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Consumer Property Law Review
Policy and Legislation Branch
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Consumer Property Acts Review - Issues Paper No.2

Owners Corporations

Introduction

Consumer Affairs Victoria (CAV) is currently undertaking a review of the provisions under the *Owners Corporations Act 2006* that regulate owners corporations, specifically issues identified with the Owners Corporations Act, with the exception of the conduct of owners corporations managers which formed part of the first issues paper.

Since the *Act* commenced on 31 December 2007, various stakeholders have raised a number of conduct-related concerns. In response to these concerns, the Minister for Consumer Affairs has asked Consumer Affairs Victoria to review the provisions of the *Act* in relation to the following:

- Functions and powers of owners corporations
- Financial management of owners corporations
- Maintenance
- Meetings and decisions of owners corporations
- Committees
- Rights and duties of lot owners and occupiers
- Rules of the owners corporation
- Owners corporation records
- Dispute resolution



- Applications to VCAT
- Owners corporations in retirement villages
- Part 5 of the subdivision Act

The purpose of the review is to identify and develop options for consideration by the Minister for Consumer Affairs.

As part of this review, the Minister for Consumer Affairs has approved the release of an issues paper for public consultation. The purpose of the issues paper is to seek stakeholder feedback on the above issues, and if needed, the approaches to addressing the issues, including any regulatory controls.

Southbank Residents Association

Southbank Residents Association (SRA) is a community not-for-profit organisation, aiming to bring together and support the interests of all who live or work within Southbank, on matters such as planning and development, traffic issues, lack of public school, open space and other matters important to residents and visitors.

SRA is the convener of the Southbank Owners Corporation Network (SOCN), which is a forum for our building memberships to work together and discuss common areas of interest when it comes to apartment living in Southbank. SOCN covers some 13 buildings across roughly 3300 lot owners.

Southbank Residents Association welcomes this review and are glad for the opportunity to participate. The *Act* has been in effect for almost 9 years and SRA believes that this review will provide stakeholders with further clarity now and into the future.

This submission is made on behalf of the 12 buildings and 3300 lot owners that Southbank Residents Association represents.

Functions and Powers of Owners Corporations

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

No.

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

Yes, 75% is too high in a first instance. A simple majority based on units of liability should suffice.



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

Yes. We feel the N.S.W. guidelines are a great start.

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

Yes. We feel the N.S.W. guidelines are a great start.

5. *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, OC's should be given powers to deal with goods on common property. Safeguards such as adequate notice prior to removal or signage should be included. Yes there can be different safeguards for different circumstances, for example where goods might be blocking an emergency exit or pose a safety risk.

6. *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?*

The common seal is seen as symbolic and rarely has a purpose in today's business environment. Members of the Committee of Management will nominate and confer the powers onto a committee member to execute the needs of the OC within the boundaries as defined by the committee.

Financial management of owners corporations

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

The benefit principle should be adopted. Our experience is that many OC's are already applying this principle.

8. *Should an owners corporations 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.

9. *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?*

The experience of our members was that it was relatively straight forward.

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

No.

11. *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?*

Yes.

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

Electronic transfer of funds should be mandated.

13. *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?*

All fees and charges should be transparent as per the rules defined by the OC.

Maintenance

14. *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?*

Yes, it should be differentiated between high-rise and low-rise. Common issues which warrant separation could be elevators, A/C facilities, different type/size of common space, integrated systems... to name a few.

15. *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?*

Every new development needs to be mandated that within 12 months from the establishment of the OC that a minimum 15 year maintenance plan is devised with rolling reviews every five years.

16. *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?*

They should not be mandatory for all OC's but smaller OC's can be discretionary.

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

It should be legislated as being part of the auditors obligation for AGM's.

18. *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 there should be a capacity where the particular works might have an adequate payback period to allow for replenishment of the fund.

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

Yes.

20. *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?*

They are not necessary for larger OC's but would probably be helpful for smaller OC's. They can be raised by special levy for emergencies or unexpected necessary expenditure.

21. *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?*

Owners should be able to take the OC to VCAT. Ideally the industry would have an ombudsman where they could take their grievances for a review/mediation or ruling.

22. *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?*



Where damage has occurred, the offender should be pursued in accordance with the law. Other possible actions could be denial of access to common property and/or a fine.

For alternation it should be by democratic approval at an AGM.

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

After building completion there should be some way of holding builders to account for their project, for example cladding that is not compliant. Too often developers dissolve a company after project completion which can then deny an OC recourse for warranties and/or sub-standard work.

N.S.W. legislation seems to be thorough on this.

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

The current policy is adequate.

25. 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.

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

The OC should have the power to decide an adequate response, which could be requesting the lot owner to fund the difference if deemed appropriate or pay the excess.

Meetings and decisions of Owners Corporations

27. 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?*



Any initial contracts should be a maximum of two years to allow owners to settle-in and understand their building. If this is not possible then any developer interests must be declared.

Fiduciary duties: The developers should be legally required to act in the best long term interests of the owners of the apartments when finding service providers and engaging contracts.

There should be no trailing interests for the developer.

