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# SUBMISSION

## Review of Vic strata laws
## Issues Paper 2, 27 April 2016
## Owners Corporations

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## BACKGROUND

Strata Community Managers has extensive experience in the management of large scale master planned residential estates in both Victoria and New South Wales.

In particular, with over eight years' experience associated with the Sanctuary Lakes Resort ("SLR"), Point Cook, we have often encountered challenging situations associated working within the confines of the Owners Corporation Act in its present form.

SLR comprises 28 plans of subdivision and over 40 OCs (some 2,950 lots), with a mix of gated and non-gated communities. The largest OC comprises 1,250 lots, yet the OC1 for this plan has no common property.

SLR has a number of OCs that would fall under the auspices of the Community Land Management Act if in NSW, and governed under an over-arching Community Association.

The Owners Corporation Act, however, often appears to have a traditional strata building bias, and challenges exist when considering the management of master planned estates (MPEs) in Victoria.

Strata buildings are most often fully completed prior to the registration of the plan and thus final settlement of all lots. The management of such includes inclusive building reinstatement and replacement insurance policies as well as requiring significant levels of essential services.

MPEs may take as little as three years, but also upwards of 20 years or more for completion. Completed Lots are sold whilst others are simultaneous created throughout this timeframe, as the developer continues to build and sell new stages whilst residents occupy newly purchased/completed homes. During this time communities, sports clubs, and interest groups establish. Original lots may be sold many times over before the last lot is created.

The initial sale is usually a block of dirt, and some remain so for many years whilst homes are designed and built in the same street. Add to that the fact that owners of blocks of land have the opportunity to design and construct their own homes, sometimes this must be in accordance with a Design Guideline, having gone through an Architectural Review approval process.

Roads, kerbing and nature strips are sometimes common property, but very often aren't, and are owned by local councils, yet the OC might elect to maintain council owned assets such as nature strips, street trees, parks and reserves to a higher standard than what the council otherwise might have. The construction process of private homes isn't always overseen by the council whose by-laws officers may attend building sites for homes not in an owners corporation. This only contributes to a lot more work for managers who assume the role of local compliance officers, ensuring that assets are not in any way damaged. And does this fit in with the dispute resolution process? Not easy when a driveway is currently being poured with a non-compliant finish. There's not a lot of time to issue OC Complaints and setup a time to mediate prior to issuing breach and final breach notices, and this may be magnified by the construction of multiple homes at any one time.

Car parking is almost impossible to police, whether in gated communities or on council reserve streets. Registered rules of MPEs often prohibit the storage of caravans, trailers and boats, as well precluding the parking of commercial vehicles in view, in an effort to improve the amenity. Just what is a


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commercial vehicle nowadays? The Model Rules provide some assistance for traditional strata buildings' car parks, but how do you use this to control on-street car parking in a gated community when the street itself is common property? It could be argued as being unreasonable to disallow a car to park on a street, but how do you distinguish one part of the common property with another when attempting to use the model rules to prevent cars being parked on and potentially damaging nature strips? This could lead to accusations of discrimination.

It may be argued that New South Wales better recognises the differences between owners corporations that exist in strata buildings and of private homes, with legislation tailored specifically for housing estates to include the Community Land Management Act.

The provisions of the Community Land Management Act take into account an 'umbrella' association, the Community Association, with 'Precinct' and 'Neighbourhood' Associations within. It recognises the length of time such developments take place, with provisions to protect the rules (Management Statement) so that the developer can complete the task of creating the development, as well as voting contingencies that dilute any developer's votes over time. It is well worth consideration when reviewing Victorian OC laws.

Below are extracts from the NSW Civil and Administrative Tribunal (NCAT) website and from a publication called *Living in a Community Scheme*, published by the NSW Office of Fair Trading. These references may assist you to understand the subtle differences between Strata and Community schemes.

**NCAT website**

http://www.ncat.nsw.gov.au/Pages/cc/Divisions/Strata_and_community_schemes/strata_and_community_schemes.aspx

## STRATA AND COMMUNITY SCHEMES

### Consumer and Commercial Division

NCAT's Consumer and Commercial Division can hear and determine disputes about strata and community schemes under the *Strata Schemes Management Act 1996* and *Community Land Management Act 1989*.

