VCAT | victorian civil & administrative tribunal

4 May 2016

Mr Simon Cohen
Director
Consumer Affairs Victoria
Level 17, 121 Exhibition Street
MELBOURNE VIC 3000

Via email: Simon.Cohen@justice.vic.gov.au

Dear Simon,

Consumer Property Law Review – Owners Corporations Issues Paper No. 2 - Tribunal submission

Thank you for the opportunity to respond to the *Owners Corporations Issues Paper No.2* (the Issues Paper).

I enclose *Tribunal Response – Owners Corporations Issues Paper No.2*
It addresses questions 1-2, 5, 7-9, 11, 21-22, 27, 33-34, 39, 41-44, 47, 49, 53, 55, and 62-63 in the Issues Paper, as these questions raised jurisdictional, procedural and/or substantive issues affecting VCAT. VCAT does not ordinarily comment on policy matters more properly the domain of Government or the Department.

Yours faithfully,

Justice Greg Garde AO RFD
President

Attachment: Tribunal Response – Owners Corporations Issues Paper No.2

Victorian Civil and Administrative Tribunal (VCAT)
President's Chambers
55 King Street
Melbourne VIC 3000

TRIM REF:BC/16/11132

Tribunal Response – Owners Corporations Issues Paper No.2

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

Question 2 – Are there any other issues relating to the power to commence legal proceedings?

As to the need for a special resolution to enable an owners corporation to issue a fee recovery claim in the Magistrates' Court, whilst theoretically an owners corporation may benefit from a costs order where its claim is successful, it also runs the risk of a costs order if it is unsuccessful. In a defended proceeding in the Magistrates' Court, an owners corporation is likely to incur higher costs, than in the Tribunal. The Court has more formal processes with the resulting requirement that the owners corporation be represented by a legal practitioner.

The requirement for a special resolution under s18 of the *Owners Corporations Act 2006* (the OC Act) causes significant difficulties in Building and Property List proceedings concerning high rise apartment buildings. This may occur where developers/builders own more than 25 per cent of the lots, and where landlords/owners (who often live overseas) do not respond.

There are two ways in which an owners corporation may validly commence proceedings in the absence of a special resolution. Under s 165(1)(ba) of the OC Act, VCAT can make an order authorising an individual lot owner (who applies under s 163(1A)), to commence and prosecute a proceeding on behalf of an owners corporation in relation to an owners corporation dispute. This order may only be made where there is 'an owners corporation dispute'. The definition of an 'owners corporation dispute' under s 162 is broad and has been the subject of varying interpretation, which is yet to be settled. Unlike Part 2F.1A (s 237) of the *Corporations Act 2001* (Cth), sub section 165(1)(ba) does not prescribe any criteria to guide the Tribunal in exercising its discretion. Consideration could be given to setting out criteria under s 165(1)(ba). The second option is to apply to VCAT to appoint an administrator under s 174 who would have power to commence a proceeding – see *Owners Corporation 1 Plan number PS 440878 v Dual Homes Victoria Pty Ltd* [2011] VCAT 211. This is a significant and expensive recourse, but there may be no practical alternative in some cases.

To simplify matters, consideration could be given to amending the OC Act to subsume subs 163(1A) and 165(1)(ba) into s 18, and not limit the right of a lot owner to apply or VCAT's power to authorise a lot owner to institute, prosecute, defend or discontinue proceedings, in 'an owners corporation dispute'. Alternatively, s 18 could be amended to allow the Tribunal in its discretion to order in an appropriate case that an ordinary resolution is sufficient.

Question 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?

With regard to goods left by a current lot owner or occupier, the remedies available to the owners corporation under the OC Act are sufficient. An owners corporation could make an application to VCAT under s 162 to determine an owners corporation dispute. Section 166 empowers the Tribunal to impose a civil penalty not exceeding $250 on a person who has failed to comply with a rule. In the case of *Owners Corporation PS425500K v Nova Stargate Pty Ltd* [2011] VCAT 194, the Tribunal enforced a rule requiring a lot owner to cease storing goods in its car park.

