

CITY OF MELBOURNE

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Dear Mr Cohen

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CONSUMER PROPERTY LAW REVIEW - ISSUES PAPER 2

The City of Melbourne administration commends the State Government for undertaking a review of consumer property legislation and welcomes the opportunity to provide a response to Issues paper 2: Owners corporations.

The City of Melbourne's role in the apartment sector covers health, safety and wellbeing; emergency management; administration of planning and building; community development; and sustainability.

The City of Melbourne administration is concerned that the current Owners Corporations model is unsuited to the management of large apartment buildings. Weaknesses in the model's applicability to large buildings present significant risks to public safety as well as the safety of tenants. The model also presents challenges for effective asset management, and does not support the effective engagement of all affected parties. Each of these is expanded below, and details of our observations are provided in the attachment.

The current model is unsuited to the management of large apartment buildings

The strata sector is experiencing rapid growth and diversification. An apartment building can now contain the same number of dwellings, accommodation and commercial/retail uses as a small town. The current legislative framework is not suited to dealing with complex, multi-use buildings. In particular, the interplay between different legislation causes confusion and frustration for local government and property owners. The City considers the scope of the review could also have covered the *Residential Tenancy Act 1997*, *Public Health and Wellbeing Act 2008*, *Building Act 1993* and the *Planning and Environment Act 1987*.

Weaknesses in the model's applicability to large buildings present significant risk to public safety

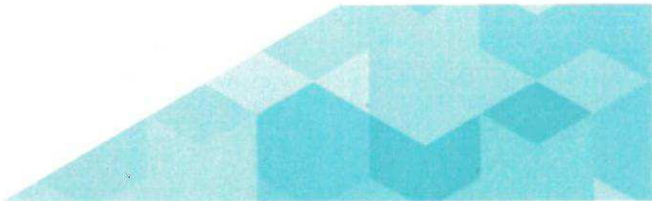
It has been the City of Melbourne's first-hand experience that when works are necessary to common property of buildings to ensure public safety that to have these works undertaken promptly has been impossible to achieve within acceptable timeframes. This places the general public at risk.

The model also presents challenges for effective asset management

As apartment buildings grow larger, so does the burden of responsibility on apartment owners, who collectively form the owners corporation. Many owners corporations are not equipped to make technical decisions about physical infrastructure and the owners corporation structure does not support timely decision-making for maintenance, upgrades and sustainability improvements to property. Additionally, the current framework does not enable effective oversight of shared accommodation, sub-letting and rooming houses.

The model does not support effective engagement of affected parties

The current model does not cater well to situations where there are large numbers of owners within a single building, some of whom live overseas. It also does not allow for the effective engagement of tenants in raising issues and in decision-making.



The administration has provided further feedback to relevant questions raised by the issues paper in attachment A and have detailed 'other' related issues not covered by the questions in the review.

Please do not hesitate to contact me at kate.vinot@melbourne.vic.gov.au if you have any questions regarding this submission.

Yours sincerely

Kate Vinot
Director City Strategy and Place

Consumer Property Law Review

Issues Paper 2: Owners corporations

Submission: 29 April 2016

Review background

Consumer Affairs Victoria is undertaking a review of the following consumer property legislation:

- *Estate Agents Act 1980*
- *Owners Corporations Act 2006*
- *Conveyancers Act 2006*
- *Sale of Land Act 1962*

Issues papers will be released in 3 phases as follows:

- Phase 1: Conduct and institutional arrangements for estate agents, conveyancers and owners corporation managers - open for public consultation until 11 March 2016
- Phase 2: Owners corporations (general) – open until 29 April
- Phase 3: Sale of land – available in March

The issues paper is available on the CAV web site www.consumer.vic.gov.au


The City of Melbourne has structured this submission to respond to particular questions raised in the Issues Paper No. 2. This submission should be read in conjunction with the issues paper. References to 'the Act' are to the *Owners Corporations Act 2006*.

