REIV THE STANDARD FOR SUCCESS

SUBMISSION

CONSUMER PROPERTY ACT REVIEW OPTIONS PAPER NO. 1 OWNERS CORPORATIONS

December 2016

ABOUT REIV

The Real Estate Institute of Victoria has been the peak professional association for the Victorian real estate industry since 1936.

Over 2,000 real estate agencies in Victoria are Members of the REIV. These Members are located in city, rural and regional areas.

The businesses employ more than 10,000 people in Victoria in a market which handles over $100 billion of transactions totalling 30 per cent of GSP.

Members specialise in all facets of real estate, including: owners' corporation management, property management, residential sales, commercial and industrial sales, auctions, business broking, buyers agency and valuations.

Introduction

The REIV is the peak industry association for the real estate industry in Victoria, representing the majority of the state's licensed sales agents, auctioneers and owners corporation managers.

This options paper - focusing on the Owners Corporations Act 2006 and its associated legislation- is of significant importance to our members who at present manage a considerable proportion of the owners' corporations across the state.

These owners' corporations collectively handle property valued at $300 million and affect the lives of more than 1.5 million Victorians.

A copy of the options paper is attached to the submission.

REIV Response

The following outcomes were gained from the member consultation process, including extensive input from the REIV's Owners' Corporation Chapter Committee.

Regulation of owners' corporation managers

1. What option do you support, and what are the features of that option that make it the most practical and cost effective way of improving the quality and conduct of owners corporation managers?

As owners' corporation managers in Victoria are responsible for property worth around $300 billion and annual transactions of more than $1 billion, the REIV believes Option 1A is the most practical and effective way to raise the level of professionalism within the industry. Greater licensing requirements will attract higher quality individuals, improve discipline within the industry and reduce risks to consumers. Furthermore, recognition of prior qualifications (such as licensed estate agents), industry experience and a grandfather clause will ensure those already working in the industry are not disadvantaged. The REIV supports a phased implementation of new licensing arrangements as well as a two-tier licensing structuring, such as an OC Representative and a licensed agent. For company directors, a full Certificate IV in Property Services (Operations) or equivalent should be required while those working under their supervision should be required to undertake basic training of at least six units. These units could include Introduction to Owners Corporation Management, Intermediate Owners' Corporation Management and Managing Trust Accounts. OC Representatives must remain under the supervision of a licensed agent for at least one year. Feedback from members who operate as both an estate agent and an owners' corporation manager – which far outnumber 11 as they currently operate as separate legal entities – suggests that under proposed licensing arrangements, these corporations and directors should not be required to pay more than one fee to operate as a licensed agent. At present, multiple sets of licensing fees may be charged when the licensed agent is fulfilling a similar task (ie managing an estate agency with an OC 'agency' within the business).

2. What other eligibility criteria should be considered under Option 1A or Option 1B?

The REIV supports the previously proposed 2014 Bill, whereby persons convicted of serious criminal offences (including fraud and dishonesty) punishable by imprisonment of three months or more, and within the last 10 years, would be ineligible to work as an owners' corporation manager. The REIV also urges CAV to increase the minimum professional indemnity insurance required for owners' corporation managers to $10 million in the aggregate and $5 million for any one claim.

3. What other matters are important to consider for the transitional arrangements under Option 1A?

The REIV believes a transition towards a full licensing scheme is vital. Under the transitioning arrangements, the Institute suggests directors must commence the Certificate IV in Property Services (Operations) qualification within 12 months and complete the course within four years. For those working under the supervision of a licensed owners' corporation manager, a 12 month transition period is adequate. The REIV supports the use of the Victorian Property Fund (VPF) to implement and maintain new licensing criteria for owners' corporation managers.

4. Which option, and why, would be more effective in ensuring the ongoing knowledge and skill of owners corporation managers?

Targeted training run in partnership with industry associations and Consumer Affairs Victoria (Option 2B) will ensure owners' corporation managers are up-to-date with legislative changes and industry best practice. The REIV would also support mandating CPD for owners' corporation managers on the proviso that it was delivered by industry bodies – SCA and the REIV. The REIV already offers a number of specialised courses for owners' corporation managers, with the ability to add new courses, seminars

and events as issues arise. Feedback from REIV members indicates there is a need for greater professionalism within the industry and the Institute has a history of providing high quality training and appropriate course material within the property sector, which has delivered improved agent capabilities. At present there are a number of unscrupulous training providers operating within this sector – both within Victoria and interstate – which would present substantial problems if mandated CPD could be delivered by all training providers.

5. What evidence is there of the benefits of continuing professional development for owners corporation managers, or for property occupations more generally, in Australia or overseas?

NSW has implemented mandatory CPD for owners' corporation managers as part of its licensing scheme. The REIV understands mandatory CPD in NSW has been successful in raising the standard of professionalism within this sector. Real estate agents operating in NSW and Western Australia are also required to undertake mandatory CPD.

6. If continuing professional development is preferred, what steps could be taken to ensure the ongoing quality and appropriateness of the training, and to reduce the risk of exploitation by training organisations and participants?

As outlined above, unscrupulous training providers are already in the market offering sub-standard real estate training. Online-only operators are another issue, where it is difficult to ascertain who has completed the training as well as the quality of the training.

7. What other options are there to support the ongoing maintenance of the knowledge and skills of owners' corporation managers?

The REIV considers CPD and/or targeted training to be the best methods in ensuring owners' corporation managers adhere to legislation and best practice. In addition, any decisions relating to misconduct by any owners' corporation manager should also be widely published, in a similar manner to misconduct by estate agents.

8. Which option is fairer to both parties and why?

The REIV considers prohibiting unfair terms in management contracts (Option 3A) to be the fairest option for both parties. This is reasonable, provides uniformity and aligns management contracts with the unfair terms provisions in the Australian Consumer Law (ACL). If an owners' corporation wishes to terminate a manager 'without cause' then they need to rely on provisions under relevant contract legislation.

9. Under option 3A, if certain terms are to be prohibited as unfair what types of terms should be prohibited and what types of terms should not be prohibited and why?

For example, while a requirement for an owners' corporation to pay a pre-determined fee in the case of an early termination is not inherently unfair, is there nevertheless a case for prohibiting such fees on the grounds that they may be unfair and may intimidate owners' corporations from terminating management contracts?

The REIV supports prohibiting certain terms in management contracts. While the Institute generally supports the unfair terms proposed under Option 3A, individual lot owners holding a committee position should not be able to terminate a manager – it should only be decided at a general meeting of that owners' corporation. In regard to this, the REIV considers management contracts of up to 25 years - entered into by the developer - should be prohibited. At present, the Owners Corporation Act allows for the immediate termination of a manager. Once terminated, the manager may sue for damages for the unexpired term of the contract. Those damages are limited to loss of profits and not loss of fees. Accordingly, requiring an owners' corporation to pay a predetermined fee by way of liquidated damages may be an unfair term if the fee is high in the order of a penalty. Consideration might be given to a maximum percentage of the management fee for the unexpired term - such as 25 per cent of the annual management fee and 0 per cent for additional fees listed in the management contract.

10. Should 'reasonable' notice be quantified under Option 3B and, if so, for how long?

While the REIV prefers Option 3A, if Option 3B were to be implemented it is imperative that 'reasonable notice' be quantified, particularly for terminations 'without cause'. The REIV suggests a 90 day notice period would be appropriate for all stakeholders. If implemented, Section 127 should be amended to state '28 days of notice of termination of appointment' for the return of owners' corporation records.

11. What is the best and fairest way to exercise the termination right under Option 3B?

The best and fairest way to terminate a manager under Option 3B would be only after the first year of the contract and by ordinary resolution at a general meeting. The manager should also have the right to address the meeting.

12. Are the disclosure requirements proposed under Option 4A sufficient to address potential conflicts of interest for managers and, if not, what other measures are required?

Proposed disclosure requirements under Option 4A are adequate in addressing potential conflict of interest for managers. In addition, the REIV would also support penalties and an immediate right of termination of the manager for undisclosed commissions or income.

13. Is Option 4B sufficient to address the issues arising from the pooling of funds, or is the extra level of regulation under Option 4C required, and if so, why?

The REIV considers Option 4B to be sufficient in addressing issues arising from pooled accounts. This level of regulation is appropriate in meeting the needs of all stakeholders as the REIV understands that the majority of owners' corporation managers have already transitioned to individual pooled accounts.

14. What are the risks, if any, of unintended consequences arising with the measures proposed in Option 4B or Option 4C?

The REIV does not consider there to be any risks associated with implementing Option 4B. The Institute would support accessing the VPF to cover any costs associated with monitoring or administration.

Responsibilities of developers, occupiers and committee members

15. Are the enhanced general obligations under Option 5A sufficient or are the additional obligations under options 5B, 5C and 5D needed, and if so, why?

The enhanced general obligations of developers - as proposed under Option 5A - are insufficient as existing general duties are not specific and only apply while a developer owns a majority of the lots. The REIV considers it imperative that developers' obligations are specified for a period of 10 years irrespective of their lot entitlement. In this way, the REIV considers the implementation of Option 5C, and 5D for building defects, to be the most appropriate in addressing any adverse impacts on owners' corporations.

16. Are the 'further expanded' obligations under options 5B or 5C necessary or should the Queensland or New South Wales approach, as applicable, be adopted without change?

As stated above, the REIV supports the adoption of the NSW model (Option 5C) with the additional obligations.

17. Why would the 'building defects' obligation be necessary?

In addition to Option 5C, the REIV supports a 'building defect' obligation for developers or builders (Option 5D). This option would provide greater protection and security for buyers of off-the-plan property. Given, the prevalence of off-the-plan property purchases, a defects bond and independent building inspection report would significantly

enhance building practices.

18. If it is desirable to expand the rule-making power to include rules on smoke drift, renovations and access to common property:

(a) should Model Rules also be made on those subjects, and if so

(b) are the proposed Model Rules based on reasonable presumptions about what most lot owners in owners corporation would regard as unobjectionable, and are they adequate?

The REIV supports the implementation of model rules regarding smoking and suggests Victoria replicate New South Wales' rules in relation to this. The REIV considers the implementation of Option 6D – whereby the owners' corporation rule-making powers would be expanded - to be the most effective in addressing a range of issues, including smoke drift, pets and access to common property. However, the rules should not prohibit pets unless they are a nuisance. The Institute considers the proposed model rules would encompass some of the more contentious issues which are frequently raised by lot owners. However, short-stay accommodation is another issue.

19. Would a Model Rule on fire-safety advice to tenants, in principle, be unobjectionable, and if so, why?

As landlords are already required to provide tenants with a copy of the owners' corporation rules at the commencement of the tenancy, fire-safety advice for tenants could be easily included. The REIV considers the implementation of this model rule to be relatively simple by taking this additional step.

20. Do all or only some of the options improve the position of owners corporations and why?

The REIV believes some aspects of the proposed options fail to strike the right balance between the owners' corporation and the rights of lot owners. For example, requiring lot owners to seek the prior consent of the owners' corporation before they can authorise commercial agents to obtain copies of the owners corporation register (Option 6A) is problematic. This requirement could cause significant delays for lot owners looking to sell their property in a timely manner. Option 6B fails to clarify 'reasonable notice', bearing in mind that if the lot is occupied by a tenant, the lot owner is required to provide the tenant with a minimum of 24 hours' notice before accessing the property.

The REIV supports Options 6C and 6D. Option 6G is problematic, as outlined below.

21. What additional justification, if any, is needed for the proposal for the joint and several liability of lot owners for breaches of owners corporation rules by their tenants and invitees?

While Option 6G would address the issue of disruptive short-stay guests who cannot be contacted and held responsible for any damage to common property, it would also leave responsible lot owners financially liable for tenants they may not be able to remove from their property. Given the prevalence of subletting, the lot owner may have provided a copy of the owners' corporation rules to the original tenant, who may have long since left without advising the lot owner. In this instance, the lot owner would be jointly liable for any damaged caused on the common property, which is unreasonable, and needs to be acknowledged in any changes to the legislation or rules.

22. Is it sufficient simply to expand on the existing duties of committee members to address the issue raised, or is a complete reformulation of committee members' duties, along the line of the Associations Incorporation Reform Act, necessary, and if so, why?

The REIV believes expanding the existing duties of committee members to include a duty to act in the owners' corporation's best interest is sufficient. Further guidance material and online training, as proposed under Option 7A, would also assist in addressing a number of

issues relating to the functioning of committees. The implementation of Option 7A would mean that committee members' duties would replicate almost all of the duties of a director under the Commonwealth's Corporations Act 2001.

23. What risks or unintended consequences might arise with options 8A, 8B and 8C, which propose extending the powers of owners corporations to deal with community building, water rights and abandoned goods?

The REIV does not support Option 8A, as unintended risks are likely to include further disharmony between residents, particularly as many would not consider community building to be an essential cost. Feedback from REIV members suggests community building is a 'nice to have' but shouldn't be expressly included as part of the Act.

The REIV supports Options 8B and 8C and does not foresee any unintended consequences arising.

24. What is the best approach for dealing with abandoned goods on common property, and why?

When dealing with abandoned goods on common property, the REIV suggests Part 9 of the Residential Tenancies Act (RTA) should apply for all residential owners' corporations. Given the RTA is currently being reviewed; the REIV considers it imperative that the legislation be applicable. In this way, it should not be the responsibility of the owners' corporation to pay for the storage of goods left behind, as this creates significant and unnecessary expenses, including the removal of goods, storage costs for what could be somewhat worthless items and costs to discard the goods if they are not claimed.

For owners' corporations overseeing commercial and/or mixed use lots, the Australian Consumer Law and Fair Trading Act in relation to abandoned goods should apply. In this way, the most appropriate model is applied in dealing with abandoned property in all instances.