Where goods are left by a *former* owner or occupier, the present remedies are cumbersome and unsatisfactory. Rules 1.1, 1.2(1), 3.1(1) and 5.1 of the model rules in Schedule 2 to the *Owners Corporations Regulations 2007* (the model rules) and s 130 of the OC Act could apply to goods left or abandoned on common property. Owners corporations can however adopt their own special rules. An owners corporation which used self-help remedies to dispose of goods, would run the risk of a claim being made by the owner of the goods. As such an owners corporation's interests are best served by obtaining an order of the Tribunal. In an emergency situation an injunction could be sought, on short notice.

A possible solution and more efficient alternative may be to introduce a regime similar to that under Part 9 of the *Residential Tenancies Act 1997* (the RT Act) to enable an owners corporation to:-

- seek an opinion of the Director of Consumer Affairs as to whether the goods left behind have a monetary value;
- remove and destroy or dispose of goods which have no monetary value;
- store for a time, then give notice or advertisement of intention to sell, goods that have a monetary value;
- recover the costs of storage and sale;
- be indemnified out of the Victorian Property Fund if it had relied upon the opinion of the Director of Consumer Affairs that the goods had no monetary value but was nevertheless liable for their value at the suit of the person who had left them behind.

Question 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?

Provided the owners corporation has not made a legal error, that is, failing to give proper consideration to the question of who benefits, and how, from the repair to which the special levy is directed, the Tribunal should not interfere. As was illustrated in *Mashane Pty Ltd v Owners Corporation RN328577* [2013] VCAT 118, there is a very broad range of factual situations which could fall for consideration. The difficulty with any proposal to include guidance on the application of the benefit principle in the OC Act is that to cover all possibilities, would require highly prescriptive formulae, which is impractical. It also runs the risk of drawing the Tribunal into conducting a 'merits review' of the owners corporation's decision, as opposed to its current role which is to determine the outcome where the parties cannot agree.

Question 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?

Question 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?

With respect to costs awarded by VCAT in fee recovery applications, the Tribunal is awarding application fees and legal/managers costs to the successful owners corporation. The usual award of costs is not on an indemnity basis nor costs on a standard basis, but a lower amount. This is aimed at encouraging managers to apply to VCAT, without engaging lawyers, while requiring the defaulting lot owner to contribute more than the other lot owners to the cost of the fee recovery application. Large cost orders may result in lawyers undertaking the fee recovery work which may add significantly to the costs for owners corporations and lot owners. Legal and administrative costs incurred by a creditor prior to legal action are not generally recoverable. No change is required to the current regime.

Question 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. The OC Act already requires the owners corporation to give two fee notices to a lot owner, which effectively gives the lot owner at least 56 days to respond to the claim for payment. Many proceedings issued in VCAT for the payment of fees are simply debt collections against debtors who refuse to pay without having any proper grounds upon which to deny liability.

The standard form of fee notice includes details of the dispute resolution process, in compliance with s 31 of the OC Act. A lot owner with a grievance about the fees may choose to take advantage of that process.

To require that an internal dispute resolution process be completed before recovery of fees would create unnecessary delay, which would prejudice those lot owners who pay their fees. In a large majority of cases, any attempt at dispute resolution before sending a final fee notice would be futile. A common grievance of a non-paying lot owner is that the manager has sent fee notices to a wrong or out-of-date address. A requirement to complete the dispute resolution process before sending a final notice would not address this grievance.

Question 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?

A couple of preliminary points made in the discussion under paragraph 4.5 require clarification. Notwithstanding that '...the Act does not expressly require a special resolution to authorise a lot owner to alter the common property', it is unlawful for a lot owner to alter the common property. If a lot owner does so without permission, the conduct would trigger an owners corporation dispute which would enable an aggrieved lot owner or the owners corporation to use the internal dispute resolution process or to issue proceedings in VCAT. Though '...there is no specific provision for owners corporations to seek rectification or compensation from the lot owner or occupier' who damages common property, a breach of rule 3.3 of the model rules would give rise to an owners corporation dispute, for which an owners corporation could issue proceedings in VCAT. By having disputes about such matters dealt with by the Tribunal, which is easily accessible by both parties, the current Act allows for flexible outcomes.