**Strata schemes** are buildings or a collection of buildings, such as apartments or townhouses, where individuals own a portion known as a 'lot'. Common property ownership is shared between lot owners, such as driveways, foyers and gardens.

**Community schemes** are a system of property ownership of lots or units which are subdivided into strata schemes or other smaller community or neighbourhood schemes. Community schemes allow for multiple dwellings on one piece of land such as rural subdivisions or gated communities. The common property forms a separate lot with its own lot number.

***Living in a Community Scheme***

http://www.fairtrading.nsw.gov.au/pdfs/About_us/Publications/ft191.pdf

## What is the NSW legislation covering community schemes?

The Community Land Development Act 1989, facilitates the subdivision and development of land with shared property. It deals with plan requirements, plan registration, changes to the subdivision and dealings with the lots. Land and Property Information within the Department of Lands administers this Act.

The Community Land Management Act (1989) provides:
• a system for the management of community schemes, precinct schemes and neighbourhood schemes established by the subdivision of land under the Community Land Development Act 1989.

This includes:
- the management of funds and books of accounts
- the holding of meetings of the association and executive
- the responsibilities of an association to maintain association property and take out insurance
- the administration of the requirements of the management statement
• a system for settling disputes in community, precinct and neighbourhood schemes, including those in the day-to-day management and compliance with requirements of the management statement.

## Relationship with strata schemes legislation

The Community Land Development Act and the Community Land Management Act is modelled on the Strata Schemes (Freehold Development) Act 1973 and the Strata Schemes Management Act 1996.

Many parallels exist between these pieces of legislation, which is appropriate given that strata legislation has been developed and refined since its introduction in 1961.

This paper will concentrate only on a small number, but very important issues facing owners corporations, and in particular, MPEs.

We thank CAV for this opportunity and further make ourselves available to discuss the merits of more formal recognition of what is an increasingly growing market segment within owners corporations, being master planned estates.

Warm regards

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# Functions and powers of owners corporation

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

No.

Requiring a special resolution is fine, however the process to obtain a special resolution requires consideration. Refer to Qn 34.

If the process to obtain a special resolution is not amended to facilitate decision making, then CAV might consider amending the legislation to allow the commencement of legal proceedings via an ordinary resolution.

# Financial management of owners corporations

### 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?

In our experience obtaining a costs order is rarely an issue. s115 of the VCAT Act facilitates the reimbursement of the application fee, and it is our experience that a satisfactory amount is awarded over and above to consider other costs to prepare the case. When representing multiple matters in the one session the aggregate of costs orders is usually adequate for the time spent. Should an OC decide to appoint a law firm for what is a relatively simple process (fee recovery) then we can't comment on the recovery of costs that a law firm might charge over and above that of a manager.

Enforcing VCAT orders is where costs to the OC can escalate.

Owners understanding how to 'play the system' by changing ownership without informing the OC and at times not settling outstanding amounts owed is becoming an increasing problem. There seems to be little recourse for owners who ignore ss134 and 135 in regard to informing the OC of a change in owner or change of an owner's contact details. This is compounded by the increase in incidence that an OC Certificate may not even have been requested for a change of ownership, particularly at times when one spouse changes to another.

### 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?

No.

This is unnecessary and will only serve to delay payment and this may cause further financial stress on 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?**

We have experience managing prescribed OCs that have no common property and no requirement for a maintenance plan, yet the Act states that they must have one.

We are aware of non-prescribed OCs that should and do obtain a maintenance plan.

**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?**

Perhaps non-prescribed OCs should be made to consider and resolve whether or not to obtain a maintenance plan as a requirement within the AGM agenda.

**21 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?**

Owners who are deemed to have caused damage to common property should pay for the cost of repair. Perhaps any protest could be subject to the dispute resolution process.

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

s61 is flawed when read in the context of MPEs, or perhaps when considering OCs with multiple buildings that are separated.