25. What are the benefits and risks of the additional power proposed for goods that block access?

Given a reasonable attempt must be made to contact the lot owner of goods that block access, and that the goods are initially moved to a safe place, the REIV does not envisage too many risks for owners' corporations. The REIV also considers it necessary that 'reasonable attempt' is clearly defined, particularly as privacy laws prevent managers ascertaining ownership information of a registered vehicle through VicRoads or the police. The ability to legally remove abandoned goods that block access to both common and private property is a significant benefit for both owners' corporation managers and affected lot owners.

Decision-making within owners' corporations

26. How might the limitations on proxy farming have negative consequences for the governance of inactive owners' corporations?

Feedback from REIV members indicates proxy farming is a significant isuse that needs to be addressed. As such, the Institute supports limitations on proxy farming. While the proposed restrictions may result in inactive owners' corporations being challenged to pass motions or resolutions, the REIV believes this restriction will encourage more lot owners to attend meetings, as there would be greater reliance on participation by the majority of lot owners.

27. Which approach to giving owners corporation managers decision-making powers in Option 9B is the more effective and why?

The REIV considers Option 9B-2 to be the best approach for providing owners' corporation managers with decision-making powers. By amending the Act to grant these powers rather than implementing a model rule, there is less opportunity for owners' corporation managers to abuse their position, particularly in inactive

owners' corporations. Under both options, owners' corporation managers will have greater decision-making powers than at present, which will reduce frustration by managers overseeing inactive owners' corporations.

28. What are the risks of giving owners corporation managers decision-making powers in the absence of a licensing or enhanced registration scheme for managers?

As outlined earlier in this paper, the REIV considers there is currently a need for greater licensing and training of owners' corporation managers. If this is not implemented and owners' corporation managers are granted with greater decision-making powers, then there may be a greater risk of defalcation and potential abuse of these powers by the manager.

29. Is further relaxation of the special resolution process required for inactive owners corporations and, if so, which alternative under Option 9C is preferable and why?

Feedback from REIV members indicates that further relaxation of the special resolution is required for inactive owners' corporations. The REIV supports a special resolution being treated as passed in instances where there is a quorum and there are no votes against the resolution. The Institute prefers this option as an interim resolution does not provide certainty for the owners' corporation to proceed with a plan of action or a decision.

30. How might reducing the size of an owners' corporation committee and providing for who can arrange a ballot improve its functioning?

The REIV believes the maximum committee size should be dependent on the size of the owners' corporation. This will improve the committees' ability to reach an agreement or decision, particularly in smaller owners' corporations. For owners' corporations with less than 20 lots, the REIV supports reducing the maximum committee size to seven members. For owners' corporations with more than 20 lots, the current maximum of 12 committee members is appropriate. In addition, the REIV supports Option 10B, whereby permitting the committee chair or secretary to arrange a ballot.

Dispute resolution and legal proceedings

31. How well do options 11A and 11B address the issues raised about the role of owners' corporations in dispute resolution and the procedures under Model Rule 6?

The REIV prefers Option 11A as it exempts owners' corporations from engaging the internal dispute resolution process when it has initiated action against a lot owner. A timely resolution is required in many disputes, particularly debt recovery, and the internal dispute resolution process is too long and cumbersome to be effective in managing problematic behaviour by residents. Feedback from REIV members suggests that in many instances, the manager would have had discussions in an attempt to resolve the issue before taking the matter to VCAT.

The REIV considers the proposed revision of Model Rule 6 is unlikely to be effective in improving the dispute resolution process within owners' corporations. The obligation for parties to meet within 28 days of the owners' corporation receiving a complaint is unreasonable and will not lead to timely resolution of disputes. Establishing a grievance sub-committee would also be time-consuming and not cost-effective, particularly if the breach included a recovery of debts.

32. What are the benefits and risks of increasing the amount of the civil penalties for breaches of the rules?

The REIV considers increasing the current penalties to $1,100, as proposed in Option 12A, would provide greater deterrence to residents and lot owners breaching owners' corporation rules. The REIV would also support the NSW model whereby the penalties are increased to $2,200 for subsequent breaches. Increased penalties will raise awareness among lot owners of the seriousness of the matter in dispute. In addition, the REIV believes the process should also be improved as penalties are often difficult to enforce. The current requirement for penalties to be paid into the Victorian Property Fund, rather than the owners' corporation, also contributes to a reluctance

by owners' corporations to pursue penalties for breaches. The REIV does not foresee any risks associated with increasing civil penalties, which are currently outdated and irrelevant, and paying fines to the OC, which will greatly improve the timely resolution of disputes and benefit virtually all lot owners – as it is the majority of lot owners who are affected by disputes.

33. Which option for reforming the imposition and payment of civil penalties achieves the best balance between fairness and effectiveness, and why?

The REIV supports Option 12C, which retains VCAT's power to impose civil penalties but - importantly - allows owners' corporations to retain any awarded amount. This option will encourage more owners' corporations to pursue lot owners who breach the rules, and may assist in deterring other residents from breaching the rules. Awarding the penalty to the owners' corporation will also ensure the owners' corporation is not significantly out of pocket for legal and administrative costs.

34. Which option, and why, best balances the need for owners' corporations to be able to commence legal action with protection for those lot owners opposed to an action?

The current constraints on owners' corporations' powers to commence legal proceedings are inappropriate. The REIV believes that the decision to commence legal proceedings should be simplified while retaining important safeguards for lot owners. In this way, the REIV supports Option13C, which reduces the voting threshold to an ordinary resolution for any action in the Magistrates Court. At the same time, a special resolution is required for legal action in the County and Supreme Courts, safeguarding residents against owners' corporations commencing expensive legal action without the support of 75 per cent of lot owners.

35. If Option 13A was adopted, would the current provision of the Owners Corporations Act that empowers VCAT to authorise a lot owner to commence proceedings on behalf of an owners' corporation still be necessary?

Yes - the REIV considers it necessary for VCAT to retain the power to authorise a lot owner to commence proceedings on behalf of an owners' corporation. An example of this being that in the event that a manager does not comply with Section 27 of the Act to return files of the owners' corporation following termination, the lot owners must commence legal proceedings against the manager and that would require a special resolution under Section 18. That might be difficult to obtain given that the manager holds records of the names, addresses and contact numbers of members of the owners' corporation. In such circumstances, VCAT would allow a single lot owner to make an application on behalf of the owners' corporation under Section 165 (1) (b) of the Act.

36. If Option 13B was considered appropriate but the 66 per cent threshold was considered insufficient to overcome the problems identified, would a further reduction to 60 per cent be appropriate?

The REIV does not support reducing the voting threshold to 66 per cent and therefore does not support a further reduction to 60 per cent.

Differential regulation of different sized owners' corporations

37. Which option, and why, represents the most appropriate way to differentiate the level of regulation of owners corporations according to their size?

The REIV supports the introduction of a tiered system with different levels of obligation dependent on lot numbers, as this will allow provide greater protections for larger owners' corporations while providing flexibility for smaller owners corporations. However, the REIV considers it crucial that lot size is determined by occupiable lots – ie those occupied by a business or resident - rather than unoccupiable lots such as car spaces and storage space. The Institute supports Option 14B and the provision of a fourth tier for two-lot subdivisions. While we support this option it's imperative that even two-lot subdivisions are required to hold public liability on common property.

38. Is the size of owners corporations in each tier appropriate for the requirements imposed on them and, if not, what should be the size requirement for each tier?

The REIV supports the size of the owners' corporations in the four tiers; however, as outlined earlier the size of the owners' corporation must be based on occupiable lots. In addition, the REIV considers it important that all Tier 2 owners' corporations are managed by a professional manager. Furthermore, a manager should only be able to charge a fee for their service if they are a licensed professional. As outlined above, the Institute also considers it essential that two-lot subdivisions (Tier 4) hold public liability insurance for common property.

Finances, insurance and maintenance

39. What other options could be considered to enable owners' corporations to recover debts?

For lot owners with a history of non-compliance, the REIV would support granting the owners' corporation authority to secure a bond from which any future unpaid fees could be drawn from. 'Non-compliance' might need to be defined in the Act or in the registered rules. Feedback from REIV members indicates that owners' corporations already adopt payment plans in hardship cases, however implementing Option 15B would formalise this arrangement. Consideration must be given as to whether the owners' corporation is in a financial position to cover the debt. In addition, the REIV also supports Option 15D which allows the owners corporations to obtain a default judgement in undefended debt recovery actions.

40. Should the amount of any fee bond be left to owners corporations to set and, if so why?

The REIV does not deem it necessary for mandatory bond lodgements, as it will penalise responsible lot owners and be a significant additional expense for new lot owners. The preference is for the imposition of a bond (as above) for non-compliant lot owners.

41. Should a maximum amount be set out in the Act and, if so, what should that amount be?

The REIV deems it necessary for a maximum bond amount to be set out in the Act, to encourage compliance without creating unnecessary hardship for lot owners. The maximum amount should be no greater than 12 months' fees.

42. Would it be more efficient if fee bonds were held by the owners' corporation itself, the owners' corporation manager or the RTBA?

While it would be more efficient for fee bonds to be held by the owners' corporation, the REIV considers it imperative that all bonds are held by the RTBA. This would prevent any abuse of the system and would require the owners' corporation to apply to the RTBA for any outstanding fees. If the bond was held by the owners' corporation, it would necessitate additional management fees as the process would need to be administered by the manager.

43. Should owners corporations be able to recover costs that exceed the debt or should they be capped at level of the debt?

The REIV believes owners' corporations should be able to recover reasonable administrative costs in addition to the debt, as proposed in Option 15C. The costs should be commensurate with the work carried out independently of the size of the debt.

44. Which of the 'litigation costs' options better achieves a balance between financial equity for lot owners, encouraging alternative dispute resolution and discouraging unnecessary use of lawyers?

The Institute supports Option 15E which aligns VCAT's power to award costs with those of the Magistrates Court. The REIV considers it unreasonable for the owners' corporation to be out-of-pocket in successful litigation matters before VCAT. Furthermore, VCAT discourages the unnecessary use of lawyers.

45. What would be the cost of increasing the minimum public liability insurance amount to $20, $30 and $50 million?

The REIV understands that the cost of increasing minimum public liability insurance from $10 million to $20 million is around $80 per annum. In this way, the Institute supports increasing minimum public liability insurance to $20 million – aligning Victoria with NSW.

46. How might the equity achieved by the powers proposed under Option 16B outweigh the potential problems?

Feedback from REIV members indicates risk-weighting insurance premiums is highly desirable. The proposed powers under Option 16B will mean that lot owners who benefit from the insurance claim – and are ultimately responsible for the damage – bear the excess and are responsible for an increased premium which may arise out of multiple claims. This option fairly supports owners' corporation residents where one lot is responsible for damaging common property, thereby increasing insurance premiums and costs.

47. In relation to the proposal under Option 16B for differential levies for insurance policy premiums (where a particular use of a lot increases the risk) should owners corporations be:

(a) required to apply to VCAT for the appropriate order, or

(b) permitted under the Act to apply the appropriate levy as of right, leaving it to an aggrieved lot owner to apply to VCAT for any remedial order?

The REIV supports providing owners' corporations with the power to apply the appropriate levy under the Act. It should be up to the aggrieved lot owner to apply to VCAT for a remedial order. The owners' corporation will be advised by insurance broker or underwriters regarding risks and are required to act in good faith in having risks assessed.

48. Which option or options do you prefer for maintenance plans and funds, and how does the option or options address the issue?

The REIV supports mandatory maintenance plans for all owners' corporations, regardless of size. In this way, the Institute supports elements of Option 17A; however this option should be expanded to include all owners' corporations – rather than just Tier 1 and 2. In relation to mandatory funding of maintenance plans, the REIV believes lot owners should have ultimate say on whether a fund is established and this information should be available to prospective lot purchasers, as it may affect the selling price. The REIV also supports the introduction of mandatory contingency plans and funds for Tier 1 owners' corporations (Option 17C). Contingency funds are necessary especially for owners' corporations without maintenance plans and they should administer it but it should only be accessed by general resolution of an owners' corporation.

49. Should a general obligation be imposed to deposit in a fund the amount necessary to implement the relevant plan, leaving it to individual owners' corporations to resolve on the appropriate part of annual fees or should some fixed proportion of fees be set in the Owners Corporations Act?

If maintenance funds were mandatory, the REIV considers they should be determined by individual owners' corporations. This will allow owners' corporations to control the level of funding, taking into account relevant services – such as lifts, pools and gyms - and projected maintenance costs.

50. If a general obligation, should the resolution as to the amount to be set aside be an ordinary or special resolution and should it also be stipulated in the Act that the designated part of the fees must be adequate to fund the plan?

The REIV believes the level of funding should be set by an ordinary resolution. As outlined above, the REIV believes lot owners should have the power to decide if a maintenance fund is established as well as the appropriate amount of fees to cover future maintenance costs.

51. If a fixed proportion of fees, what should that be for both types of fund?

The REIV does not support setting out a fixed proportion of fees to fund maintenance plans in the Owners Corporation Act.

52. Where an owners corporation needs to make an assessment of how much of its general repair and maintenance costs arise from a particular use of a lot, what criteria or principles should it apply in making the assessment?

The REIV believes assessments should be based on risk-weighting of insurance premiums, which will predominately apply to premises used for commercial/ industrial or retail use. This ensures that these revenue-generating businesses, which can often impact in an intensive manner on the building and/or other general lot owners, pay an appropriate amount to cover these costs.

Part 5 of the Subdivision Act

53. What, if any, risks arise from removing the requirement for owners' corporations to have and use a common seal?

The REIV believes the requirements for a common seal are no longer relevant in the current marketplace. The REIV recommends this requirement be replaced with the signing procedure in Section 127 of the Corporations Act 2001, together with sub-section 128 (5) of the same Act.

54. How much should developers' property rights regarding initial settings of lot liability and entitlement give way to considerations of fairness?

The REIV believes lot liability and entitlement should be set by a surveyor, using existing 'change' principles - as outlined in Option 20B. Given that this criteria is already in place but is often misunderstood, the REIV would support greater clarification and guidance for surveyors. In addition, the REIV considers it necessary that when a lot is sold, the incoming owner must provide the owners' corporation with a copy of the notice of acquisition of land, at the same time that it is provided to the State Revenue Office.