Financial management of owners corporations

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

As the size and complexity of buildings grow, so does the burden of responsibility on owners corporations. Owner corporations are made up of ordinary people, many of whom are not equipped to make complex and expensive decisions about the physical infrastructure of their building. Many buildings struggle to get an engaged owners corporation or high-functioning executive committee, in large part due to the time and responsibility burden. As such, new executive committee and owners corporations' models are beginning to emerge, for example:

- Executive committee members could receive a discount on their owners corporation fees in return for their active service.
- Executive committee members could be paid a small stipend in return for their active service.

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- Paid external parties could be brought into committees to provide direct services, with or without proxy privileges.

It is important that the legislation can facilitate emergent sector needs and support attempts to improve the functions of owners corporations and their associated committees.

Maintenance

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?

There are four key challenges with regards to maintenance planning for buildings:

1. The technical capability of owners corporations to plan for effective maintenance
2. The financial capability of owners corporations to make the necessary investments in this area
3. The ability of owners corporations to make timely and effective decisions around asset maintenance
4. The need for additional measures to drive building energy and water performance to encourage cost savings and improve resilience.

Each of these is expanded upon below.


1. The technical capability of owners corporations to plan for effective maintenance

The Act requires an owners corporation to repair and maintain common property, chattels, fixtures etc. and replace infrastructure/equipment as it ages. It does not require proactive improvement the efficiency of the services being maintained, even where upfront financial investment could see financial savings over the long-term. On the whole, owners corporations currently lack the technical capabilities to identify and plan for these types of building improvements.

The responsibilities of the owners corporation around asset management could be broadened in the Act to encourage them to investigate water, energy and waste efficiency improvements with a view to the long term efficiency and improved maintenance of the building. Phasing-in legislated maintenance standards for key issues like energy efficiency could be particularly valuable in the residential strata sector. High-rise residential apartments consume 25% more energy per person than in a detached dwelling ('Multi Unit Residential Buildings Energy and Peak Demand Study', NSW Department of Infrastructure, Planning & Natural Resources, 2005). These costs could be offset by integrating energy efficiency into regular maintenance work. Standards for building sustainability performance would help owners corporations plan for and make informed decisions about what upgrades will be beneficial for their building, rather than the individual owners corporations of each building spending time and money investigating what could or should be done

2. The financial capability of owners corporations to make the necessary investments in this area

The ability for owners corporations to make investments in the future of their buildings is limited to their financial capacity to do so. The Act needs to require better development and



maintenance of sinking funds for adequate asset management. These funds should require owners corporations to optimise building performance, especially where this investment is likely to have an optimal return on investment.

The Act also needs to provide guidance on more extensive building maintenance such as facades and common property to ensure public safety. This is particularly relevant to heritage buildings and aging building stock, where restorative works are difficult to enforce due to complex and onerous requirements on owners corporations. The City of Melbourne recognises that heritage is both a public and private value, and the review could consider financial mechanisms to support and incentivise such building maintenance works.

3. The ability of owners corporations to make timely and effective decisions around asset maintenance.

Current owners corporation rules require each property owner to agree to common property changes. This often results in delays to undertaking work while a unanimous decision is reached. The issue is compounded when some of the property owners reside overseas or do not understand their obligations.

The inability of owners corporations to make timely decisions is of particular concern in cases where inaction of reparative or restorative works poses safety concerns to occupants or the public generally. The Act should provide owners corporations with scope to make decisions on behalf of the owners or require emergency work to be undertaken immediately if issues of safety are identified.

4. The need for additional measures to drive building energy and water performance to encourage cost savings and improve resilience

Over the past few years, the City of Melbourne has worked hard to identify primary building infrastructure interventions to help buildings cope with climate change impacts. In addition, City of Melbourne have been a key partner in the development of the national Smart Blocks program which helps apartment owners and their managers to improve the energy efficiency of common property in apartment buildings.

