has bearing. eg all Residential where the type of lot is much larger than the others or for Commercial.**

**3. Set based on Occupancy where the number of occupants has greater bearing than area. eg sustainable measures, common utilities.**

**4. Set based on use (area x factor). Eg develop a factor applied to area for restaurants, office, retail, heritage, sustainability etc**

**SCA (Vic) recommends that the Land Victoria form OC1 and OC2 guidelines changes to reflect this position and where possible to state which method was applicable for the Plan being lodged.**

***Background:* Body Corporate PS341300K (The Ardoch) vs Lots 41, 43 & 45. Magistrates Court of Victoria, case number K02160991 of 1997.**

This case examined the lot liabilities of these three lots as compared to the other 92 lots. The court determined:

*“While the court considers that it must determine lot entitlements in accordance with value it does not believe that it would be just and equitable for the plaintiff to contribute towards the administrative and general expenses of the body corporate in accordance with the value of their units. None of the other units have had their lot liability determined this way and the result would be that their contribution, although originally reduced remains “out of whack” with other units. The court considers that in order to achieve a just and equitable result it must adopt the benchmarking approach recommended by Mr Ross. It agrees with his view that 150 is an appropriate benchmark and the plaintiffs should have their lot liability fixed at that benchmark figure.”*

***Background:* Gazic & Ors v Body Corporate No 30056ON (Real Property) [2009] VCAT 920 (26 May 2009)**

This case examined subdivision of unit development – application to change liability of owners - incorporate a unit of property into the common property – relevant considerations – Subdivision Act 1998 s 32, 33, 34D. In particular it examines the “personal use” by a person as a basis for setting UOL.

*“The methodology (ie the “user” methodology) used is inappropriate in terms of being ‘just and equitable’ within the context of the overall development as it places an unjust and inequitable loading on the remainder of the lot owners.*

*In my opinion, the most appropriate methodology to determine an acceptable figure to be placed into the Lot Liability Schedule should be based on the proportion of the individual lot area/value in relation to the total lot area/value of all lots.*

*It is this proportional figure allocation that represents a ‘just and equitable’ solution for all. The figure so placed into the Liability Schedule determines the appropriate fraction or percentage ‘that it would be just and equitable for the owner of the lot to contribute towards the administrative expenses of the owners corporation’.*

*The above methodology further allocates, in a transparent way, the intangible aspects and responsibilities that the building structure and services provision provides to each lot.”*

Queensland has undertaken a review of the method used to determine what a lot owner pays for services and in the Body Corporate Community Management Act 2003 (BCCM) it requires that when setting the schedule all lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.

The 2003 Act amendments introduced a requirement that developers must set contribution schedule lot entitlements at the establishment of a scheme according to the principle already legislated for the District Court to consider in determining applications for the adjustment of contribution schedule lot entitlements.

It also became mandatory for the developer to have regard to the following matters when setting the contribution schedule lot entitlements and interest schedule lot entitlements for a scheme:

* how the scheme is structured;
* the nature, features and characteristics of the lots included in the scheme; and
* the purposes for which the lots are used.

Where the contribution schedule lot entitlements are not equal, the community management statement and disclosure statement given to prospective buyers by the developer must explain the reason for the unequal lot entitlements.

***Background:* Sharing Expenses in Community Titles Schemes: A Discussion Paper on Lot Entitlements under the Body Corporate and Community Management Act 1997. December 2008. Queensland Review**

Most community interest in lot entitlements has focused on contributionschedule lot entitlements, which have the most immediate impact on owners as they determine how body corporate costs are shared. In light of the ongoing interest in lot entitlement issues, this discussion paper has been released to inform the community about the current system of lot entitlements and why it was introduced, and to facilitate public comment and feedback on the appropriateness and operation of the current system.

Overseas legislators are also trying to ensure just and equitable lot entitlements are set for the consumer.

*South Africa Sectional Titles Act* firstly recognises single and mixed use and sets out how UOL is to be determined.

*Singapore Land Titles Act* provides guidelines for mixed use by using a weighting factor.

*Kuala Lumpur Strata Title Act 1985 (STA)* sets out for Single and Multiple use developments how to set UOL -

Single Use: Share units are classified as a single use when it is wholly residential, wholly commercial or wholly industrial development (flatted industries) and is based on floor area of the parcel.

Multiple Use Development:

* Simple Mixed Development

Residential development based on floor area x factor (1.0);

Commercial development based on floor area x factor (1.5).