55. If developers' right should give way to fairness, which of Options 20C to 20E for the initial setting of lot liability and entitlement best ensures fairness, and why?

As outlined above, the REIV supports Option 20B as it would utilise existing, commonsense guidelines as to how surveyors should set lot liability and entitlement. It also removes the developers' discretion in setting lot entitlement, thereby providing a fair process for all lot owners. A land surveyor is licensed and would be expected to have undertaken formal training and continuing professional development with sanctions for unprofessional conduct. A developer is less likely to have those skills and expertise.

56. Under what circumstances could options 20B to 20D be implemented by the developer rather than a licensed surveyor (which would be cheaper and quicker)?

As stated above, the REIV believes Option 20B should be implemented by a licensed surveyor.

57. To what extent should the surveyor (or developer) be required to set out how the criteria were applied in achieving the settings?

The REIV considers the criteria for setting out units of liability and entitlement should form part of the application for certification of the plan of subdivision. In addition, it should be a compulsory requirement that the criteria be produced at the first meeting of the owners' corporation and be annexed to the minutes of that meeting.

58. Under Option 20E, is 30 days a reasonable time for an owners corporation to notify Land Victoria of changes to lot liability and entitlement?

Feedback from REIV members indicates there is no need

to set a time limit, as the current process is satisfactory. If a time limit must be imposed, 30 days is appropriate.

59. How might the proposal to reform the process for VCAT applications be sufficient to balance the rights of the majority of lot owners against those of a holder of the majority lot entitlement?

The REIV believes the current process for VCAT applications should remain as the right of the holder of the majority lot entitlement must have preference over the majority of lot owners.

60. Which option, and why, is the best and fairest way to provide for a more flexible process to sell buildings governed by owners' corporations?

The REIV considers the fairest process to sell buildings governed by owners' corporations is Option 21B - reduce the threshold to 75 per cent of total lots and 75 per cent of total lot entitlement. Reducing the threshold to one special resolution is reasonable, while the added requirement of 75 per cent of lot entitlement makes this option reasonably democratic and preferable to the current NSW model on which it is based.

61. Under Option 21D, which voting thresholds and VCAT processes are preferable, and why?

Feedback from REIV members indicates that there is little support for thresholds based on building age or use. Tier 1 – which mirrors thresholds set out in Option 21B – is the most preferable.

62. Under Option 21E, which sub-alternative is preferable, and why?

As above, the REIV does not support thresholds based on building age or use.

63. If the 'less restrictive' sub-alternative, should the special resolution be 75 per cent of lot entitlement only and should the burden of proof be on the applicant rather than the respondents?

As above, the REIV does not support thresholds based on building age or use.

64. To what extent do the options to reform the Subdivision Act improve decision-making processes within owners' corporations?

The REIV believes the reforms add flexibility and fairness to the decision making process, particularly in regard to a building's longevity.

Retirement villages within owners' corporations

65. Which option, and why, better achieves the aim of ensuring that the operation of owners' corporations in retirement villages conforms with both the Owners Corporations Act and the Retirement Villages Act?

The REIV supports Option 22B, requiring separate committees and annual general meetings for owners' corporations and retirement village residents. Feedback from REIV members indicates implementation is the problem, rather than the legislation. In this way, the REIV considers it appropriate that the legislation provides for separate meetings being held consecutively or concurrently. This option formally recognises the different functions of each Act and provides greater clarity.

66. If Option 22A, which sub-alternative, and why, better resolves the problems involved in the combining of annual meetings for owners corporations and retirement villages?

As outlined above, the REIV prefers Option 22B. The REIV considers both sub-alternatives in Option 22A would add further confusion for stakeholders.

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REIV

Consumer Property Law Review

Options for reform of the *Owners Corporations Act 2006*

consumer.vic.gov.au

CONSUMER AFFAIRS VICTORIA

About the Consumer Property Law Review

The Consumer Property Law Review (the review) is examining four key pieces of consumer property legislation: the *Sale of Land Act 1962* (Sale of Land Act), the *Estate Agents Act 1980* (Estate Agents Act), the *Conveyancers Act 2006* and the *Owners Corporations Act 2006* (Owners Corporations Act).

The terms of reference for the review are to:

- assess the four Acts to identify improvements that could be made to the legislation, having regard to the experiences of stakeholders and to developments that have taken place since each of the Acts came into operation
- examine the efficiency and effectiveness of the regulatory arrangements governing the conduct of licensed practitioners involved in the sale of land, real estate transactions and the management of owners corporations, and
- recommend necessary amendments to improve the operation of the legislative arrangements set in place by these Acts.

This review covers two Acts that have been in place for many years (the Sale of Land Act and the Estate Agents Act). Therefore, opportunities to modernise and improve the legislation will also be considered. It also touches on Part 5 of the *Subdivision Act 1988* (the Subdivision Act), which provides for the creation of owners corporations.

Stakeholder feedback

Between December 2015 and April 2016, Consumer Affairs Victoria (CAV) released three issues papers, which covered:

- licensing and conduct of estate agents, conveyancers and owners corporation managers and the institutional and regulatory arrangements that govern those licensing schemes (Issues Paper 1)
- owners corporations, specifically issues identified with owners corporations (Issues Paper 2), and
- the sale of land and business, specifically issues identified with the Sale of Land Act, including pre-contractual issues and contracts of sale (Issues Paper 3).

The issues papers did not attempt to provide data or evidence to substantiate the existence of issues raised. Rather, the purpose of the papers was to draw out evidence and commentary from stakeholders about the nature of the issues and extent of any problems.

The Owners Corporations Act received the most attention with over 100 submissions received in response to Issues Paper 2.

A theme that emerged from submissions to Issues Paper 2 was a high level of dysfunction with some owners corporations, including the presence of inactive owners corporations, leading to a range of problems with decision making and management.

About this options paper

Feedback from Issues Papers 1 and 2 has informed the development of this options paper. In particular, this paper responds to issues that were of the most importance to individuals and organisations that made submissions to the review. Options have not been developed where feedback has indicated that the legislation is working well or no legislative change is desired.

The purpose of this paper is to outline potential legislative changes that could be made to the Owners Corporations Act, and to gather stakeholder views on those reform options.

How to get involved?

We invite your views and comments on the potential options outlined in this paper.

Until **16 December 2016** you can make a submission:

By mail:

Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

By email:

consumerpropertylawreview@justice.vic.gov.au

Unless you label your submission as confidential, your submission or its contents will be made publicly available in this and any subsequent review process. Submissions may be subject to Freedom of Information and other laws. CAV reserves the right not to publish information that could be seen to be defamatory or discriminatory.

Next steps

Submissions on this options paper will inform the government in determining the final suite of reforms to the regulation of owners corporations in Victoria.

Proposals for amendments to the Owners Corporations Act and the Subdivision Act are planned to be considered by Parliament in 2018.

Glossary

ACL	Australian Consumer Law
CAV	Consumer Affairs Victoria
CPD	Continuing Professional Development
REIV	Real Estate Institute of Victoria
SCAV	Strata Communities Australia (Victoria)
VCAT	Victorian Civil and Administrative Tribunal

Contents

Executive summary

A growing number of Victorians are living in multi-unit developments that are governed by owners corporations. This paper responds to the issues raised through the review that are considered to hinder the effective operation of those owners corporations and their owners corporation managers, and presents a range of options to address the issues.

The issues examined in this paper respond to Issues Paper 1 (Conduct and institutional arrangements for estate agents, conveyancers and owners corporation managers) and Issues Paper 2 (Owners corporations) released earlier in the review.

The review has found that there is a high level of apathy among lot owners about their owners corporations, resulting in an inability to gain quorums or pass resolutions. In particular, difficulties were reported in gaining consensus in planning and paying for long-term maintenance, and undertaking strategic works to prevent future problems.

For some owners corporations, the degree of lot-owner disengagement has reached a point where they are completely inactive and are not meeting any of their obligations under the Owners Corporations Act.

On the other hand, many other owners corporations appear to be dominated by cliques or driven by factions, often making them dysfunctional.

There was a sense that these problems create discontent and undermine the sense of community within owners corporations.

Another issue is the desired general level of regulation of owners corporations and managers. To date, the Owners Corporations Act has been considered a 'light touch' regulatory model. However, increased regulation of owners corporations, and interference in the property rights of lot owners, is argued to be justified on two grounds.

First, lot owners owe a duty to each other to maintain and insure the common property, and, because of the ability of each lot to affect the value and amenity of other lots, a duty to take reasonable account of that fact in the use and presentation of their lots.

Second, there is a degree of *public* interest in the regulation of owners corporations to ensure that they are democratically operated. Further, and particularly for owners corporations governing high-rise buildings, there is an interest in ensuring that the common property is maintained in a safe condition and supported by public liability insurance, so that members of the public, who enter the building as invitees, are protected.

Chapters 1 to 8 examine the issues that have been identified for reform in eight areas:

- the regulation of owners corporation managers
- the responsibilities of developers, occupiers and committee members
- decision-making within owners corporations
- dispute resolution and legal proceedings
- differential regulation of different sized owners corporations
- finances, insurance and maintenance
- Part 5 of the Subdivision Act, and
- retirement villages with owners corporations.

Options presented to address the issues aim to:

- achieve more professional managers and fairer management contracts
- provide clearer roles and responsibilities for developers and owners corporation members
- streamline decision-making by and dispute resolution within owners corporations
- facilitate recovery of debts by owners corporations
- delivery stronger penalties for breaches of rules
- rationalise the regulation of different-sized owners corporations
- strengthen the insurance and maintenance obligations and powers of owners corporations,
- create fairer criteria for setting and changing lot liability and lot entitlement

- provide a more flexible process for the sale and redevelopment of apartment buildings, and
- clarify the role of developers and owners corporations in retirement villages.

For some issues, a set of ‘alternative options’ are presented for reform while for other issues a ’stand-alone option’ is presented for consideration and feedback. Stand-alone options are presented for issues where only one approach is considered to be feasible.

While feedback is sought on each of the options in the alternative sets of options and also on the stand-alone options, views are also sought on the potential cumulative effect of adopting certain options.

In addition, if the status quo is preferred on any issue, views are sought on the rationale for that position.

List of consultation questions

Regulation of owners corporation managers

1 What option do you support, and what are the features of that option that make it the most practical and cost effective way of improving the quality and conduct of owners corporation managers?

2 What other eligibility criteria should be considered under Option 1A or Option 1B?

3 What other matters are important to consider for the transitional arrangements under Option 1A?

4 Which option, and why, would be more effective in ensuring the ongoing knowledge and skill of owners corporation managers?

5 What evidence is there of the benefits of continuing professional development for owners corporation managers, or for property occupations more generally, in Australia or overseas?

6 If continuing professional development is preferred, what steps could be taken to ensure the ongoing quality and appropriateness of the training, and to reduce the risk of exploitation by training organisations and participants?

7 What other options are there to support the ongoing maintenance of the knowledge and skills of owners corporation managers?

8 Which option is fairer to both parties and why?

9 Under option 3A, if certain terms are to be prohibited as unfair what types of terms should be prohibited and what types of terms should not be prohibited and why?

For example, while a requirement for an owners corporation to pay a pre-determined fee in the case of an early termination is not inherently unfair, is there nevertheless a case for prohibiting such fees on the grounds that they may be unfair and may intimidate owners corporations from terminating management contracts?

10 Should 'reasonable' notice be quantified under Option 3B and, if so, for how long?

11 What is the best and fairest way to exercise the termination right under Option 3B?

12 Are the disclosure requirements proposed under Option 4A sufficient to address potential conflicts of interest for managers and, if not, what other measures are required?

13 Is Option 4B sufficient to address the issues arising from the pooling of funds, or is the extra level of regulation under Option 4C required, and if so, why?

14 What are the risks, if any, of unintended consequences arising with the measures proposed in Option 4B or Option 4C?

Responsibilities of developers, occupiers and committee members

15 Are the enhanced general obligations under Option 5A sufficient or are the additional obligations under options 5B, 5C and 5D needed, and if so, why?

16 Are the 'further expanded' obligations under options 5B or 5C necessary or should the Queensland or New South Wales approach, as applicable, be adopted without change?

17 Why would the 'building defects' obligation be necessary?

18 If it is desirable to expand the rule-making power to include rules on smoke drift, renovations and access to common property:

(a) should Model Rules also be made on those subjects, and if so

(b) are the proposed Model Rules based on reasonable presumptions about what most lot owners in owners corporation would regard as unobjectionable, and are they adequate?

19 Would a Model Rule on fire-safety advice to tenants, in principle, be unobjectionable, and if so, why?

20 Do all or only some of the options improve the position of owners corporations and why?

21 What additional justification, if any, is needed for the proposal for the joint and several liability of lot owners for breaches of owners corporation rules by their tenants and invitees?

22 Is it sufficient simply to expand on the existing duties of committee members to address the issue raised, or is a complete reformulation of committee members' duties, along the line of the Associations Incorporation Reform Act, necessary, and if so, why?

23 What risks or unintended consequences might arise with options 8A, 8B and 8C, which propose extending the powers of owners corporations to deal with community building, water rights and abandoned goods?

24 What is the best approach for dealing with abandoned goods on common property, and why?

25 What are the benefits and risks of the additional power proposed for goods that block access?

Decision-making within owners corporations

26 How might the limitations on proxy farming have negative consequences for the governance of inactive owners corporations?

27 Which approach to giving owners corporation managers decision-making powers in Option 9B is the more effective and why?

28 What are the risks of giving owners corporation managers decision-making powers in the absence of a licensing or enhanced registration scheme for managers?

29 Is further relaxation of the special resolution process required for inactive owners corporations and, if so, which alternative under Option 9C is preferable and why?

30 How might reducing the size of an owners corporation committee and providing for who can arrange a ballot improve its functioning?

Dispute resolution and legal proceedings

31 How well do options 11A and 11B address the issues raised about the role of owners corporations in dispute resolution and the procedures under Model Rule 6?