<u>Urgent repairs</u>

An owners corporation's failure to deal with an urgent repair will trigger an owners corporation dispute. Depending on the nature of the urgent repair, a lot owner could seek an urgent hearing in the Tribunal or an injunction. Currently, a lot owner who carries out and pays for the cost of urgent repairs and then seeks reimbursement, faces the potential defence that the lot owner did so voluntarily and without the request or authority of the owners corporation. Consideration ought to be given to a regime similar to that under ss 72 and 73 of the RT Act to provide a lot owner with a right to carry out urgent repairs to common property if the owners corporation does not, and to apply to the Tribunal to recover the cost.

<u>Non-urgent repairs</u>

The current provisions are appropriate for non-urgent repairs. The owners corporation's failure to deal with the repairs will amount to an owners corporation dispute, allowing the lot owner to commence a proceeding in the Tribunal.

Question 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?

VCAT has dealt effectively with many cases in this area and the OC Act as currently expressed, provides for sensible and flexible solutions. Lot owners who have damaged or altered common property without permission have been required to repair the damage and/or compensate the owners corporation. Lot owners who have sought to make very minor changes to the state of the common property, and have been unreasonably refused permission by the owners corporation, have received orders allowing them to make the change. For example, in an old block of single story home units, a lot owner wanted to install an air-conditioning unit in what was effectively their garden bed, but actually the common property (the air conditioner would have been on the ground and behind a shrub). The owners corporation refused permission, on the basis of a concern that the floodgates would be opened and that chaos would reign. Similar cases have arisen where the lot owner has affected common property, for example by putting a chimney unit through a roof which was common property, but in an area which was invisible, and the Tribunal declined to order the lot owner to remove it.

Rule 3.3 of the model rules prohibit a lot owner or occupier from damaging common property. Accordingly, causing damage is a breach of the rule, which allows the owners corporation to seek relief against the offending lot owner.

Question 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?**

Developers need to have an obligation of good faith. Some developers have appointed managers, which are related bodies corporate, under long-term contracts at excessive fees. This is an abuse which needs to be stopped. The recommendation made by VCAT in its response to the first issues paper; that management contracts be made easier to terminate, could assist in doing so. The issue is not just confined to managers, though, because developers can also appoint cleaners and other contractors on long-term contracts.

As the developer and the builder are often either identical or related, the period for the developer's obligations should be extended to 10 years, to align with the 10 year limitation period for the bringing of a building action under s134 of the *Building Act 1993*. The Tribunal's comments under question 2 are relevant. Where a developer (who may be a related entity to the builder) owns more than 25% of the lots, it will be near impossible for the OC to obtain a special resolution to take action against the builder for defective building works.

Consideration should be given to prohibiting the developer from voting on matters relating to building defects and their rectification.

Question 33 – What has been your experience of voting within an owners corporation?

An owners corporation should include in every notice of general meeting, a general warning to all lot owners that if they are in arrears they will be unable to vote at the meeting, unless the fees are paid.

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

Save for the Tribunal's comments under questions 1 and 2 regarding special resolutions, there is no need to change the way in which the OC Act provides for voting thresholds or interim resolutions.

There is no need for any interim unanimous resolution. Almost all requirements for unanimous resolutions for proposed alterations to a plan of subdivision, are found in Part 5 of the *Subdivision Act 1988*, not in the OC Act. Proposed alterations usually affect the proprietary rights of some lot owners. In accordance with Part 5, it should be left to the Tribunal to decide whether to require the proposed alteration to be made, or to consent on behalf of a member to its being made, despite the absence of a unanimous resolution. A lot owner's proprietary rights should not be compromised by any proposed 'interim unanimous resolution'.

The one instance in the OC Act of a unanimous resolution being required is in s 63: to permit each lot owner to arrange their own insurance instead of through a common owners corporation policy. Subject to s 171(3), s 170(c) provides the Tribunal with the power to grant an exemption from this requirement.

Question 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?

There may be some attraction to amend the OC Act to prohibit a lot owner from making any alteration along lines similar to s 129, without the owners corporations consent or a VCAT order, however it is more likely to encourage disputes between parties over minor alterations.

Given the breadth of situations which could give rise to disputes, it is difficult to prescribe in what circumstances changes can be made nor to apply a blanket rule to cover all circumstances. For example, in a suburban block of single storey home units, with garden beds at the front of the units, lot owners' different garden design preferences may not present a problem. However where an apartment building has a particular look, it would be unacceptable for one lot owner to paint their external surface in a different colour to the rest.