A developer should not be able to use their combined lot liability power to block the establishment of a maintenance plan. This occurs where a developer is holding a number of lots and wants to reduce their short-term financial obligations.

28. What other changes should be made to developers' obligations?

Hidden commissions from ongoing contracts: Developers put in Winenergy, or related subsidiaries into long term contracts that are very hard to remove either legally or physically. For example, a building on St Kilda Rd has NBN to the building but the developer has connected apartments to an internet service provider that pays him commission instead of the NBN

Disproportionate power: Developers who have been around for a while know how to play the system, and use the legal system. Developers can use mechanisms to entrench their power and control. It is very difficult for individual lot owners who suffer loss to overcome this. One of our member OCs' has spent \$650,000 on legal bills fighting a 55 year contract worth \$20 million. No single lot owner could fight this. We suggest an Ombudsman that can take complaints from any individual lot owner, and has the power to overturn contracts that are unfair.

A developer should not be able to give themselves a skewed voting entitlement through disproportionate voting entitlements on lots they keep, nor entrench themselves on the OC committee. One of our members OC had the developer appoint himself as the OC chairperson of the OC committee for life.

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

No problems with current system. A lot owner should not be able to inspect ballot papers as this is private information of the voting lot owner.



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

No restrictions, but there should be a cut-off 48 hours before the meeting for the submission of proxies. A lot owner with unpaid fees should still be able to act as a proxy for another lot owner

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

They are adequate.

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

No, unless there is a conflict of interest.

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

Generally straight forward.

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

Our members believed a special resolution should be 60%, while the unanimous resolution should be removed or at minimum reduced to 90% as with large OC's it is almost impossible to achieve. However the unanimous should be retained for smaller OC's.

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

Current provisions are fine, however a lot owner in arrears should be excluded from being able to convene a SGM.

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

Current provisions are fine.

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

At the AGM or attend an OC committee meeting.

Committees



38. 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?

A committee shouldn't be too big and nor too small. It depends on the size of the OC but could be decided by a ratio of lots.

The Chairperson would be responsible for arranging ballots.

We are happy with the Chairpersons role as it currently stands, however the Act should outline the role and voting power of the chairperson.

Minutes should be promulgated within 48hrs.

If the OC is small and it has no members for its committee then the OC manager will be appointed chairperson by default.

Rights and duties of lot owners and occupiers

39. 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?

A lot owner would need to apply to the committee and then follow their process. An OC should have the power to determine and enforce the rules.

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

Common problems with external appearance is the colour of the curtain or its backing and washing hung out on balconies or balconies being used as a storage location which detracts from the overall external aesthetics of the building.

41. 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?

Yes they should.

Not all lot owners should have access to all common areas or services. Some services are located on the rooftop and it can be dangerous.

Lot owners should not have access to common facilities when they are not residing in the complex. Access should be limited to the resident of the lot.



Where necessary, ie. gym and swimming pool, residents should be inducted.

Rules of the owners corporation

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

Everyone should comply with the rules. Ignorance should not be considered.

43. 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?

Responsibility stops with the lot owner or leasee.

44. 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)?

Small and large OC's are different. One size fits all won't apply.

OC's should be able to make the rules regarding pets and smoking.

There needs to be a maximum number of animals ruling. The City of Melbourne is the only Council that doesn't have a ruling.

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

Nothing that comes to mind.

46. What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?

Lot owners need to apply for permission. OC's should not reasonably withhold permission. The OC needs to consider the application in relation to the rules, particularly where there may be an impact on the outward appearance, noise or safety.

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

Follow N.S.W model.

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

Not at present.



Owners corporation records

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

There needs to be set criteria for a lot owner to gain access to the records which includes a reason for deliberation by the OC.

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

Current procedures are acceptable.

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

Short stay information should be included on OC certificates for transparency.

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

Certificates should have a maximum time frame for issuing. We have stories of certificates taking months to issue – unacceptable.

Dispute resolution

53. 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?

OC's should have the right to pursue the breaches without the need to go to VCAT and only turn to VCAT when the breach notice is not complied with.

54. Are there any other issues relating to dispute resolution?

There is too little guidance on items such as: who can chair a grievance meeting, who can sit on a grievance committee if none has been formed in the past? What is the responsibility of an OC when they receive a complaint against them? What happens when a committee member submits a complaint against the managing company and the committee? We think the dispute resolution process needs further work.

Applications to VCAT

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

Follow the current process/procedure.



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

No.

Owners corporations in retirement villages

57. *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?*

No comment.

58. *What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?*

No comment.

59. *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?*

No comment.

Part 5 of the Subdivision Act

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

The size of the OC matters and will vary the process, but generally the current process is adequate.

61. *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.*

It should be done by an independent licensed surveyor.

62. *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?*

A review should be undertaken as to the fairness of the initial liability determination.

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



Nothing further to add.

Conclusion

A major point that our members were unanimous on was the desire for an industry ombudsman where a number of these issues could be addressed before legal action.

Thanks for the opportunity to make a submission on this review and we look forward to the next phase of the process.

A handwritten signature in black ink, appearing to read "Tony Penna", written over a horizontal line.

Tony Penna
President
Southbank Residents Association