32 What are the benefits and risks of increasing the amount of the civil penalties for breaches of the rules?

33 Which option for reforming the imposition and payment of civil penalties achieves the best balance between fairness and effectiveness, and why?

34 Which option, and why, best balances the need for owners corporations to be able to commence legal actions with protection for those lot owners opposed to an action?

35 If Option 13A was adopted, would the current provision of the Owners Corporations Act that empowers VCAT to authorise a lot owner to commence proceedings on behalf of an owners corporation still be necessary?

36 If Option 13B was considered appropriate but the 66 per cent threshold was considered insufficient to overcome the problems identified, would a further reduction to 60 per cent be appropriate?

Differential regulation of different sized owners corporations

37 Which option, and why, represents the most appropriate way to differentiate the level of regulation of owners corporations according to their size?

38 Is the size of owners corporations in each tier appropriate for the requirements imposed on them and, if not, what should be the size requirement for each tier?

Finances, insurance and maintenance

39 What other options could be considered to enable owners corporations to recover debts?

40 Should the amount of any fee bond be left to owners corporations to set and, if so why?

41 Should a maximum amount be set out in the Act and, if so, what should that amount be?

42 Would it be more efficient if fee bonds were held by the owners corporation itself, the owners corporation manager or the RTBA?

43 Should owners corporations be able to recover costs that exceed the debt or should they be capped at level of the debt?

44 Which of the 'litigation costs' options better achieves a balance between financial equity for lot owners, encouraging alternative dispute resolution and discouraging unnecessary use of lawyers?

45 What would be the cost of increasing the minimum public liability insurance amount to $20, $30 and $50 million?

46 How might the equity achieved by the powers proposed under Option 16B outweigh the potential problems?

47 In relation to the proposal under Option 16B for differential levies for insurance policy premiums (where a particular use of a lot increases the risk) should owners corporations be:

(a) required to apply to VCAT for the appropriate order, or

(b) permitted under the Act to apply the appropriate levy as of right, leaving it to an aggrieved lot owner to apply to VCAT for any remedial order?

48 Which option or options do you prefer for maintenance plans and funds, and how does the option or options address the issue?

49 Should a general obligation be imposed to deposit in a fund the amount necessary to implement the relevant plan, leaving it to individual owners corporations to resolve on the appropriate part of annual fees or should some fixed proportion of fees be set in the Owners Corporations Act?

50 If a general obligation, should the resolution as to the amount to be set aside be an ordinary or special resolution and should it also be stipulated in the Act that the designated part of the fees must be adequate to fund the plan?

51 If a fixed proportion of fees, what should that be for both types of fund?

52 Where an owners corporation needs to make an assessment of how much of its general repair and maintenance costs arise from a particular use of a lot, what criteria or principles should it apply in making the assessment?

Part 5 of the Subdivision Act

53 What, if any, risks arise from removing the requirement for owners corporations to have and use a common seal?

54 How much should developers' property rights regarding initial settings of lot liability and entitlement give way to considerations of fairness?

55 If developers' rights should give way to fairness, which of options 20C to 20E for the initial setting of lot liability and entitlement best ensures fairness, and why?

56 Under what circumstances could options 20B to 20D be implemented by the developer rather than a licensed surveyor (which would be cheaper and quicker)?

57 To what extent should the surveyor (or developer) be required to set out how the criteria were applied in achieving the settings?

58 Under Option 20E, is 30 days a reasonable time for an owners corporation to notify Land Victoria of changes to lot liability and entitlement?

59 How might the proposal to reform the process for VCAT applications be sufficient to balance the rights of the majority of lot owners against those of a holder of the majority lot entitlement?

60 Which option, and why, is the best and fairest way to provide for a more flexible process to sell buildings governed by owners corporations?

61 Under Option 21D, which voting thresholds and VCAT processes are preferable, and why?

62 Under Option 21E, which sub-alternative is preferable, and why?

63 If the 'less restrictive' sub-alternative, should the special resolution be 75 per cent of lot entitlement only and should the burden of proof be on the applicant rather than the respondents?

64 To what extent do the options to reform the Subdivision Act in improve decision-making processes within owners corporations?

Retirement villages with owners corporations

65 Which option, and why, better achieves the aim of ensuring that the operation of owners corporations in retirement villages conforms with both the Owners Corporations Act and the Retirement Villages Act?

66 If Option 22A, which sub-alternative, and why, better resolves the problems involved in the combining of annual meetings for owners corporations and retirement villages?

1 Regulation of owners corporation managers

This Chapter sets out stakeholder feedback and presents options on the following issues concerning the regulation of owners corporation managers:

- licensing versus registration of professional owners corporation managers
- continuing professional development
- unfair terms in, and termination of, management contracts
- the duties and obligations of owners corporation managers arising from conflicts of interest, and
- the pooling of money held on behalf of multiple owners corporations.

1.1 Licensing versus registration of owners corporation managers

Issue

The current regulation of professional owners corporation managers is considered to be inadequate to address the risk of harm for consumers from the lack of knowledge and poor conduct of managers.

Alternative options

- **Option 1A** – Introduce a full licensing scheme for professional owners corporation managers.
- **Option 1B** – Enhance the current registration scheme for professional owners corporation managers.

Background

Currently, a person who manages an owners corporation for fee or reward, i.e. a professional owners corporation manager, must be registered with the Business Licensing Authority. A person is ineligible to be registered as a professional owners corporation manager if they are under 18 years of age, an insolvent person or a represented person (a person with a disability who has a guardian or administrator appointed to help them to manage their personal, legal or financial affairs). Additionally, registration can be cancelled if the manager does not lodge an annual statement and pay the annual fee, becomes a represented person or insolvent, or has obtained registration through false or misleading information.

Three other states and territories regulate professional owners corporation managers but in different ways to the Victorian registration scheme. While there is a separate licensing scheme in New South Wales, owners corporation managers are included in the licensing schemes for real estate agents in the Australian Capital Territory and the Northern Territory.

Stakeholder feedback

There was a strong view that the current regulation of professional owners corporation managers is inadequate to address the risks they pose to consumers if they are ignorant of the law or display poor conduct. Some stakeholders were also concerned that problematic managers are not being held to account for their poor conduct. There were also reports of bullying and intimidation by managers.

There was wide support for some sort of licensing of professional managers, such as the licensing approach in New South Wales, which includes a mandatory training requirement.

A separate licensing regime for professional managers was preferred rather than making them a category of the estate agent's licence, on the basis that roles and responsibilities of owners corporation managers are very different from those of estate agents.

Two alternatives to address this issue are presented for feedback.

Option 1A: Introduce a full licensing scheme for owners corporation managers

Under this option, a separate licensing scheme would be established for professional owners corporation managers. The scheme would include the licensing of individuals and corporations.

For individuals, the eligibility criteria would include:

- an appropriate training requirement drawn from the relevant national training package
- a requirement to hold an appropriate amount of professional indemnity insurance at all times – this would replace the current requirement for evidence of professional indemnity insurance only upon registration, and
- enhanced disqualification or ineligibility criteria that cover a greater range of offences, including serious criminal and sexual offences similar to those in the *Rooming House Operators Act 2016* (Rooming House Operators Act).

The existing criteria for age, insolvency and disability would continue to apply to individuals.

For corporations, at least one of the directors would be required to be a licensed owners corporation manager. Other directors would need to meet the licensing eligibility criteria applying to individuals, excluding the training requirement.

To ensure that all owners corporations and residents benefit from the additional screening of professional managers, both new and existing managers would be required to meet the licensing requirements. This is because the number of new managers registered each year is relatively small, 7 for 2015-16, compared to the pool of 73 individual registered managers. Therefore, transition arrangements would be needed to allow existing managers sufficient time to meet the new licensing requirements and to continue to provide management services to owners corporations. For example, the transition arrangements could include a minimum period of 12 months for existing managers to complete the training requirement.

As there are currently 11 individual estate agents who are also registered owners corporation managers, specific arrangements would be needed to minimise the duplication arising from the need to meet the requirements of two separate licensing schemes. This could be achieved by requiring agents who apply for a manager's licence to only meet the requirements that exceed those for an agent's licence. For example, agents would need to meet the additional eligibility requirements for serious criminal and sexual offences and complete training that is specific to managers and is not included in the licensing training for agents. Similarly, licensed managers who apply for an estate agent's licence would need additional training.

A licensing scheme would likely encourage only people with an aptitude for and commitment to a career as an owners corporation manager to enter the sector. It would also address many manager-conduct issues raised by stakeholders, and so might reduce disputes by providing for better trained and more professional managers, and a process for disciplinary action for poor conduct.

However, it would have costs for:

- government to set up and operate a licensing scheme entailing ongoing supervision and monitoring of licensees
- industry because of the extra training and licence fees that would be required, and
- ultimately for owners corporations through the higher fees that would presumably be required to engage licensed managers.

It would also create a barrier to entering the industry for those who do not have the financial capacity to undertake the relevant training and, therefore, reduce the pool of managers available to owners corporations.

Option 1B: Enhance the current registration scheme for owners corporation managers

Under this option, the existing registration scheme for professional owners corporation managers would be retained and enhanced.

Although professional managers would not have to complete an initial training requirement, the enhanced scheme would include:

- a requirement to hold an appropriate amount of professional indemnity insurance at all times - this would replace the current requirement for evidence of professional indemnity insurance only upon registration, and
- enhanced disqualification or ineligibility criteria that cover a greater range of offences including serious criminal and sexual offences similar to those in the Rooming House Operators Act.

An enhanced registration scheme would be less costly for government and industry than a full licensing scheme. As it does not have ongoing supervision and monitoring of registrants, registration fees would be significantly lower than licence fees. Also, the eligibility criteria for an enhanced registration scheme would not create a significant barrier to those wishing to entry the industry. For residents, it would likely have less impact on the fees they pay to professional managers. While enhanced disqualification and ineligibility criteria would be expected to ameliorate some manager-conduct issues, and possibly reduce disputes, this would not be to the extent expected of a licensing scheme.

Transition to the new registration requirements would be simpler for new and existing managers.

Questions

1 What option do you support, and what are the features of that option that make it the most practical and cost effective way of improving the quality and conduct of owners corporation managers?

2 What other eligibility criteria should be considered under Option 1A or Option 1B?

3 What other matters are important to consider for the transitional arrangements under Option 1A?

1.2 Maintaining the knowledge and skills of owners corporation managers

Issue

A further issue for any registration or licensing scheme is ensuring that owners corporations managers are up to date in their knowledge of the law and current practices to enhance the quality of advice and services they provide to owners corporations.

Alternative options

- **Option 2A** – Mandate continuing professional development for owners corporation managers as a condition of being licensed or registered.
- **Option 2B** – Deliver an ongoing and targeted information and training program for owners corporation managers in partnership with industry associations.

Background

Continuing professional development (CPD) is one of a number of approaches to ensuring that a practitioner's knowledge is up to date and that their skills are appropriately maintained. It does this by requiring a specified amount of training to be completed each year for a practitioner to qualify for continued registration or licensing.

Formal CPD is not part of the current Victorian registration scheme for owners corporation managers, although it is a requirement of the New South Wales licensing scheme.

Programs currently available to Victorian owners corporation managers to assist them to maintain their knowledge and skills include the information services delivered by Consumer Affairs Victoria (CAV) and the voluntary CPD programs offered by Strata Communities Australia (Victoria) (SCAV) and the Real Estate Institute of Victoria (REIV) to their members.

Stakeholder feedback

Some stakeholders expressed concerns about the low level of many managers' knowledge and skill and the risk this may pose given the significant role they play in residents' lives.

These stakeholders considered that it should be mandatory for owners corporation managers to undertake CPD each year and that CPD should be a component of any registration or licensing scheme for managers. Stakeholder submissions did not specify the amount or the nature of the training that managers should be required to undertake to maintain their knowledge and skills.

Two alternatives to address this issue are presented for feedback.

Option 2A: Mandate continuing professional development for owners corporation managers

Under this option, owners corporation managers would be required to undertake a specified program of CPD each year. The requirement could be part of the annual statement process for a registration scheme or a licensing scheme for managers.

Drawing on the requirements currently in place for strata managers in New South Wales, the key features of CPD under this option would be:

- completion of a specified number of points of training each year for a manager to be eligible to continue to hold their registration or licence,
- specification of the –
  - eligible topics and types of training
  - points for different types of training
  - organisations eligible to deliver training for the CPD program, and
- requirements for managers to record and verify training, and submit evidence of training, as part of their annual statement obligations.

CPD would apply to both existing and new managers, with transition arrangements to allow existing managers to build their CPD points before their first eligible annual statement date.

The purpose of CPD is to reduce risks for consumers and improve productivity for business, although there appears to be limited formal evidence of its benefits and cost effectiveness, which is an important factor given that it constitutes a barrier to entry.

Option 2B: Deliver an ongoing and targeted information and training program for owners corporation managers in partnership with the industry associations

Under this option, CAV would develop and deliver in partnership with SCAV and the REIV an annual program of information and training for owners corporation managers.

Under such program, CAV would provide information tailored to the needs of managers on changes to law and on systemic legal and practice issues that pose a risk for consumers. The information could be provided in a variety of traditional and innovative ways, including through web based tools that allow managers access to information when and where they most need it.

In addition, SCAV and the REIV would be supported to develop the information and tools into training packages for managers that could be incorporated into their voluntary CPD programs, and which are a condition of managers' membership of those industry associations.

The benefits of this option are that information would be targeted to particular problems or issues. Where information and tools are incorporated in training provided by SCAV and the REIV, the programs would be less vulnerable to exploitation by training organisations and participants and could be more structured with clear and measurable learning outcomes. This option also has the potential of providing a more flexible and timely response to emerging issues than a pre-determined annual program of CPD. While this approach to the provision of information and training for managers would minimise the overall burden and cost for industry, the opportunities for the broader skill development of managers would remain the responsibility of employers, SCAV, the REIV and other industry groups.