**Perhaps all that's required is the replacement of two words. We'll explain below why we believe that 'the plan', highlighted in red below, would be better served to be replaced with 'that building'.**

**61 Insurance for lots in multi-level developments**

1) If a **building** on a plan of subdivision is located above or below common property, a reserve or a lot, the owners corporation must take out the following insurance in respect of all lots in **the plan**-
   a) reinstatement and replacement insurance for all buildings on each lot in accordance with section 59; and
   b) public liability insurance in accordance with section 60—

as if any reference in those sections to common property were a reference to those lots.

2) Subsection (1) does not apply to—
   a) a single-storey building; or
   b) a plan of subdivision that was registered under the Cluster Titles Act 1974 or the **Strata Titles Act 1967** unless one or more lots in the plan is located above another lot in the plan.


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**What constitutes a multi-level development?**

Our view is that for a 'multi-purpose', 'multi-use', or perhaps more to the point, 'multi-building' owners corporation (call it whatever you want), that the intent of the wording in the Act is to protect ONLY all of the lots that could be affected by an event triggered by a single lot that say, catches fire/floods.

The VCAT findings for OC2297/2011 (OC SP268824D v Saponja) established that the OC is not obliged to take out building reinstatement and replacement insurance for buildings privately owned by the owners, being detached self-contained houses and home units on blocks of land. The Tribunal confirmed that such insurance could be taken out upon the passing of a special resolution.

**We believe that the intent of s61 was to ensure adequate insurance, should any lot within a particular building have an ability to affect another lot within the same building.**

This could be viewed as one section of the OC Act that is biased towards traditional strata buildings.

A master planned estate might have 600 lots within OC1; of which 100 lots are medium density townhouse and comprise OC2; and of which 100 are hotel rooms in a dedicated and geographically isolated building; the remaining 400 lots being independent blocks of land, geographically disbursed around a golf course, completely in isolation of OC2, and more importantly OC3.

The townhouses in OC2 are all single storey and s61 actually doesn't mandate that the OC obtain building reinstatement and replacement insurance, although it would make good sense in doing so.

The requirement to provide building reinstatement and replacement insurance for the 400 independent houses doesn't fall under s61 as was the understanding in OC2297/2011.

Yet, the 100 hotel lots, which are within their own independent building, geographically isolated from the 100 townhouses and the 400 private homes, purportedly trigger s61, due to the original wording of the section that begins with explaining lots **in a building**, but then perhaps erroneously concludes with all lots **in the plan**.

Each of the living units, the house blocks, townhouses and hotel rooms, have very different insurance requirements, and should be treated allowed the opportunity to be treated separately.

As mentioned in our *Background* at the beginning of this Submission, the development of an MPE might take as many as 20 years. Owners who are able to design and construct their own private house could do so at very different construction costs. Neighbouring houses might see a $1.3M house next door to a $350K house.

Why should they pay the same contribution to their insurances via an OC policy? Traditional strata buildings factor in units of entitlement and liability for such discrepancies.

What would happen if after several years and the full completion of 1,247 private houses of the largest OC in SLR, a common property building that complies with s61 is constructed on the plan? Would all 1,247 private homes' building reinstatement and replacement insurance then be required


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to be included in an OC insurance policy? This would be a logistical nightmare and would create a lot of unrest amongst owners.

How would the OC then practicably comply with s65 *Valuation of buildings*? Obtaining insurance valuations for each of the 1,247 private house lots would if not perhaps be impossible, but would quite simply be impracticable and unnecessary.

> **65 Valuation of buildings**
>
> 1) A prescribed owners corporation must obtain a valuation of all buildings that it is liable to insure.
> 2) The valuation must be obtained every 5 years or earlier as determined by the owners corporation.
> 3) The owners corporation must present the valuer's report at the next general meeting after it is received.