However, with the increasing level of climate change risk, a support program is not enough to ensure the resilience of apartment buildings. The City of Melbourne encourages the State Government to investigate and implement mechanisms in the *Owners Corporation Act* to drive the uptake of energy, water and waste efficiency and climate resilience retrofits in apartment buildings. This may include:

- Lowering decision-making thresholds for projects with clear sustainability outcomes, particularly where there are direct and proven savings on utility bills (e.g. measurable reduction in energy or water consumption).
- Include retrofitting for efficiency and climate resilience as an explicit part of owners corporations repairs and maintenance duties.
- Making it easy for apartment owners to install water and energy efficiency technologies, waste minimisation technologies and other climate resilience initiatives in the private realm of buildings, even where it may have a small impact on the physical appearance of the building.

- Providing clear mechanisms to facilitate the use of underutilised common area space for sustainability initiatives that benefit the occupant of a particular lot (e.g. in low rise or townhouse, facilitate the use of roof space to install solar systems to power individual apartments).
- Incentive based owners corporation management fees (distinct from commissions) that encourage sustainable practices.
- Legislation to mandate actions (e.g. switching to LED lighting, carbon monoxide sensors to control car park HVAC systems).

Buyer-Beware: Home Insurance, Extreme Weather and Climate Change, a report by The Climate Institute in partnership with Choice states that governments should “require that all dwellings and associated infrastructure be built or renovated as fit-for-purpose for the maximum projected impacts over their design life”.

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?

The City of Melbourne administration’s perspective is that buildings should be adequately maintained to ensure public safety and the safety of tenants and visitors.

Given the aging building stock in the City of Melbourne and the complexity around planning, investment and decision-making, major refurbishments, redevelopments and heritage buildings, as outlined above, there is currently a risk that buildings may become unsafe or fall into disrepair. Mandatory maintenance plans should be implemented for all owners corporations, regardless of size as the current threshold does not capture all of the at-risk building stock. Maintenance plans should consider action to protect buildings or enhance their performance under risks such as climate change.

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

The City of Melbourne’s administration encourages the current review to consider how to strengthen the mechanisms that encourage the effective implementation of maintenance plans. This includes consideration of financing and decision-making considerations regarding maintenance (such as the proper development and management of sinking funds) and appropriate accountability and inspection regimes.

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

All buildings should be appropriately insured. Insurance needs to cover issues that may arise within the buildings, as well as the potential impact of the buildings on public health and safety.

The City of Melbourne has identified specific climate change impacts relevant for the municipality. These are extreme heat, drought and water scarcity, sea level rise, extreme storm and flash flood. The Victorian strata sector’s exposure to climate change events is likely to impact on insurability and insurance costs.

Given the potential impact of climate change on building and the associated hazards and risks, the Act could encourage owners corporations to insure buildings against such impacts.

The insurance approach could take into account the level of mitigation that has been put in place by the building owners to reduce the likelihood and consequence of such impacts. Further research and professional advice should be considered to explore and understand the full implications of such a change. Some relevant material is contained in

Buyer-Beware: Home Insurance, Extreme Weather and Climate Change, a report by The Climate Institute in partnership with Choice. This states that:

This study also finds that climate change can be expected to worsen the situation for homebuyers through increases in the frequency and/or intensity of many hazards. According to the latest report from the Intergovernmental Panel on Climate, these escalating hazards are projected to, 'increase losses and loss variability in various regions and challenge insurance systems to offer affordable coverage'. This study finds that this is not a distant threat, but one that could push up some insurance premiums by more than 90 per cent over the period of a 30 year mortgage.

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)?

The City of Melbourne administration does not support the suggestion of an opt-out option. The owners corporation needs to be able to represent all owners and the entirety of common areas and structural integrity of a building for the benefit of all owners. An opt-out clause would unfairly burden those remaining owners who would be left to pay a higher proportion of the insurance cost.

Meetings and decisions of owners corporations

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

Voting thresholds need to be aligned to achieve effective and timely outcomes, particularly with respect to public health and safety. This can be difficult to achieve if decision-making requires a unanimous decision from a disparate group of owners, some of which may not reside in the country or speak a common language. The review could consider setting thresholds based on the nature of the issue or on levels of risk or consequence of the issue under consideration.