Questions

4 Which option, and why, would be more effective in ensuring the ongoing knowledge and skill of owners corporation managers?

5 What evidence is there of the benefits of continuing professional development for owners corporation managers, or for property occupations more generally, in Australia or overseas?

6 If continuing professional development is preferred, what steps could be taken to ensure the ongoing quality and appropriateness of the training, and to reduce the risk of exploitation by training organisations and participants?

7 What other options are there to support the ongoing maintenance of the knowledge and skills of owners corporation managers?

1.3 Unfair terms and termination of management contracts

Issues

Some management contracts have terms that financially disadvantage owners corporations and make them difficult to terminate. These include automatic renewals, punitive early termination fees and other terms that are barriers to removing underperforming managers. For example, as management contracts can only be terminated at the end of the term or where there is a breach, termination by an owners corporation of the contract of an underperforming manager 'without cause', risks legal action.

Alternative options

- **Option 3A** – Prohibit unfair terms in management contracts.
- **Option 3B** – Simplify the termination of management contracts 'without cause'.

Background

The Owners Corporations Act currently requires management contracts to be in an approved format but does not require particular terms to be included or excluded.

Many management contracts presented to owners corporations to sign are long and include automatic renewals. They also require steps to be taken for termination that are not required by the Owners Corporations Act or allow managers to assign the contract without obtaining the owners corporation's formal consent.

Stakeholder feedback

Some stakeholders were concerned that long-term management contracts entered into by developers contain terms that financially disadvantage the owners corporation and are complex and difficult to terminate. In general, long-term contracts, automatic renewals and punitive early termination fees were all raised as barriers to removing underperforming managers.

Currently under the Owners Corporations Act, owners corporations can terminate management contracts at any time before the term expires. However, if no breach of the contract by the manager has been established that justifies termination, i.e. if termination is 'without cause', termination normally constitutes a breach of the contract by the owners corporation. A key issue raised was the reluctance of owners corporations to terminate the contracts of underperforming managers for fear of activating the early termination fee or of being sued for damages for wrongful termination.

There was support for removal of automatic renewal terms. However, there was also concern that removing such terms in owners corporations with large numbers of apathetic lot owners may result in the owners corporation losing an effective manager and becoming inactive or dysfunctional.

The following two options have been developed to reduce unfair terms in management contracts and to provide owners corporations with greater capacity to remove underperforming managers.

Two alternatives to address this issue are presented for feedback.

Option 3A: Prohibit unfair terms in management contracts

Under this option, certain terms would be prescribed as unfair terms and prohibited in management contracts, for example terms that:

- provide for a contract duration of more than a set period (for example, three years)
- require owners corporations to pass any resolution other than an ordinary resolution for termination, or that require a general meeting to be convened to consider the matter
- provide for excessive notice periods for termination (for example, more than three months' notice) or excessive early termination fees
- allow managers to renew contracts at their option or that provide for automatic renewal if owners corporations fail to give notice of the intention not to renew, and
- prohibit owners corporations from refusing consent to an assignment of the contract; however, allow terms that provide for the owners corporation's consent but that require consent not to be withheld unreasonably.

The current provisions for management contracts to be terminated through an ordinary resolution would be retained, as would the ability of managers to sue for damages for wrongful termination.

To ensure that owners corporations would not be left without a manager because of the prohibition on automatic renewals, contracts could provide for a roll over on a monthly, quarterly or other basis if arrangements were not made for renewal or non-renewal before the contract expired.

In addition to prescribing the above terms as unfair, this option would also give the Victorian Civil and Administrative Tribunal (VCAT) the power to rule generally whether terms in management contracts were unfair under the unfair contract term provisions of the Australian Consumer Law (ACL). Currently, management contracts do not come within the ACL provisions.

This option substantially reduces the factors that hinder owners corporations in removing underperforming managers, although it does not necessarily remove the fear of being sued for damages for wrongful termination. On the other hand, in some cases, long contracts and automatic roll over terms may be beneficial for some owners corporations: long contracts may attract managers willing to commit long-term resources and assist in managers obtaining finance for their business; and automatic roll over terms may address the difficulty in obtaining a quorum at a meeting to renew the contract.

Option 3B: Simplify the termination of management contracts 'without cause'

Under this option, there would be no restrictions on the length of management contracts or on automatic renewals. While this option also includes the proposal to give VCAT the power to rule on unfair terms in management contracts, this would not extend to restrictions on the length of management contracts or on automatic renewals.

However, without limiting the ability of owners corporations to terminate contracts at any time where the manager has breached the contract, owners corporations would also be able to terminate 'without cause' on reasonable notice to the manager. There would be no right of compensation for the manager, whether through early termination fees or legal actions for damages.

'Reasonable notice' could be quantified, for example, as two, three or four weeks.

The right to terminate a contract 'without cause' could be exercisable, for example:

- at any time by ordinary resolution (i.e. more than 50 per cent majority) including by resolution of the owners corporation committee, or
- at any time but only by special resolution (i.e. 75 per cent majority) at a general meeting, which the manager would be entitled to address, or
- only after the first year of the contract and by ordinary resolution at a general meeting, which the manager would be entitled to address.

By not regulating contract length and automatic renewals, this option recognises that they may sometimes be a convenient and effective arrangement where an owners corporation wishes to continue with the engagement of their

current manager. However, the ability to terminate 'without cause' might be considered destabilising for some managers, affecting their willingness to commit long-term resources.

Questions

8 Which option is fairer to both parties and why?

9 Under option 3A, if certain terms are to be prohibited as unfair what types of terms should be prohibited and what types of terms should not be prohibited and why?

For example, while a requirement for an owners corporation to pay a pre-determined fee in the case of an early termination is not inherently unfair, is there nevertheless a case for prohibiting such fees on the grounds that they may be unfair and may intimidate owners corporations from terminating management contracts?

10 Should 'reasonable' notice be quantified under Option 3B and, if so, for how long?

11 What is the best and fairest way to exercise the termination right under Option 3B?

1.4 Duties and obligations of owners corporation managers

Issue

The current, general duties of owners corporation managers are inadequate to deal with a range of specific, 'real world' issues, which would exist even with a licensing or enhanced registration scheme.

Stand-alone option for conflict of interest

- **Option 4A** – Expand the obligations of owners corporation managers regarding procurement of goods and services, voting on owners corporation matters, and access to financial documents.

Alternative options for money held on trust

- **Option 4B** – Restrict the pooling of unrelated owners corporations' funds.
- **Option 4C** – Require moneys held on trust by owners corporation managers to be kept in regulated trust accounts.

Issues Paper 1 looked at a range of issues regarding the conduct of managers, including:

- disclosure of commissions and other benefits received
- conflicts of interest generally
- involvement in voting on owners corporation matters, and
- financial transparency.

1.4.1 Conflicts of interest, voting conduct and transparency

Background

Currently, managers have general duties under the Owners Corporations Act to act honestly and in good faith, exercise due care and diligence, not make improper use of their position for gain and to account separately for the money held for each owners corporation by the manager. It also requires managers to report to the annual meeting on their 'activities' (which would include their dealings with owners corporation moneys).

In Queensland and New South Wales managers have specific obligations to disclose commissions, payments and other benefits received, and any relationships with suppliers.

Stakeholder feedback

Submissions revealed some differences in the experiences and views of residents and managers in relation to the disclosure of commissions, payments and other benefits received.

Managers reported that with the exception of insurance premiums, which are 'best practice' to disclose, they receive very few commissions or other benefits.

However, residents reported that managers are not always open about financial matters in general, including the commissions, payments and benefits they receive. Some residents also expressed frustration with their inability to access the financial records of their owners corporation from the manager.

While there was general support for further regulation of conflicts of interest and access to financial documents, there was some support for regulation of managers' conduct in relation to voting by lot owners on owners corporation matters.

The following stand-alone option to address these issues is presented for feedback.

Option 4A: Expand the obligations of owners corporation managers regarding procurement of goods and services, voting on owners corporation matters, and access to financial documents

Under this option, managers would be required to:

- take reasonable steps to ensure that any goods and services they procure on behalf of the owners corporation are procured at competitive prices and on competitive terms
- disclose commissions, payments or other benefits received from suppliers of goods or services to the owners corporation
- disclose beneficial relationships with suppliers of goods or services to the owners corporation
- comply, as soon as practicable, with requests for copies of bank statements for the previous three years for accounts held by the manager containing trust moneys
- report to the annual meeting on –
  - receipts and disbursements of trust moneys, and
  - commissions, payments and other benefits received, and
- not exert pressure on any member of the owners corporation to influence the outcome of their vote on an owners corporation matter.

An exception to the obligation to disclose commissions, payments or other benefits would apply in emergency situations. In an emergency situation it is necessary for the manager to enter into a contract and it is not reasonably practicable for them to disclose a beneficial relationship beforehand. Instead, the manager would be required to disclose the relationship as soon as is practicable.

A manager who fails to disclose as required would be presumed to have breached their duty not to make improper use of their position to gain an advantage, unless the manager:

- was not aware of, and could not reasonably have been expected to be aware of the beneficial relationship before the contract was entered into, and
- disclosed the relationship to the owners corporation immediately after becoming aware of the beneficial relationship.

1.4.2 Money held on trust and pooling of funds

Background

The Owners Corporations Act also requires managers to hold money on behalf of owners corporations 'on trust' and to account separately for the money held for each owners corporation they manage. In New South Wales strata managers are required to keep money on behalf of owners corporations in regulated trust accounts.

Some managers use separate bank accounts to keep moneys from the multiple owners corporations they manage, while other managers keep pooled accounts and use modern software packages to assist them in accounting separately for moneys from different owners corporations.

Some of the owners corporations whose moneys are in a pooled account may be in surplus and some in deficit. There is a risk that money held in a pooled account may be 'lent' to owners corporations in deficit, at low interest rates. Another problem with pooled accounts is the interest earned, which belongs to each owners corporation in proportion to its contribution to the pool. There is a risk that some managers may not be properly accounting to the owners corporations for their share of the interest or may be converting it to their own use.

Stakeholder feedback

There was general support for a prohibition on managers pooling the funds of multiple owners corporations they manage.

Two alternatives to address this issue are presented for feedback.

Option 4B: Restrict the pooling of unrelated owners corporations' funds

Under this option, managers would be prohibited from pooling the funds of separate owners corporations they manage in one bank account. Money held on trust for separate owners corporations would be required to be kept in separate bank accounts, subject to the following exceptions, where pooling of funds would be permissible:

- pooling of funds of owners corporations in the same subdivision, provided that each owners corporation has consented, and
- pooling of funds in a statutory trust account held by a legal practitioner, licensed estate agent or licensed conveyancer.

This option seeks to continue the 'light touch' approach to regulation of owners corporations while reducing the risks associated with pooling of funds. However, it relies strongly on managers' compliance.

Option 4C: Require moneys held on trust by owners corporation managers to be kept in trust accounts

Under this option, managers would be required to keep trust accounts for money they receive from or on behalf of owners corporations, to maintain comprehensive record systems and be subject to independent auditing, in the same way as estate agents or conveyancers. Because trust accounts would be supervised and independently audited with the results reported to CAV, pooling would be permissible.

Managers would be entitled to make payments from trust accounts for their fees, disbursements and general expenses incurred on behalf of the owners corporation.

This option seeks to address the problems associated with pooling while still permitting it. However, the extra regulation would have costs for government to set up and supervise the scheme and it might not eliminate the possibility of fraud or misappropriation.

Questions

12 Are the disclosure requirements proposed under Option 4A sufficient to address potential conflicts of interest for managers and, if not, what other measures are required?

13 Is Option 4B sufficient to address the issues arising from the pooling of funds, or is the extra level of regulation under Option 4C required, and if so, why?

14 What are the risks, if any, of unintended consequences arising with the measures proposed in Option 4B or Option 4C?

2 Responsibilities of developers, occupiers and committee members

This Chapter sets out stakeholder feedback and presents options on the following issues concerning the responsibilities of developers, occupiers and committee members:

- developers' obligations
- the duties and rights of owners and occupiers
- the duties of committee members, and
- the powers of owners corporations regarding community building, water rights and abandoned goods.

2.1 Developers' obligations

Issues

The current, general duties of developers are inadequate either in their duration or in their capacity to address the adverse impacts on owners corporations of the contracts they enter into on behalf of owners corporations. The current general obligation of developers to take all reasonable steps to enforce any domestic building contract regarding defects in the common property is inadequate to protect owners corporations.

Alternative options for developers' obligations

- **Option 5A** – Extend the duration of the existing developers' obligations.
- **Option 5B** – Extend and expand developers' obligations in line with the Queensland approach.
- **Option 5C** – Extend and expand developers' obligations in line with the New South Wales approach.

Stand-alone option for building defects

- **Option 5D** – Introduce specific obligations for developers regarding building defects.

2.1.1 General obligations

Background

Currently, developers (referred to as 'initial owners' in the Owners Corporations Act) have general duties to act honestly and in good faith, and with due care and diligence in the interests of the owners corporation, when exercising any rights under the Act.

However, these obligations only apply while developers own a majority of the lots in an owners corporation and for a period of five years following the registration of the plan of subdivision.

Stakeholder feedback

Feedback from submissions was that the five-year period is too short and should be extended to 10 years. It was also suggested that the obligations should apply while the developer holds a majority of *lot entitlements*, not a majority of the lots, because it is total lot entitlement that is the critical factor in exercising control. For example, the developer may have retained ownership of only one lot but attached the majority of lot entitlements to that lot in the plan of subdivision.

There was a view that the obligations should apply to current *and future* members of the owners corporation, for example, as in Queensland. In Queensland developers must act in the best interests of the owners corporation as it stands after the developer's period of control ceases.