* Complex Mixed Development

Residential development based on floor area x factor (1.0);

Office space based on floor area x factor (4.0);

Commercial/Car Parks/Industrial based on floor area x factor (5.0)

***Background:* The South African Sectional Titles Act compared with the Singapore Land Titles (Strata) Act by CG Van der Merwe. Singapore Journal of International & Comparative Law (1999) 3 pp 134 – 185**

This paper examines the difference between South Africa and Singapore Strata Acts. On page 147, the method of calculation is discussed.

***The Sectional Titles Act*** draws a distinction between residential and non-residential schemes with regard to the calculation of the participation quota. In a residential scheme the quota is a decimal fraction correct to four places arrived at by dividing the floor area correct to the nearest square meter of the particular section by the aggregate floor area of all the section in the scheme.91. In calculating the floor area of a section, all parts of the section, for example an adjoining balcony and a non-contiguous garage, must be taken into account. In non-residential schemes the determination of participation quotas is left to the discretion of the developer. He is not bound by relative floor area but can take other factors such as relative value, location and composition of a section (for example whether it has a balcony or lock-up garage) into account in determining the participation quota of a particular section. In the case of a mixed scheme consisting of residential and non-residential units the developer must indicate the total quotas allotted to each segment of the scheme for example 40% to residential units and 60% to non-residential units. The quota for each individual unit must then be allocated in the aforesaid manner.

***In terms of the Land Titles (Strata) Act*** a schedule of strata units showing the proposed share values to be allotted to all the apartments must be fixed and accepted by the Commissioner for Buildings before strata lots can be sold.92. In the absence of guidelines issued in terms of the Act, the Building Commissioner is guided by guidelines issued by the Building Management Unit of the Public Works Department. Basically share values are influenced by two main principles namely the type of user of a lot with commercial use being allocated the highest value (5) followed by office use (4) and finally residential use (1). This means that in a mixed-use development the share values allocated to commercial units would be the highest followed by office units and then residential units. The second principle is that share values for lots with the same use, are allocated on the basis of floor areas. By contrast to the Sectional Titles Act share values are not in such cases rigidly allocated on square footage but units of approximately the same size are allocated equal share values. The Commissioner will not accept an allotment unless he considers it just and equitable.

***Background: ‘*Proposed Allocation of Equitable Share Units’. Paper presented to Department of Director General of Land and Mines Kuala Lumpur to present a paper at the Land Administration Seminar held on 18 Jun 2009 by REHDA Malaysia (WPKL) Branch**

REHDA WPKL proposes a more transparent and equitable formula for calculation of share units based on the following formulae on currently:

**Formula A: Capital Value Share Unit equivalent to UOE**

1. Market price of the parcel

Parcel with higher market price will be allocated with more share units than parcel with lower market price.

2. Selling price of the parcel

Parcel with higher selling price will be allocated with more share units.

3. Value of the parcel

Parcel value determined by Local Authority, i.e.: valuation for assessment rates.

4. Floor area of the parcel

Parcel with larger floor area will be allocated with more share units.

5. Type of use for the parcel

Parcel for the purposes of commercial will be allocated with more share units than parcel for residential.

6. Location or position of the parcel

In condominium developments, parcel at higher floor will be allocated with more share units than those at the lower floors whereas in the case of walk-up flats, the opposite will be used.

**Formula B: Service Charge Share Unit equivalent to UOL**

1. Gross Floor Area (GFA)

Parcel with higher GFA will be allocated with more Service Charge Share Unit. Example, more air conditioning ledges, accessory parcels, service ducts and etcetera will require more maintenance service.

2. Common Area

Parcel connected to larger common area will be allocated with more Service Charge Share Unit Example, eight units per floor vs two units per floor.

3. Floor Area of the Parcel

Parcel with larger floor area will be allocated with more Service Charge Share Unit. Example, large 4+1 bedroom unit vs 1 bedroom unit.

4. Frequency of Usage

Parcel which has a higher frequency of usage to certain services or facilities will be allocated with more Service Charge Share Unit. Example, units with lifts and those without lifts, high- rise and low-rise in a development.

5. Human Traffic

Parcel with higher human traffic will be allocated with more Service Charge Share Unit. Example, usage of common facilities between office vs retail parcels.

6. Risk Factor

Parcel which has a higher risk factor will be allocated with more Service Charge Share Unit. Example, security of services consumed between residential, retail and retained car park.

1. **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?**

No change is necessary.

1. **Are there any other issues relating to Part 5 of the Subdivision Act?**

Yes.