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

In the City of Melbourne, only around a quarter of apartments are owner-occupied, thus tenants are an increasingly important part of apartment communities. The way tenants utilise the building has a significant impact on building attractiveness, amenity, maintenance, as well as a number of other issues such as harmony and social cohesion within the building environment. Given this, tenants should be engaged in the building community. Notifying tenants of key meetings, providing an opportunity for tenants to present at meetings or other engagement mechanisms should be encouraged.



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?

The primary responsibility of building owners with regards to common areas including the external appearance should be the safety of the public, and of tenants and others using the building. Changes to the external appearance of the lot should not be allowed to compromise these issues. There are also a number of heritage and other planning requirements that may limit the options for owners to be able to change the external appearance of their lot.

However where these requirements can be met, there can be benefits to owners to undertake modifications that change the external appearance of their lot without having a significant impact on other parties. For example, installing pelmets, curtains, window films and water tanks can achieve private benefit of cooling apartments. This is an important health issue given the increasing number of hot days in Victoria and the effect of these on the aging population.

In circumstances where such improvements will be paid for by the lot owner and has a positive impact in relation to efficiency and resilience there should be minimal barriers in place to prevent owner from implementing the change. Indeed, it may be worth amending the model rules to encourage the acceptance of such initiatives.

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

Due to the shortage of space, external balconies are being utilised as storage areas, sometimes creating excessive clutter and also creating large potential fire loads. This is not their intended purpose nor are they designed for such uses (e.g. fire systems are not design for this external use).

The City of Melbourne requests that the review considers options to strengthen the capacity and capability of owners corporations to address these issues.

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?

Building owners have a responsibility to ensure public safety. However, it has been the City of Melbourne's first-hand experience that when works are necessary to common property of buildings to ensure public safety that to have these works undertaken promptly has been impossible to achieve within acceptable timeframes. This places the general public at risk.

In the event of an emergency such as a fire or building failure (i.e. façade failure, glass canopy failures, parapet failures) the Municipal Building Surveyor is required to serve on ALL owners and owners corporations (often several for one building) a Building Order to undertake emergency works to bring a building into a safe state.

Very recent incidents have required inspection of each individual apartment and common property to enable the serving of a Building Order of each property owner and owners

corporations – resulting in hundreds of notices being served. Each property owner is required by law to be responded to, to bring the building back to a safe condition.

It is the City's experience that property owners are ignorant of the need to have urgent rectification works undertaken, nor that they are individually liable for these works.

The owners corporation rules require all owners to agree to common property changes and to fund the works, however, with many property owners residing overseas, and many property owners not understanding their obligations, this has proven impossible to achieve. In addition, this has placed significant burdens on the City of Melbourne to process these requirements, without success. Failure to comply with emergency orders will ultimately require the City of Melbourne to take each owner to Court. This still will not guarantee a resolution unless all owners can come to agreement.

Whilst it is important to ensure that the rights of the individual property owners are protected, it is equally important that buildings which are considered dangerous to the public and property are rectified and brought to a safe state as quickly as possible. The current regime does not allow this.

In addition, lot owners and occupiers should have access to all common property. The owners corporation and facility managers also need to gain access to test systems which are in the common property and the apartments.

Rules of the owners corporation

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)?

Model Rules regarding pets and smoking should be considered. No view or position is submitted as to whether there should be a choice of rules; however the City of Melbourne suggests that the review considers adopting the New South Wales legislation addressing smoke drift rules.

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

Consideration should be given to how the Model Rules could encourage the uptake of technologies that improve water and energy efficiency.

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

The Act should encourage 'sustainability' enhancements where there will be no impact on safety of occupiers, building and or amenity of the adjoining surrounds.

At a minimum the Act should align to the Queensland model that restricts the ability of owners corporations to make rules merely to enhance or preserve the external appearance of a building if they have the purpose, or effect of, prohibiting the installation of such things as:

- roofs with colours that have particular solar absorption values
- energy efficient windows
- solar hot water systems, or

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- photovoltaic cells.