There was also much commentary in submissions about curbing the capacity of developers to:

- set initial lot entitlement and lot liability in a way that entrenches their control of owners corporations (setting of lot entitlement and liability is discussed in Section 7.2)
- set the initial budget of the owners corporation at an unsustainably low level to entice buyers with low initial owners corporation fees, and
- enter into arrangements that provide a financial benefit to them at the expense of the owners corporations, such as –
  - artificially designating common property or services as private lots, retaining their ownership and leasing them to the owners corporation
  - entering into long-term supply contracts with owners corporations, and
  - appointing themselves or their associates as the owners corporation manager and using their position to control access to information about the owners corporation's affairs.

It was apparent in submissions from residents in dysfunctional owners corporations that, in many cases, the dysfunction stems from residents being unable to change unfavourable arrangements put in place by developers.

Three alternatives to address these issues are presented for feedback (alternatives to address issues relating to settings of lot entitlement and liability are discussed in Section 7.2).

Option 5A: Extend the duration of existing developers' obligations

Under this option, the existing developer-obligations under the Owners Corporations Act would be retained but would be extended to apply:

- while the developer held the majority of lot entitlements (rather than the majority of lots) and
- for 10 years after registration of the plan of subdivision.

This option would be a relatively simple and 'light touch' approach to addressing the issues raised.

Option 5B: Extend the duration and expand the number of developers' obligations in line with the Queensland approach

Under this option, the existing obligations would be retained but, in line with the Queensland approach, they would be expanded so that developers must also ensure that:

- any contract they enter into with a third party (for example, an owners corporation manager) achieves a fair and reasonable balance between the interests of the third party and the owners corporation, and
- the powers to be exercised and functions to be performed by the third party are appropriate and do not adversely affect the owners corporation's ability to carry out its functions.

To strengthen the Queensland approach, developers' obligations could also include:

- requiring developers to disclose, at the first meeting of the owners corporation, any relationship with the owners corporation manager, including any immediate or future financial transactions that might arise out of the relationship, in particular any specific benefits flowing to the developer as a result of the relationship
- prohibiting developers from receiving any payments from the manager in relation to the management contract
- prohibiting developers setting the initial budget of the owners corporation at an unsustainably low level, and
- prohibiting developers artificially designating common property or services as private lots.

Further in line with the Queensland approach, the obligations would be extended so that a developer who holds a majority of lot entitlements must consider the interests of current and *future* members of the owners corporation.

This option would substantially expand developers' obligations in a relatively detailed way.

Option 5C: Extend the duration and expand the number of developers' obligations in line with the New South Wales approach

Under this option, the existing obligations would be retained but, in line with the New South Wales approach, would be expanded to:

- prohibit developers appointing themselves or their associates as owners corporation manager within the first 10 years of a development
- provide that the contract of any third party manager appointed by the developer expires at the first meeting of the owners corporation, and
- limit the duration of any non-management agreement made by the developer in relation to the owners corporation and under which they benefit, to three years.

To strengthen the New South Wales approach, the additional developers' obligations under Option 5B could also be included.

The duration of these obligations could be as under Option 5A or 5B.

As with Option 5B, this option would substantially expand developers' obligations in a relatively detailed way. However, the New South Wales-based obligations under this Option may involve more detail than the Queensland-based obligations under Option 5B.

2.1.2 Obligations regarding building defects

Background

Currently, and in addition to their general obligations, developers have a specific obligation to take all reasonable steps to enforce any domestic building contract they have entered into in establishing the owners corporation, in the event there is a breach of that contract that relates to the common property, of which they are, or should be aware.

Stakeholder feedback

Concerns were expressed that developers' current obligations do not sufficiently address the general issue of the legacy of any shoddy workmanship. Also, the specific issue of developers who protect (associated) builders by using their voting power to block owners corporations from suing them for building defects was raised in submissions.

The following stand-alone option to address these issues is presented for feedback.

Option 5D: Introduce specific obligations for developers or builders regarding building defects

Under this option, which is based on new requirements in New South Wales, developers or builders would be:

- required to pay a 'defects bond' of 2 per cent of the contract price, and
- required to fund independent building inspection reports.

Additionally, developers would be:

- required to provide the first meeting of the owners corporation with the building maintenance manual, the asset register, a maintenance plan, warranty details and building specifications, reports, certificates, permits, notices and orders, and
- prohibited from voting on any resolution relating to building defects.

This option could be treated as an alternative to or in addition to options 5A, 5B and 5C. While it would address the issues raised to the maximum extent, it would significantly raise the level of regulation.

Questions

15 Are the enhanced general obligations under Option 5A sufficient or are the additional obligations under options 5B, 5C and 5D needed, and if so, why?

16 Are the 'further expanded' obligations under options 5B or 5C necessary or should the Queensland or New South Wales approach, as applicable, be adopted without change?

17 Why would the 'building defects' obligation be necessary?

2.2 Duties and rights of owners and occupiers

Issues

The existing duties and rights of owners and occupiers do not address a number of issues relating to owners corporation records, access by owners corporations to private lots to repair common property, alterations by lot owners to common property, smoke drift, pets, the installation of sustainability items on private lots, quiet enjoyment during renovations by lot owners, and restrictions on access to common property.

Stand-alone options

- **Option 6A** – Clarify the right to inspect owners corporation records and align the basis for invalidating resolutions and rules.
- **Option 6B** – Give owners corporations access to private lots to repair common property.
- **Option 6C** – Prohibit lot owners from making alterations or repairs to common property.
- **Option 6D** – Expand rule-making power to enable rules to be made, for pets, smoke drift, renovations and access to common property.
- **Option 6E** – Make Model Rules for smoke drift, renovations and access to common property.
- **Option 6F** – Develop a Model Rule for fire safety advice to tenants and provide for owners corporations rules to be part of tenancy agreements.
- **Option 6G** – Make lot owners ultimately responsible for compliance by their tenants and guests with owners corporation rules.

2.2.1 Resolutions and records

Background

Currently, the validity of an owners corporation resolution under the Owners Corporations Act depends on whether it is oppressive to, unfairly prejudicial to, or unfairly discriminates against, a lot owner. However, the validity of an owners corporation rule, which is made as a result of a resolution, only depends on whether it unfairly discriminates against a lot owner (or occupier).

Further, the Owners Corporations Act *requires* owners corporations to make records (such as the meeting minutes, rules, and copies of resolutions) available to lot owners for inspection free of charge but gives them a *discretion* as to whether to provide copies upon payment of the requisite fee.

Stakeholder feedback

There was support for aligning the provisions for the validity of owners corporation resolutions and owners corporation rules by requiring that both not be oppressive or unfairly prejudicial to lot owners or to unfairly discriminate against them. Submissions also raised the need to change the provisions of the Owners Corporations Act regulating the inspection of owners corporation records to ensure that:

- owners corporations are required to provide copies of records on payment of the relevant fee (as opposed to the current situation, where it is discretionary) to bring this into line with owners corporations' current obligation to provide copies of the owners corporation register, and
- lot owners cannot permit commercial agents to obtain copies of the owners corporation register for marketing purposes, without the prior consent of the owners corporation.

The following stand-alone option to address these issues is presented for feedback.

Option 6A: Clarify the right to inspect owners corporation records and align the basis for invalidating resolutions and rules

Under this option:

- the provisions of the Owners Corporations Act regulating the availability of owners corporation records for inspection would be changed to ensure that:
  - owners corporations are required to provide copies of records on payment of the relevant fee, and
  - lot owners cannot authorise commercial agents to obtain copies of the owners corporation register for marketing purposes, without the prior consent of the owners corporation, and
- the provisions for the validity of owners corporation resolutions and owners corporation rules would be aligned by requiring that both not be oppressive or unfairly prejudicial to lot owners or to unfairly discriminate against them.

2.2.2 Access to private lots

Background

Under the Owners Corporations Act, owners corporations may, with notice, enter private lots to carry out works on a *service* that benefits other lots or the common property, such as water, sewerage, drainage, gas, electricity, telephone or internet service.

However, there is no specific power for owners corporations to enter private lots where it is necessary to repair or maintain common property *generally*, nor any obligation on lot owners or occupiers to give reasonable access to enable such works.

The Owners Corporations Act only requires lot owners not to use or neglect the common property or permit it to be used or neglected in a manner that is likely to cause damage or deterioration of the common property.

Stakeholder feedback

A suggestion was made that lot owners and occupiers should be required to provide reasonable access to their lots to owners corporations in order to repair common property. This would support the owners corporation's obligation under the Owners Corporations Act to repair and maintain the common property.

The following stand-alone option to address this issue is presented for feedback.

Option 6B: Give owners corporations access to private lots to repair common property

Under this option:

- owners corporations would be expressly permitted to enter private lots on reasonable notice where that is necessary to repair or maintain common property
- lot owners and occupiers would be required to provide reasonable access to their lots to owners corporations for that purpose, and
- VCAT would be expressly empowered to make orders to that effect.

2.2.3 Alterations and repairs to common property

Background

Currently, the Owners Corporations Act only allows owners corporations to make alterations or repairs to the common property. Nothing is specified in the Owners Corporations Act about lot owners' rights to do so, including for urgent matters.

Stakeholder feedback

No suggestions were put forward regarding the ability of lot owners to make urgent repairs or alterations to common property, except to clarify that lot owners must not do so. This reflects a general view that the current process that requires a lot owner to seek the appropriate resolution of the owners corporation or to apply to VCAT for an appropriate order, is sufficient.

The following stand-alone option to address this issue is presented for feedback.

Option 6C: Prohibit lot owners from making alterations or repairs to common property

Under this option, the implied obligation of lot owners not to make alterations or repairs to the common property would be clearly set out in the Owners Corporations Act.

2.2.4 Rule-making powers and Model Rules

Background

Currently, the Owners Corporations Act:

- enables owners corporations to make rules regarding the 'use of common property', 'the external appearance of lots', 'requiring notice to the owners corporation of renovations to lots' and 'the times within which work on lots can be carried out', and
- requires lot owners to give a copy of the owners corporation rules to their tenants at the outset of the tenancy agreement.

It is clear that owners corporations can make rules prohibiting the installation of sustainability items on the external surfaces of private lots, such as solar hot water systems, solar energy panels and roofs with colours that have particular solar absorption values. While owners corporations can make rules about the noise made by pets (although difficult to enforce), it is clear that the rule-making power does not allow owners corporations to prohibit pets. However, it is unclear whether the rule-making power for the health, safety and security of occupiers and invitees covers smoke drift from private lots (as distinct from rules prohibiting or controlling smoking on common property, which are permitted).

The Act also provides for Model Rules for owners corporations, which are set out in the Owners Corporations Regulations 2007. The Model Rules apply to all owners corporations unless or until an owners corporation makes its own rules.

Stakeholder feedback

Smoke drift and pets

There was much commentary about owners corporations' rule-making powers and the Model Rules, in particular, about smoke drift from private lots and the keeping of pets. Many submissions supported a Model Rule covering smoke drift from private lots but the feedback on whether there should be a Model Rule on keeping pets, and what it should be, was not conclusive.

Advice to tenants and incorporation of owners corporation rules into tenancy agreements

A suggestion was made that if a lot owner complies with the obligation to give a copy of the owners corporation rules to a tenant, the rules should form part of the tenancy agreement, thereby enabling lot owners to enforce the rules against tenants.

While owners corporations can make rules for the health, safety and security of occupiers and invitees, it was also suggested that a Model Rule be developed to require lot owners to advise their tenants about applicable fire safety and fire-alarm responsibilities.

Renovations to lots

There was support for giving lot owners more control over changes to the external appearance of their lots, with safeguards, either by:

- simply expanding the current rule-making power to enable owners corporations to make rules to protect the –
  - quiet enjoyment of other occupiers during building works
  - structural integrity of the building, and
  - value of other lots
- developing a Model Rule that –
  - allows minor external changes without the owner's corporation's approval, subject to protections for the quiet enjoyment of other occupiers during the works, but
  - requires approval by special resolution for any change that affects the appearance, structural integrity or amenity of the building, or the value of other lots, or
- developing a Model Rule that prohibits any change without the owners corporation's approval, which must not be unreasonably withheld.

Stakeholder feedback was mixed on whether owners corporations should be able to make rules that prohibit the installation of sustainability items on the outside of private lots. Although institutional stakeholders generally agreed that owners corporation should not be able to make rules that unreasonably prohibit such installation, many residents considered that owners corporations should be able to make rules on these matters, including for purely aesthetic reasons. However, there was also general agreement that sustainability items should not impede access to, or the use of, other lots and common property.

Access to common property

Although owners corporations can make rules about the '*use* of common property', there was support for enabling them to make rules regulating occupiers' *access* to common property and common services.

There was some support for simply giving occupiers unrestricted access to common property and common services, provided it does not disturb the quiet enjoyment of other occupiers, and the owners corporation has not resolved by unanimous resolution to restrict access. There was also support for enabling owners corporations to prohibit access to common property such as gyms and swimming pools by lot owners who have leased their units, on the basis that this constitutes 'double dipping'.

The following stand-alone options to address these issues are presented for feedback.

Option 6D: Expand the rule-making power to enable rules to be made for smoke drift, pets, renovations and access to common property

Under this option, the matters about which owners corporations can make rules would be expanded to include:

- smoke drift from private lots
- keeping pets
- protection of: the quiet enjoyment of other occupiers during works to renovate lots or changes to the external appearance of lots; the structural integrity of the building; and the value of other lots, and
- access to common property and services.

The existing power to make rules about the external appearance of lots would be amended so as not to include rules that unreasonably prohibit the installation of sustainability items on the outside of private lots. In terms of what might be an unreasonable prohibition, a prohibitions for purely aesthetic reasons could be deemed to be unreasonable.

However, rules simply requiring that works on the external appearance of lots should not to impede reasonable access to, or the use of, other lots and common property would be deemed reasonable.

Option 6E: Make Model Rules for smoke drift, renovations and access to common property

Under this option, Model Rules would be developed for:

- controlling smoke drift from private lots
- protecting: the quiet enjoyment of other occupiers during works to renovate lots or changes to the external appearance of lots; the structural integrity of the building; and the value of other lots, and
- access to common property and services.

Any Model Rule for smoke drift from private lots would require, in line with the New South Wales position, occupiers to ensure that smoke does not penetrate to the common property or any other lot.