**In summary, we believe that s61 could possibly be amended to clarify its intended meaning, or to eliminate any ambiguity, by the replacing 'the plan' with 'that building'.**

We don't support the premise that alteration of units of entitlement or liability are practical ways of resolving this matters for private homes in MPEs. Units of entitlement and liability are determined prior to the registration of the plan and prior to the initial settlements. As we have mentioned, some lots may remain blocks of dirt for many years. There is no way of determining what the future construction costs of a house will be, therefore determining owners' liability for the building reinstatement and replacement is unknown/impossible. Altering the plan of subdivision at future points in time requires unanimous resolutions, which will require continual updates. This is clearly inappropriate and unnecessary.

## 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?

Special resolutions are required for the ss12, 14, 15, 18, 24, 25, 44, 52, 53, 87 (7), 96 and 138 of the OC Act.

**The existing threshold for attaining a special resolution is stifling the ability for all large OCs, and in particular those in MPEs to efficiently operate, particularly with prescribed OCs that have hundreds of lots.**

Not only is there apathy amongst owners to vote generally, the conditions placed upon OCs to be able to facilitate the following are too onerous: to take legal proceedings; lease or licence common property; provide services that would be deemed realistic and reasonable and reflecting the fast paced nature of what's available to society and of societies expectations; to use funds from the maintenance fund when in need; to change/alter/improve common property; or not by any means the least important, the ability to be able to amend rules to be able to keep abreast of contemporary living standards.


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**These restrictions are also very well known by members of committees, so much so that even they are apathetic to change as they feel defeated before they even begin to take on what could be a project that would be well received by the vast majority of owners and residents, thus improving the quality of life of occupants as well as to improve property values.**

It's almost as though the OC Act was written to stifle change. We're certain this is not the intent by the law makers, but the heavy restrictions 'protecting owners' serve only to treat them with contempt, by assuming that the leaders in owners corporations as well as those who are prepared to participate in voting, don't have the ability to be able to make reasonable decisions without essentially managing by consensus.

The Corporations Act determines a special resolution from those that attend meetings either in person or by proxy, or participate in decisions by ballot. The OC Act mandates that 75% of all owners, whether in attendance/active participation or not.

We know most owners show apathy towards the attendance and participation of their OC, Sanctuary Lakes Resort OC's AGMs regularly result in a 4% attendance rate.

The existing threshold to attain a result by special resolution for prescribed OCs, which would include most MPEs, is too stringent.

**It is our opinion that CAV should consider the method that operates in NSW.**

Owners are given an opportunity to attend a general meeting in person or by proxy. If a quorum is achieved (just 25%; in Victoria it's 50%) then all resolutions are determined by those present in person or by proxy).

Should a quorum not be achieved, then the meeting may be adjourned for as soon as seven days' time, or as determined by the chairperson, and whoever attends the adjourned meeting forms the required quorum.

Just how many chances must owners be provided? This gives them two opportunities to get involved with participating in the proposed resolution(s). If they chose not to participate, then they accept the decisions of those that do.

Perhaps in such circumstances one last layer of protection could be provided so far as to have an interim period for any decisions made at an adjourned general meeting if a quorum is not achieved.

The following text has been lifted from the Strata Schemes Management Act 2015 (NSW), of which is expected to become law in the second half of 2016. Information on the recent review of the NSW strata laws is available via the following link:

http://www.fairtrading.nsw.gov.au/ftw/About_us/Have_your_say/Reform_of_strata_laws.page

**Strata Schemes Management Act 2015**

### Part 1 – Preliminary

### 1 Name of Act

This Act is the *Strata Schemes Management Act 2015*.

**2 Commencement**
This Act commences on a day or days to be appointed by proclamation.

**5 Resolutions of owners corporations**

(1) In this Act, a resolution of an owners corporation is a **"special resolution"** if:

(a) it is passed at a properly convened general meeting, and

(b) not more than 25% of the value of votes cast are against the resolution.

(2) For the purposes of determining a special resolution, the value of a vote in respect of a lot is equal to the unit entitlement of the lot. However, if the total unit entitlement of lots of the original owner is not less than half of the aggregate unit entitlement, the value of the vote in respect of those lots is taken to be reduced by two-thirds (ignoring any fraction).