**Legal ownership of common property and its effect on income tax liability of OCs**

**Change s30 of Subdivision Act 1988 so that assessable income is taxed in the hands of the OC and not the individual lot owners.**

***Specific change required***

To solve, Vic needs to change the vesting of common property in s30 [Part 5, Division 2] of the Subdivision Act 1988, from one where it’s vested in the proprietors, to one where the OC holds the common property *as trustee* on behalf of the proprietors, to be along the lines of:

“…ownership of common property is vested in the owners corporation as trustee for the owners as tenants in common in proportions equal to their lot entitlements”

Underline emphasis - is what needs to be added to existing

To which entity moneys received in respect of the common property are assessed, will depend on whether under the relevant State or Territory strata title legislation:

• The common property is vested in the proprietors

• The common property is vested in the strata title body as agent for the proprietors, or

• The strata title body holds the common property as trustee on behalf of the proprietors.

Where the common property is vested in the proprietors or in the strata title body as agent for the proprietors, the income derived from the use of the property constitutes assessable income of the individual proprietors.

Where strata title bodies hold the common property as trustee on behalf of the proprietors, moneys received from the use of the common property are derived in the capacity as trustee and are assessed in accordance with Division 6 of the ITAA 1936.

Looking across Australia, small states and territories lead the nation.

These jurisdictions already have such a definition: Tas, NT, SA [strata title].

These jurisdictions do not already have such a definition: Vic, Qld, NSW, ACT, SA [community title].

If Victoria made such a recommended change, the income generated by the common property would be returned by using the Trust Form T rather than the current Company Form C.

**Why**

Having previously advocated the below, it was well intentioned but probably somewhat ‘misguided’.

Amendments will be required because the legal ownership of common property in Victoria’s legislation prevents fixing this problem so that assessable income is taxed in the hands of the OC and not the individual lot owners.

Below provides the rationale for ‘why’ we have been advocating for the change -

In 2015, Tax Ruling No IT2505 was withdrawn and replaced by Taxation Ruling TR2015/D1 Income Tax: income tax matters relating to body corporate constituted under strata title legislation.

In essence The Australian Taxation Office [ATO] new strata income tax ruling had minimal change – it just consolidated a number of them into the one ruling.

The Australian Government has a Tax Policy Statement and a commitment to simplification of the administration of the taxation system, particularly for ordinary working Australians. In that context we seek support to alleviate a growing compliance and administrative burden on both the managers of strata and community titled properties in Australia and the increasing number of households opting to live in them.

The tax ruling clarifies the tax treatment of income of bodies corporate as constituted under the various state and territory laws. In essence, the ruling takes the view that owners corporation income from its members (typically strata levies) is mutual income and thus not taxable in the hands of the owners corporation. But other income derived from common property (e.g. parking) is taxable. The ruling then applies the principles of mutuality and determines that this non-mutual income is taxable in the hands of the individual members or lot owners rather than the owners corporation itself.

Over the last two decades the strata and community title sector has become significantly larger and more complex. It has seen a proliferation of large multi-use developments which derive income from a variety of sources other than levies. Many strategically located buildings now earn significant income as sites for mobile communication towers which did not exist 20 years ago.

Generally owners corporations use this income to meet ordinary maintenance costs and other expenses rather than distribute the proceeds to individual owners. While this could be regarded as income to the extent that it reduces levy requirements, it is of course problematic for owners corporations to fairly apportion expenses between those incurred in earning the non- mutual income and those which would have otherwise been borne by lot owners through levies. This complexity also acts as a disincentive for owners corporations to invest in environmentally friendly solar power technology where credits are available for electricity returned to the grid.

The effect of the ruling is to require the owners corporation to provide an annual income statement to each member. This is of itself a significant compliance burden. The individual member is then required to declare their share of the net income for taxation purposes regardless of whether there has been any actual distribution.

Any estimate of the level of actual disclosure by individual lot owners will be largely speculative in the absence of detailed audit information. Certainly many of the home owners affected by this ruling are financially unsophisticated and the view within our industry is that compliance levels overall are not high. We are also aware of instances where the declaration of such income has affected pension entitlements, for example, even though the individual received no direct benefit.

In our view a strong case can be made on simplicity, efficiency and compliance grounds for body corporate net non-mutual income to be taxable in the hands of the owners corporation at the company tax rate.

In NSW this would be consistent with the treatment of income from financial assets (e.g. interest) because the state legislation treats these funds as assets of the owners corporation itself rather than being held in trust for the individual owners.

From a revenue perspective the net effect of such a change is more likely to be positive than negative as any difference between the company tax rate and the average marginal tax rate of lot owners is likely to be more than offset by improvements in compliance.

The Tax Commissioner’s consideration of not-for profit status for GST registration purposes, which resulted in owners corporations being eligible for the higher $150,000 threshold where they do not intend to distribute any non-mutual income, may also be informative.