Any Model Rule for protecting quiet enjoyment etc. would be part of a wider Model Rule on changes to the external appearance of lots by prohibiting any change without the owners corporation's approval. The owners corporation's approval could not be unreasonably withheld but could be given subject to reasonable conditions to protect quiet enjoyment etc.

Any Model Rule for access to common property and services would provide for unrestricted access to common property and services by occupiers (i.e. excluding absentee lot owners) except to the extent that it disturbs the quiet enjoyment of other occupiers. The rule would also be subject to any reasonable safety or security restriction imposed by the owners corporation.

Because the feedback on whether there should be a Model Rule on keeping pets, and what it should be, was not conclusive, a Model Rule on the keeping of pets is not proposed. Although it was not conclusive there was a general view that the New South Wales approach of three alternative Model Rules was not appropriate for Victoria.

Simply expanding the rule-making powers as suggested under Option 6D, and leaving the making of any rules to owners corporations, would be a more flexible approach than developing Model Rules. Model Rules set the 'default' situation, such that lot owners seeking no rules or different rules on the subject have the difficult task of organising a special resolution to change the situation. However, Model Rules might be considered acceptable if most lot owners in any owners corporation would regard them as unobjectionable.

Questions

18 If it is desirable to expand the rule-making power to include rules on smoke drift, renovations and access to common property:

(a) should Model Rules also be made on those subjects, and if so

(b) are the proposed Model Rules based on reasonable presumptions about what most lot owners in owners corporation would regard as unobjectionable, and are they adequate?

Option 6F: Develop a Model Rule for fire safety advice to tenants and provide for owners corporations rules to be part of tenancy agreements

Under this option, the matters about which owners corporations can make rules would be expanded to include advice about fire safety and fire alarm systems. In addition, a Model Rule would be developed to require lot owners to advise tenants about applicable fire safety and fire alarm systems.

The Owners Corporations Act would also be amended so that if a lot owner complies with the obligation to give a copy of the owners corporation rules to a tenant, the rules that were given would form part of the tenancy agreement.

While it would be a more flexible approach simply to expand the rule-making powers of owners corporations to include rules on fire-safety advice to tenants, this option is based on the presumption that lot owners in any owners corporation may, in principle, regard the Model Rule as unobjectionable.

Questions

19 Would a Model Rule on fire-safety advice to tenants, in principle, be unobjectionable, and if so, why?

2.2.5 Responsibility for compliance with owners corporation rules

Background

Currently, under the Owners Corporations Act lot owners, lessees, sub-lessees and occupiers are bound by owners corporation rules.

Stakeholder feedback

While it was agreed that tenants and guests should be bound by owners corporation rules, there was general support for making lot owners ultimately responsible for compliance by their tenants and guests, including for their breaches.

The following stand-alone option to address this issue is presented for feedback.

Option 6G: Make lot owners ultimately responsible for tenants' and guests' compliance with owners corporation rules

Under this option, the Owners Corporations Act would be amended to make lot owners responsible for ensuring their tenants and guests comply with owners corporation rules. Lot owners would also be made jointly and severally liable with their tenants or guests for any loss or damage suffered by the owners corporation arising from their breach. However, in relation to tenants, the lot owner's liability would be avoided if they had complied with their obligation to give a copy of the rules to the relevant tenant.

While this amendment would address the issue raised, the proposal for the joint and several liability of lot owners, even with the proposed safeguard regarding tenants, might be considered contrary to the traditional presumption against making one person liable for the acts of another.

Questions

20 Do all or only some of the options improve the position of owners corporations and why?

21 What additional justification, if any, is needed for the proposal for the joint and several liability of lot owners for breaches of owners corporation rules by their tenants and invitees?

2.3 Duties of committee members

Issue

The existing duties of committee members do not specifically require them to act in their owners corporation's best interests.

Alternative options

- **Option 7A** – Expand the existing duties of committee members to include a duty to act in the owners corporation's best interests.
- **Option 7B** – Reformulate the duties of committee members according to the Associations Incorporation Reform Act model.

Background

The Owners Corporations Act requires members of committees to:

- act honestly and in good faith in performing their functions
- exercise due care and diligence in performing their functions, and
- not make improper use of their position for personal gain.

However, committee members are not specifically required to act in the owners corporation's best interests, an obligation that is imposed on developers who control owners corporations.

Stakeholder feedback

Issues Paper 2 did not raise specific issues about the functioning of committees, such as the adequacy of the existing duties of committee members. However, feedback on the functioning of committees generally reflected the overall themes relating to dysfunction and apathy (see Section 3.2).

Some people who serve on committees reported that they were unsure what to do in their role, or experience difficulties with other committee members who exert undue influence in meetings or appear to be on the committee to serve their own ends rather than those of the owners corporation. This feedback calls for examination of the duties of committee members.

Two alternatives to address this issue are presented for feedback.

Option 7A: Expand the existing duties of committee members to include a duty to act in the owners corporation's best interests

Under this option, the existing set of duties under the Owners Corporations Act would be expanded to require committee members to act in the best interests of the owners corporation in exercising their powers and functions. Therefore, in addition to not using their position for personal gain, committee members would be expected not to use their position to cause detriment to their owners corporation.

The expanded duties under this option could be supplemented with further guidance material including voluntary online training to assist committee members to understand their obligations and responsibilities.

This option addresses the particular issues raised without otherwise changing the current position on members' duties. It does not address any wider issues that might have been raised if the general issue of the adequacy of the current position had been raised in Issues Paper 2.

Option 7B: Reformulate the duties of committee members according to the Associations Incorporation Reform Act model

Under this option, the existing duties of committee members would be recast in the language of the duties of office holders in incorporated associations under Division 3 of Part 6 of the *Associations Incorporation Reform Act 2012* (the Associations Incorporation Reform Act).

Many incorporated associations are small, voluntary associations that are similar to owners corporations.

The duties of office holders in incorporated associations are based upon, and are broadly equivalent to the duties of a director under the Commonwealth's *Corporations Act 2001*. In summary, an office holder must:

- exercise their powers and discharge their duties with a reasonable degree of care and diligence
- exercise their powers and discharge their duties in good faith in the best interests of the association, and for a proper purpose, and
- not make improper use of their office or of information acquired to gain an advantage for themselves or any other person, or cause detriment to the association, or knowingly or recklessly do so.

If an office holder makes a business decision in relation to the operation of the association they must, among other things:

- make the decision in the best interests of the association, and
- not have a personal interest in the decision.

The Associations Incorporation Reform Act also applies business judgement in determining whether an office holder has fulfilled their duty and provides for an office holder to place reasonable reliance on information and advice from appropriate officers, advisers or experts.

Again, the duties under this option could be supplemented with further guidance material including voluntary online training to assist committee members to understand their obligations and responsibilities.

Although the adequacy of the current position on members' duties was not raised in Issues Paper 2, this option brings those duties in line with the outcome of the most recent review of the issue in the similar context of incorporated associations.

Question

22 Is it sufficient simply to expand on the existing duties of committee members to address the issue raised, or is a complete reformulation of committee members' duties, along the line of the Associations Incorporation Reform Act, necessary, and if so, why?

2.4 Powers of owners corporations regarding community building, water rights and abandoned goods

Issue

Owners corporations do not have specific functions or powers relating to community building, water rights or disposing of abandoned goods.

Stand-alone options

- **Option 8A** – Give owners corporations a community building function.
- **Option 8B** – Permit owners corporations to deal with water.
- **Option 8C** – Permit owners corporations to dispose of abandoned goods on common property.

2.4.1 Community building

Background

The functions of owners corporations, as set out under the Owners Corporations Act, are essentially restricted to common property issues and do not extend to community building, although it is open to individual owners corporations to extend the Act's functions through appropriate rules. The Act provides that an owners corporation has all powers conferred on it by legislation and by its rules and 'all other powers that are necessary to enable it to perform its functions'.

Stakeholder feedback

The suggestion was made that in order to enhance the 'liveability' of buildings governed by owners corporations, the functions of an owners corporation under the Owners Corporations Act should include community building within the owners corporation. This would allow owners corporations to organise and fund groups, clubs and activities involving lot owners and other occupants of the building.

The following stand-alone option to address this issue is presented for feedback.

Option 8A: Give owners corporations a community building function

Under this option, the functions of an owners corporation under the Owners Corporations Act would expressly include community building within the owners corporation.

It is open to individual owners corporations to extend the functions prescribed by the Act, through appropriate rules, including to provide itself with any specific powers deemed necessary to fulfil such extra functions. In this way, owners corporations could extend their functions to include community building. However, expressly including community building in the Act would signal that this function is properly to be regarded an integral part of the governance of owners corporations. On the other hand, its inclusion in the Act might provide scope for disputes in some owners corporations between residents who do not have an interest in community building and those who do and who might seek to use its official status to get expenditure on the matter.

2.4.2 Water rights

Background

While the Owners Corporations Act specifically allows owners corporations to acquire, hold, lease and dispose of personal property, it is unclear whether these powers extend to dealing with water rights under the *Water Act 1989*. It is also unclear whether water that falls, occurs or flows on common property is itself common property, thus enabling the owners corporation to make rules or resolutions about its use or collection.

Stakeholder feedback

There was wide support for the proposition that the powers of owners corporations to deal with personal property should extend to dealing with water rights and that water that falls, occurs or flows on common property is itself common property.

The following stand-alone option to address these issues is presented for feedback.

Option 8B: Permit owners corporations to deal with water

Under this option, the definition of 'common property' in the Owners Corporations Act would be amended to include water that falls, occurs or flows on common property, and the Act would be further amended to permit owners corporations to deal with water rights as with any other type of personal property.

2.4.3 Abandoned goods

Background

The functions of the owners corporation include managing, administering, repairing and maintaining the common property. However, there are no specific powers to deal with goods that may be left behind or abandoned on the common property.

In contrast, the New South Wales legislation allows for regulations to be made that confer powers on owners corporations to store or dispose of goods left on common property, with provision for the serving of notices on the owner or other relevant persons (no regulations have yet been made).

Stakeholder feedback

There was concern that the current powers available to owners corporations to deal with goods abandoned on common property are inadequate. There was wide support for owners corporations having the power to remove goods on common property, particularly where they block access to common property or other private lots, or otherwise caused an emergency. This power was proposed to apply to both goods that are abandoned *and* those simply left in breach of owners corporation rules and the owner refuses to remove them.

However, in relation to goods that have not been abandoned but have simply been left on common property in breach of owners corporation rules, owners corporations are in no different position than owners of any land in such situations. The right of property owners to remove such goods is governed by the general law of trespass. Under this law land owners must apply to the court for an order to remove such goods. Therefore, it is considered to be inappropriate to put owners corporations in any special position in relation to disposing such goods.

The following stand-alone option to address the issue of goods abandoned on common property is presented for feedback.

Option 8C: Permit owners corporations to dispose of abandoned goods on common property

Under this option, owners corporations would be allowed to deal with abandoned goods on common property. Owners corporations could be permitted to deal with such goods in the same way that:

- landlords can deal with goods left behind in rented premises under Part 9 of the *Residential Tenancies Act 1996* (noting that this Act is under review), or
- traders can deal with unclaimed goods under Part 4.2 of the *Australian Consumer Law and Fair Trading Act 2012.*

In addition, for goods abandoned on common property that block reasonable access to common property or to other private lots, and a reasonable attempt has been made to notify the owner, owners corporations could be allowed to remove them immediately to a safe place. The provisions of the Residential Tenancies Act or the Australian Consumer Law and Fair Trading Act would then apply regarding their disposition.

A summary of the relevant provisions of the Residential Tenancies Act and the Australian Consumer Law and Fair Trading Act is included in Attachment A.

Allowing owners corporations to deal with abandoned goods, with appropriate safeguards, would clarify how to deal with a common problem. However, whether goods have actually been abandoned or whether they really block access might be a moot point in particular circumstances, which might result in increased disputes.

Questions

23 What risks or unintended consequences might arise with options 8A, 8B and 8C, which propose extending the powers of owners corporations to deal with community building, water rights and abandoned goods?

24 What is the best approach for dealing with abandoned goods on common property, and why?

25 What are the benefits and risks of the additional power proposed for goods that block access?

3 Decision-making within owners corporations

This Chapter sets out stakeholder feedback and presents options on the following issues concerning decision-making within owners corporations:

- voting thresholds and the use of proxies, and
- committee size and processes.

3.1 Voting thresholds and the use of proxies

Issues

The problems associated with proxy farming, committee proxies, contractual voting restrictions and inactive owners corporations need to be addressed.

Stand-alone options

- **Option 9A** – Restrict proxy farming and committee proxies, and prohibit voting limitations in sale contracts.
- **Option 9B** – Give owners corporation managers greater authority to make decisions.
- **Option 9C** – Treat unopposed special resolutions as passed or as interim resolutions.

3.1.1 Proxies and voting limitations

Background

The Owners Corporations Act places some limitations on the practice of 'proxy farming'. For example, a person is prohibited from requiring or demanding that a lot owner give that person, or any other person, a power of attorney or a proxy. Additionally, where a lot owner appoints a proxy to vote on their behalf, the proxy lapses after a period of 12 months where an earlier period is not specified.

Stakeholder feedback

The problem of getting enough people at a meeting to pass a resolution was a consistent issue in submissions. Although the use of proxies is intended to address this problem, many submissions bemoaned the use of proxies by disengaged lot owners who hand over their proxies without any real idea of how they will be exercised.

Many lot owners also complained that they attend meetings only to watch the resolutions they supported being defeated by someone holding a large number of proxies. There were also allegations that lot owners or owners corporation managers were actively seeking out proxy votes from absentee lot owners ('proxy farming') in an attempt to control the owners corporation.

These lot owners called for greater controls on proxies and for restrictions on voting rights to prevent individuals controlling owners corporations through proxies, at the expense of engaged lot owners who attend meetings.

However, alternative concerns were expressed that restricting voting rights and the use of proxies could lead to greater dysfunction within owners corporations as it would be even more difficult to get the votes required to pass resolutions.