The preferable position is for the parties to apply to the Tribunal on the basis of an owners corporation dispute.

Question 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?

The law needs to allow for flexibility because building designs are so highly variable. In a suburban block of single storey home units where the common property is essentially a driveway, lot owners should have access to the common property. However in a multi-storey apartment building, if only for reasons of security, there is a good argument that an occupier of the second floor should not have access to the tenth floor. The designers of the properties can make appropriate arrangements and express them in rules. There is no need for any legislative provision about the right which, in the absence of any such rules, a lot owner as a beneficial co-owner (as tenant in common) has to unqualified access to common property.

Issues arise where access to individual lots is required to carry out repairs and maintenance to common property. For example, in building disputes concerning high rise apartment buildings, access to common property from individual units might be required. Access via balconies (part of, or none of which may be common property) may be needed to repair external cladding, or access from inside a unit might be necessary to repair/install fire separation in the common property wall spaces

between units. Despite the owners corporation having obtained a special resolution under s 18 and VCAT having joined the other owners under s 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, as persons whose interests are or might be affected, there is no provision under the OC Act to enable access to individual lots. This situation is hindering the settlement of these disputes. The OC Act needs amending to empower VCAT to order that an individual lot owner provide access to an owners corporation, to allow repairs to be carried out to common property.

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

The *Sale of Land Act* (s 32) and the OC Act (ss 136 and 143) impose obligations on the vendor, owners corporation or lot owner, to provide a purchaser of a lot, lot owner or occupier with a copy of the rules (or consolidated rules, where applicable). All lot owners and occupiers should be bound by the rules and aware of them.

An invitee on the other hand has no enforceable right to obtain a copy of the rules, and there is no obligation imposed upon a lot owner or occupier to give the invitee a copy. It would be wrong in principle to make an invitee bound by the rules. Independent of the OC Act or OC regulations, an invitee of a lot owner who damages the common property may be liable in tort law. The common law should not be interfered with unintentionally.

A situation in which a lot owner's guest breaches a rule is different in character to one where, for example, the lot owner is renting their apartment out as short stay accommodation to a large number of backpackers. The latter is more likely to warrant a regime in which the lot owner is liable for the conduct of their invitees.

Question 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?

The Tribunal can and does decide, on a case-by-case basis, whether a lot owner or occupier is liable for conduct of an invitee which, if it were the conduct of the lot owner or occupier, would be a breach of the OC Act or of a rule. Any claim by the owners corporation, or by anyone else, against an invitee is presently beyond the Tribunal's jurisdiction. In the absence of wider reform, it is a matter for a court.

Question 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)?

No. Rules 3.1 (4) & (5) of the model rules deal with some aspects regarding pets. Though it is the owners corporation that determines whether an animal is a danger or is causing a nuisance to the common property, the person served with the notice can dispute its validity by applying to VCAT. To ban smoking within a person's own home might be considered intrusive and practically difficult to enforce. Currently, rule 5.1 of the model rules only deal with the behaviour of guests of the owner or occupier. If rule 5.1 of the model rules were amended to cover the behaviour of an owner or occupier of a lot OR guests of the owner or occupier, this would cover issues arising from smoking.

Owners corporations should be left to make their own rules, where they can. Schedule 1 to the OC Act does not empower an owners corporation to make rules about pets per se. Consideration should be given to amending sch 1 so that it is so empowered, to make rules. There should be no generally applicable model rules.

Question 47 – What are your views about civil penalties for breaches of owners corporations rules?

The power to impose civil penalties should be retained and cover an infringement of the rules and infringement of a VCAT order. The Tribunal had one proceeding where, in a building in which businesses were operating and one lot owner persistently took over common property with trucks and industrial equipment, a substantial fine was imposed for contempt of VCAT orders. The fine was much greater than the civil penalty under the OC Act. Civil penalties are proven on the balance of probabilities having regard to the Briginshaw standard. Contempt of the Tribunal is a serious criminal offence punishable by imprisonment or a very substantive fine. Contempt is proven beyond reasonable doubt. It would be beneficial for the Tribunal to have a range of options in dealing with non-compliance particularly, in the context of the rules of an owners corporation.