In addition, the review should consider preventing owners corporations having rules preventing other activities relating to sustainability, climate resilience and efficiency, for example:

- the use of balconies to dry clothes
- the use of balconies to store bicycles
- water tanks
- battery storage associated with solar panels
- green roofs
- waste and recycling storage and facilities

These measures should only be considered where the aforementioned activities do not negatively affect the structural integrity of a building or pose a fire safety risk.

The Act needs to consider how heritage laws may currently prevent the activities above from being performed and seek to maximise outcomes for sustainability without negatively affecting the heritage value of a property.

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

The ability for the Owners' Corporation to issue penalties, based on the South Australian model, should be considered for implementation in Victoria. A thorough review on the success or otherwise of this model should be conducted as part of this consideration. Should such a model be implemented, it is suggested that the VCAT be a preferred vehicle for appeals rather than the Magistrates' Court to improve accessibility due to cost impositions.

Dispute resolution

54 Are there any other issues relating to dispute resolution?

It is essential that state and local governments and strata industry professionals encourage and promote less confrontational methods of resolutions. The use of mediation services such as the Dispute Settlement Centre of Victoria and encouraging proactive creation of social connections within apartment buildings and owners corporations should be encouraged. This could be included as part of the OC rules when managing issues which arise in the first instance, rather than resorting to VCAT or other avenues of appeal.

Part 5 of the Subdivision Act

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

The review should consider the risk of sale or development of building areas independently of the apartment/commercial building structure. If car parking areas can be subdivided or sold independently of an associate apartment building, then this adds further complexity to the owners corporation. Owners of car park areas would be in a position to delay maintenance investment or other relevant decisions but virtue of being co-owners within the

property. The review should consider how bicycle and motorcycle parking provisions could be enhanced given the strong community trend towards these modes of transport.

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

In multi-storey developments, the City of Melbourne administration suggests that the position of lot boundaries should always be the internal face, so that all external, structural elements and essential safety services are part of common property and maintained by the owners corporation. Examples of issues relate to boundaries

- A boundary in the middle of a balustrade causes confusion as to who repairs the balustrade, particularly if it is glass
- Cladding on the external face of a building including the cladding wrapping around balconies needs to be under the control of one decision-making and financing entity, not subject to the decision making of dozens if not hundreds of co-owners
- Waterproofing of a building and the long term impacts if it is not fixed in a timely manner will affect others and needs to be managed by the owners corporation

The allowance of having shared fire services between different buildings/towers creates a subdivisional complexity in particular to gaining access for maintenance personnel.

Other related issues identified by City of Melbourne

The City of Melbourne administration has identified five further issues that should be considered in the current review:


1. The need for improved understanding of roles and responsibilities
2. The need for improved engagement and social structures within large owners corporations
3. The need for improved financial acumen around budgets and expenditures
4. The need to better identify and manage rooming houses
5. The need for improved emergency planning and management.

Each of these is expanded upon below:

1. The need for improved understanding of roles and responsibilities

During the rollout of City of Melbourne's numerous apartment programs it has become evident that there is significant misinformation, confusion and lack of knowledge amongst apartment owners about their roles and responsibilities. The City of Melbourne's experience suggests that most first-time apartment buyers are not aware of the responsibility they are purchasing along with their property. There are of course also leading owners who are extremely knowledgeable about strata regulations and norms but these are the minority.

As the size and complexity of buildings grow, the use of these residential buildings becomes more diverse, so does the expectation by occupiers and the burden of responsibility on owners corporations. Owner corporations are generally made up of ordinary people, many of whom are not equipped to make complex and expensive decisions about the physical infrastructure of their building. A clear delineation of roles and responsibilities, including desirable experience to undertake these roles, should be provided by the Act and guidance offered as to when to engage third-party providers for expert advice.



As the *Better apartments – a discussion paper* identifies, the number of apartments being approved and built in Victoria makes up nearly one third of all new dwellings approved across the state – more than at any time in our history. Without improved support for the owners corporations which have responsibility for these assets and more broadly the communities which inhabit them the current challenges that are faced will worsen.