(3) In this Act, a resolution of an owners corporation is a **"unanimous resolution"** if it is passed at a properly convened general meeting and no vote is cast against the resolution. A motion or election that is not required to be approved by a special resolution or unanimous resolution is passed by a simple majority of votes (see clause 14 of Schedule 1).

**21 Unanimous or special resolutions to be amended or revoked in same way**

(1) A unanimous resolution or special resolution of an owners corporation about a matter that is required by or under this Act or the by-laws of a strata scheme to be determined by a resolution of that kind cannot be amended or revoked other than by a subsequent resolution of the same kind.

(2) However, a unanimous resolution of an owners corporation dealing with common property may be amended by a special resolution.

**Part 3 – General meeting procedure**

**17 Quorum**

(1) Quorum required for motion or election. A motion submitted at a meeting must not be considered, and an election must not be held at a meeting, unless there is a quorum present to consider and vote on the motion or on the election.

(2) When quorum exists. A quorum is present at a meeting only in the following circumstances:

(a) if not less than one-quarter of the persons entitled to vote on the motion or election are present either personally or by duly appointed proxy,

(b) if not less than one-quarter of the aggregate unit entitlement of the strata scheme is represented by the persons who are present either personally or by duly appointed proxy and who are entitled to vote on the motion or election,

(c) if there are 2 persons who are present either personally or by duly appointed proxy and who are entitled to vote on the motion or election, in a case where there is more than one owner in the strata scheme and the quorum otherwise calculated under this subclause would be less than 2 persons.

(3) A person who has voted, or intends to vote, on a motion or at an election at a meeting by a permitted means other than a vote in person is taken to be present for the purposes of determining whether there is a quorum.

(4) Procedure if no quorum. If no quorum is present within the next half-hour after the relevant motion or business arises for consideration at the meeting, the chairperson must:

(a) adjourn the meeting for at least 7 days, or

(b) declare that the persons present either personally or by duly appointed proxy

and who are entitled to vote on the motion or election constitute a quorum for considering that motion or business and any subsequent motion or business at the meeting.

(5) Quorum for adjourned meeting. If a quorum is not present within the next half-hour after the time fixed for the adjourned meeting, the persons who are present either personally or by duly appointed proxy and who are entitled to vote on the motion or election constitute a quorum for considering that motion or business and any subsequent motion or business at the meeting.

**20 Adjournments**

(1) A meeting may be adjourned for any reason if a motion is passed at the meeting for the adjournment.

(2) The time and place at which a meeting adjourned under this Part is to be resumed must be fixed by the person who was presiding at the meeting or, if the meeting was adjourned because of a lack of a quorum, by the person who would have presided at the meeting but for the lack of the quorum.

(3) The secretary of the owners corporation must give to the members of the owners corporation, at least 1 day before the resumed meeting, a written notice specifying:

(a) the time and place of the meeting, and

(b) the provisions of this Act for determining the quorum at a meeting.

## Rules of the owners corporation

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

Yes.

The existing requirement to make or amend rules by a special resolution is preventing many prescribed OCs, particularly in MPEs, from the sometimes necessary periodic review and amendment of rules.

Owners are then stuck with what may be antiquated rules or rules that were originally created by the developer to benefit the developer and are no longer relevant.

In practical terms, owners don't have a very easy passage to at some point review and amend developer created rules. This is addressed in the Community Land Management Act (NSW) under what can and can't be altered in the Initial Period.

## Owners corporation records

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

Yes.

The number of lots changing ownership without a) an OC Certificate being obtained, b) informing the OC/manager of the change of ownership, and/or c) changing ownership without the payment of outstanding OC fees and charges, seems to be on the rise.

# Dispute resolution

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

Yes.

If an OC doesn't have a committee, but it does have a professional manager, the manager should be able to act in the capacity of the OC with exception to complaints made about the manager.

In the absence of a committee it is not necessary, confusing and time consuming to have to notify all owners (the OC) of a complaint, particularly when an OC is prescribed. Not all OCs in MPEs have common property, therefore it is very realistic that such an OC does not have a committee.



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