The penalty of $250.00 is far too low and needs to be increased in line with contemporary standards. The current VCAT application fee to seek a civil penalty of $250.00 is $525.00. The Tribunal notes that the *Victorian Civil and Administrative Tribunal (Fees) Regulations 2013* will expire on 30 June 2016 and a new fee framework is under consideration and development by the Department of Justice and Regulation.

Consideration should be given to the penalty being paid to the owners corporation instead of to the Victorian Property Fund. However there would need to be a provision similar to s 168 of the OC Act, to ensure that the lot owner subject to the penalty does not receive any indirect benefit.

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

There is no need for any legislative change, as the current regime under s 146 of the OC Act is sound. It is not always unreasonable for a manager to seek to charge for making records available for inspection. Depending on the age of the records, the extent of the records, and the reasonableness of the request, seeking to prevent a manager from being able to charge any fee for the collation and production of records could be quite unfair. If the parties are in dispute they can apply to the Tribunal to resolve it.

Question 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?

A requirement to participate in a dispute resolution process is to be encouraged to minimise or avoid precipitate action, whether on the owners corporation's initiative or taken after a lot owner or occupier's complaint. However it should not bar a party from commencing a proceeding at the Tribunal. Several Tribunal decisions have established that the effect of s 164 of the OC Act is that a non-compliance with s 153 is not necessarily fatal. In any discussion of this issue, it is noted that VCAT usually requires parties to attend a mediation very early in proceedings; the filing fee on an owners corporations dispute is low; and generally, costs are not awarded. A requirement that a dispute resolution process be completed before commencing proceedings can cause unnecessary delay and costs to an aggrieved party, whereas removing such a requirement would not deprive the respondent from the opportunity to mediate.

The comments made under paragraph 10 of the issues paper require clarification. The Tribunal is unaware of any decision which has '...differed about whether this requirement also applies where an owners corporation pursues a breach on its own initiative (as distinct from when it is dealing with a complaint)'. If the remark was prompted by the decision in *Owners Corporation No 8 PS422665R v Walton* [2015] VCAT 1742, then it has been misunderstood. There is no distinction between the two classes.

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

VCAT should consider the legality of the matter: whether the owners corporation had power to make the rule; whether the appropriate resolution was made; what the rule means when properly interpreted; and whether it unfairly discriminates against a lot owner or occupier. The democratic right of lot owners to pass resolutions should also not be discounted. One lot owner may feel that a rule banning pets is oppressive or prejudicial, while other lot owners may feel that the keeping of a pet in breach of the rules is oppressive to them and reduces their amenity and enjoyment of life.

It is odd that s 167 (d) of the OC Act refers to a resolution or proposed resolution, but not to a rule. There is no reason why VCAT should not consider the impact of a rule on a lot owner or lot owners. Accordingly, VCAT supports an amendment to s 167(d) to include reference to a rule or a proposed rule.

Question 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?

There is no need for prescriptive legislation regarding what the Tribunal should or should not consider. The case law provides that the Tribunal may have regard to the matters set out in s 33 of the *Subdivision Act 1988* (the Subdivision Act) but is not confined by those.

It is important that this issue not be framed in an overly simplistic way. Some changes to lot liability and lot entitlement are made because, as expressed on the plan of subdivision, they are in error. In the absence of sufficient cause, VCAT will not make an order changing the lot liability or lot entitlement.

Question 63 – Are there any other issues relating to part 5 of the Subdivision Act?

The comment made under paragraph 13.2 of the issues paper appears to misstate the effect of s 34D. To clarify, it is only when an application is made under s 34D(1)(b), not otherwise, that the Tribunal's power to make an order depends upon more than 50% of lot owners with more than 50% of lot entitlements having supported the proposed alteration to the plan of subdivision.

There is disconformity between what must be established before the Tribunal may make an order under s 34D(1)(a) and what must be established before the Tribunal may make an order under s 34D(1)(b). For an application under s 34D(1)(a), the section does not specify anything, but s 34D(1)(3) specifies several criteria that must be satisfied before an order may be made; some of which are either difficult to establish, or require expensive evidence to establish. The effect being that it is easier to make an application under s 34D(1)(a) rather than s 34D(1)(b).

The imbalance in s 34D requires review and needs to be recast in favour of a reasonable level of access to VCAT, rather than a series of restrictive requirements.