2. The need for improved engagement and social structures within large owners corporations

On top of infrastructure challenges, owners corporations and specifically their executive committees must manage complex interpersonal interactions that can exist within apartment communities. Taking a role on the executive committee for example comes with it a burden of responsibility. There are specific skills required of the chair to ensure successful meetings, resolutions and negotiation and communication outcomes. As in any organisation or community where every party has an interest, it is not uncommon to hear of factions in conflict with each other within apartment buildings and there are currently very few, easily available support mechanisms to help resolve these tensions. Long-standing “bad-blood” issues can have ongoing impacts and are not always appropriate to resolve at the VCAT. The Act could consider new models of governance and guidelines aimed at improving social structures within owners corporations and their executive committees.

3. The need for improved financial acumen around budgets and expenditures

The City of Melbourne’s experience through strata industry partnerships indicates owners corporation fees are an area of contention and friction. One reason for this is a lack of engagement from owners in strata processes. Many owners are unaware of the detail of annual budgets and maintenance expenditure meaning that with little understanding about *how* money is spent, there can be resentment towards the payment of fees.

For many owners corporation managers, the mailing of fee notices correlates with a spike in customer calls regarding the finances. Consideration should be given to mechanisms that support owner education or exposure to the expenditure/budgets of the building on an ongoing basis. It is important to remember that many owners will not be adept at reading and interpreting complex financial statements, reports or budgets. As such, any move that encourages improved, simplified communication of financial papers would be beneficial – for example, simple pie charts or infographics could improve owners comprehension of financial matters.

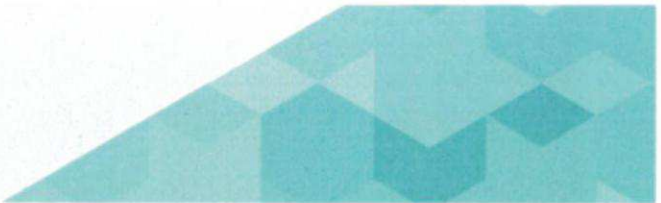
The review should consider how to improve quality and transparency of financial matters and reporting.

4. The need to better identify and manage rooming houses

The management of rooming houses remains a major challenge for the City of Melbourne. Poorly maintained or overcrowded rooming houses create a major risk for the health and wellbeing of occupants and the safety of the building occupants more generally.

City of Melbourne administration has found that apartments are often sub-tenanted however the ability for Council to obtain evidence to enforce action against illegal rooming houses is duplicitous under the *Building Act and Health and Wellbeing Act*. The review should consider providing an obligation on Owners Corporations and Owners Corporations Managers to report suspected unregistered rooming houses, similar to the obligation imposed on real estate agents in accordance with 142D of the *Residential Tenancies Act 1997*.

City of Melbourne administration has consistently experienced owners corporations that are frustrated at the separate pieces of legislation dealing with rooming house operations and



short term accommodation. The common conflict is between owner and owner occupiers and those who are utilising apartments as accommodation businesses. Commercialisation of apartments can increase wear and tear, insurance needs, security risks and health issues.

The proper management of rooming houses relies on interplay between numerous pieces of legislation. In this context the review of the Act needs to consider how both the *Residential Tenancy Act 1997* and the *Public Health and Wellbeing Act 2008* can support, rather than impede outcomes in this area.

5. The need for improved emergency planning and management.

There are an increasing number of apartment buildings that are being evacuated due to poor workmanship in the building and in particular fire safety measures.

Lack of emergency management planning by owners corporations and in particular for the recovery process where occupiers are displaced. Most apartment towers have emergency management plans to get people to a designated space, however very few have details of how to set up a recovery centre and provide temporary accommodation until dwellings can be inhabited again. This is continually falling on local government to source and fund solutions when dealing with incidents

The review should consider ways to better address contingency measures for periods when all or part of the building is unavailable for an extended period, and the issue of interim housing for building occupiers during the recovery period.