The use of proxies at committee meetings was generally not supported, with feedback that, unlike lot owners who give proxies and who represent only themselves, committee members represent the owners corporation. In this context, there was a view that the giving of proxies by committee members, especially to someone who is not a lot owner, is inconsistent with their elected or representative status.

There was limited support for any specific provision for the chairperson of an owners corporation to have a casting vote. In any case, owners corporations can already make rules about the functions of their chairperson (and secretary).

There was strong support for prohibiting terms in contracts of sale (particularly where the seller is the developer) that limit or control the voting rights of the buyer of a lot, to match the existing prohibition on anyone demanding or requiring an existing lot owner to give a proxy.

There was little support for the formal inclusion of tenants in owners corporation meetings, with submissions stating that the matter should be left to the discretion of owners corporations and that tenants can raise owners corporation issues with their lot owner/landlord.

The following stand-alone option to address this issue is presented for feedback.

Option 9A: Restrict proxy farming and committee proxies, and prohibit voting limitations in sale contracts

Under this option:

- the total number of proxies that could be held by a person voting on a general resolution would be –
  - one, if there are 20 or less lots in total, and
  - 5 per cent of the lots, if there are more than 20 lots in total
- committee members would only be able to give a proxy to another committee member, and
- terms in contracts of sale that limit or control the voting rights of the buyer would be prohibited.

This option seeks to address the issue of proxy farming in a way that does not eliminate the practical advantages of proxies, and in a way that recognises the different nature of small and large owners corporations. However, it still allows for a degree of proxy farming while reducing the capacity to get resolutions passed.

3.1.2 Decision-making powers for managers

Background

The Owners Corporations Act sets out a number of requirements that seek to support the meetings of owners corporations and their decision-making. These include requirements about convening and conducting meeting, voting and passing resolutions.

For instance, a meeting can proceed in the absence of a quorum but not if no lot owner or proxy attends. Under the current arrangements, in the absence of a quorum, the members of the owners corporation present at the meeting have the authority to pass interim resolutions, which are distributed with the minutes for consideration by all lot owners within 14 days of the meeting.

Although owners corporations can delegate any power or function to their managers, there are no specific requirements in the Act regarding the role of managers in decision-making.

Stakeholder feedback

A large number of submissions commented on decision-making within owners corporations, expressing disappointment and frustration with the way meetings are arranged and conducted, and decisions are made, both at general meetings and committee meetings.

As indicated above, there is a general level of ignorance and apathy among lot owners, leading to problems such as:

- concentration of power, either through cliques of lot owners or individuals (such as the developer)
- infighting between factions of lot owners
- inability to obtain a quorum, pass resolutions and make decisions, and
- individuals exercising undue influence at the annual general meeting or at committee meetings (such as the developer, the committee chair or owners corporation manager).

Some of these problems are inescapable in a democratic institution but the feedback indicates that several improvements could be made to the democratic processes under the Owners Corporations Act.

The following suggestions were made to facilitate decision-making:

- where *no* lot owners attend a properly convened meeting (as distinct from the situation where the lot owners present are insufficient for a quorum) the owners corporation manager should be permitted to make interim decisions on the proposed resolutions, except if the resolution involves an amount greater than 10 per cent of the budget or involves the manager's contract, and
- if a special resolution fails to obtain the 75 per cent level or the level for an interim special resolution (at least 50 per cent of total lots in favour and not more than 25 per cent against) but there are no votes against the resolution and there is a quorum, the resolution should pass.

The following stand-alone option to address this issue is presented for feedback.

Option 9B: Give owners corporation managers greater authority to make decisions

Under this option, managers would be permitted to make interim decisions if no-one with voting rights or proxies is present at a properly convened meeting of the owners corporation or of the committee.

While the current arrangements address the situation where the members present do not constitute a quorum, they do not address inactive owners corporations where no one, other than the manager, attends a meeting.

Under this option, which at least addresses the situation of an inactive owners corporation with a manager, the manager would be permitted to pass interim resolutions at such meetings.

Two approaches to address these issues are presented for feedback.

Option 9B -1: Developing Model Rules

Owners corporations could be allowed to make rules about their manager's ability to pass interim resolutions in the situation described. Because the proposal is aimed at inactive owners corporations that might not pass any such rule, this could be augmented by providing a Model Rule that enables managers to pass such interim resolutions. However, the Model Rule would be limited to decisions that require only an ordinary resolution and would also exclude any resolution affecting the manager's contract or that involves an amount greater than 10 per cent of the owners corporation's budget.

This would allow active owners corporations to exclude the Model Rule, if desired, or for more inactive but still functioning owners corporations either to further limit the manager's power to certain matters, such as urgent repairs or maintenance, or to expand it, for instance to allow the manager to pass interim *special* resolutions.

Option 9B -2: Amending the Act

A Model Rule, as suggested, would require owners corporations to pass a special resolution to exclude or alter it, as desired. In the case of both active and inactive-but-still-functioning owners corporations, although for different reasons, the requirement of a special resolution might be regarded as onerous and as leading to unwanted situations if unable to be achieved. Therefore, another way to implement the proposal would be to amend the Act to give managers powers based on the proposed Model Rule, i.e. make it the default position in the same way a Model Rule would operate, and enable owners corporations to exclude it or alter its effect by *ordinary* resolution.

While empowering owners corporation managers in this way addresses a significant problem with the current arrangements, it would constitute a major shift in the nature of owners corporation governance. Simply permitting owners corporations to make rules, without any Model Rule or amendment to the Act as proposed, would not impinge on active owners corporations. However, it might not meet the problem of inactive owners corporations, where obtaining the requisite special resolution for a rule is not feasible.

3.1.3 Special resolutions

Background

In recognition of the issues relating to apathetic or absentee voters and the high threshold for special resolutions (75 per cent), the Owners Corporations Act allows for an *interim* special resolution process. Where the threshold for a special resolution has not been met, but more than 50 per cent of the total votes are in favour, and no more than

25 per cent of the total votes are against the special resolution, the Owners Corporations Act provides that the resolution is deemed to be an interim special resolution.

Notice of the interim special resolution must then be provided to all lot owners within 14 days. At the end of 29 days, the interim resolution becomes a special resolution in the ordinary way, unless lot owners who hold more than 25 per cent of the total lot entitlement petition the owners corporation secretary against the resolution. In that case, the interim resolution fails completely.

Stakeholder feedback

Some stakeholders suggested that decision-making in inactive owners corporations regarding special resolutions needs to be further facilitated in the situation where no-one is actively opposed to the resolution but the 50 per cent threshold for an interim resolution cannot be achieved.

The following stand-alone option to address this issue is presented for feedback.

Option 9C: Treat unopposed special resolutions as passed or as interim resolutions

Under this option, if a special resolution fails to obtain the 75 per cent majority or the level required for it to be deemed an interim special resolution but there is a quorum and there are no votes against the resolution, the special resolution would pass.

Alternatively, such a resolution could be deemed to be an interim resolution.

This option has the advantage of further facilitating decision making in inactive owners corporations. However, at least with the proposal for special resolutions to pass if the proposed criteria are met, it might weaken the role of special resolutions in more important governance matters. While the alternative of deeming such a resolution as interim is more in line with current arrangements, it might be less useful in facilitating decision-making.

Questions

26 How might the limitations on proxy farming have negative consequences for the governance of inactive owners corporations?

27 Which approach to giving owners corporation managers decision-making powers in Option 9B is the more effective and why?

28 What are the risks of giving owners corporation managers decision-making powers in the absence of a licensing or enhanced registration scheme for managers?

29 Is further relaxation of the special resolution process required for inactive owners corporations and, if so, which alternative under Option 9C is preferable and why?

3.2 Committee size and processes

Issue

The current maximum size of committees is too large for optimal decision-making and the process for arranging committee ballots is unclear.

Stand-alone options

- **Option 10A** – Reduce the maximum committee size from 12 to seven members.
- **Option 10B** – Permit the chair or secretary of the committee to arrange a ballot.

A number of suggestions were made to improve the operation of committees and the competency of committee members particularly in larger owners corporations including a suggestion to limit the term of committee members, mandate training for members and pay members. Practical issues arise with the implementation of these suggestions including limiting the pool of owners willing and available to participate on committees and increasing fees.

Additionally, the Owners Corporations Act does not prohibit owners corporations from requiring their members to be trained or from paying them. Therefore, no options are put forward in relation to these matters.

3.2.1 Committee size

Background

Under the Owners Corporations Act, the committee of an owners corporation is a sub-group of 3 to 12 elected lot owners (or their proxies). By virtue of the fact that the committee can make any decision requiring only an ordinary resolution of the owners corporation, it is able to manage owners corporations between general meetings. A committee is mandatory for owners corporations with 13 or more lots. The committee members are responsible for electing the chairperson.

Stakeholder feedback

It was suggested that the mandated size of committees should be smaller than the current size of up to 12 members, as it would improve decision-making and the general functioning of the committee. Changing the size of the committee to a maximum of seven members was seen as bringing Victoria into line with the majority of other states.

The following stand-alone option to address this issue is presented for feedback.

Option 10A: Reduce the maximum committee size from 12 to seven members

Under this option, the maximum size of committees would be seven members but with provision for owners corporations to resolve on a larger committee, up to 12 members.

3.2.2 Committee ballots

Background

Under the Owners Corporations Act a ballot of the owners corporation may be arranged by the chairperson or secretary (or a lot owner or manager with the required number of nominees). However, no provision is made for organising a ballot of the committee.

Stakeholder feedback

It was suggested that the Owners Corporations Act should clarify that the chair or secretary can arrange a ballot of the committee.

The following stand-alone option to address this issue is presented for feedback.

Option 10B: Permit the chair or secretary of the committee to arrange a ballot.

Under this option, the chair or secretary of a committee would be permitted to arrange a ballot of the committee.

Question

30 How might reducing the size of an owners corporation committee and providing for who can arrange a ballot improve its functioning?

4 Dispute resolution and legal proceedings

This Chapter sets out stakeholder feedback and presents options on the following issues concerning dispute resolution and legal proceeding for owners corporations:

- dispute resolution processes initiated by owners corporations
- civil penalties for breaches of owners corporation rules, and
- initiating legal proceedings.

4.1 Internal dispute resolution process

Issues

The engagement of the internal dispute resolution process of an owners corporation is inappropriate where the matter has been initiated by the owners corporation itself. Model Rule 6 (Dispute resolution) does not provide for certain things that would facilitate dispute resolution.

Stand-alone options

- **Option 11A** – Exempt owners corporations from the need to engage the internal dispute resolution process for matters they initiate.
- **Option 11B** – Revise Model Rule 6 (Dispute Resolution).

4.1.1 Matters initiated by owners corporations

Background

The Owners Corporations Act sets out the process for making complaints and resolving internal disputes. The statutory process details how owners corporations must deal with and attempt to resolve complaints of breaches of the Owners Corporations Act, regulations and rules.

Stakeholder feedback

Although not unanimous, there was support for not requiring owners corporations to engage the process for any matter, including recovery of debts from lot owners, where it has initiated an action, on the grounds that the process:

- is an interference in the internal affairs of owners corporations
- cuts across the democratic process that resulted in the resolution to take action
- is unlikely to be useful
- unnecessarily delays the ability of owners corporations to commence action in VCAT to recover debts, and
- is intended only for disputes between residents.

The following stand-alone option to address this issue is presented for feedback.

Option 11A: Exempt owners corporations from the need to engage the internal dispute resolution process for matters they initiate

Under this option, an owners corporation would not be required to engage the internal dispute resolution process for any matter on which it had initiated action.

This option would address the issue raised but could result in some matters being unnecessarily litigated, when negotiation or discussion through the dispute resolution process might have led to resolution.

4.1.2 Dispute resolution Model Rule

Background

Model Rule 6 sets out the procedures for making complaints and resolving disputes within owners corporations. While it sets strict timelines for the parties to meet to discuss the dispute, it does not provide for an owners corporation to have a specific sub-committee for grievances or to seek expert advice to make a determination.

Stakeholder feedback

There was general stakeholder support for speedy and informal dispute resolution.

There was also a suggestion that the current requirement in Model Rule 6 for parties to meet within 14 working days of the dispute coming to the attention of all parties does not provide sufficient time to organise the meeting, and that the rule is uncertain about when this timeframe actually commences.

There was also concern that if an owners corporation does not have a grievance sub-committee, which would be relatively small and expected to be aware of privacy issues, complaints would need to be directed to the owners corporation itself, where sensitive matters would get broader exposure.

Stakeholders also suggested that the addition of an ability to refer a dispute for expert determination would be a useful avenue for resolving certain types of disputes.

The following stand-alone option to address this issue is presented for feedback.

Option 11B: Revise Model Rule 6

Under this option, Model Rule 6 would be revised to:

- replace the requirement for the parties to meet within 14 working days of the dispute coming to the attention of all parties with an obligation to meet within 28 days of the owners corporation's receipt of the complaint
- provide for referral of disputes for expert determination, and
- provide for a grievance sub-committee (with complaints going directly to it rather than the owners corporation).

This option is consistent with the approach to internal dispute resolution under Model Rules in the Associations Incorporation Reform Act, which provide for the appointment of a mediator and require that each party to the dispute be given an opportunity to be heard. However, it might be considered inconsistent with the desire for speedy dispute resolution processes.

Question

31 How well do options 11A and 11B address the issues raised about the role of owners corporations in dispute resolution and the procedures under Model Rule 6?

4.2 Civil penalties for breaches of owners corporations rules

Issue

The maximum civil penalty that VCAT can impose for a breach of an owners corporation's rules of $250 is inadequate to deter breaches, and owners corporations have little incentive to apply to VCAT for penalties as it is a time-consuming process and the penalties go into the Victorian Property Fund.

Stand-alone option for the amount of civil penalties

- **Option 12A** – Increase the maximum civil penalty to $1,100.

Alternative options for the payment of civil penalties

- **Option 12B** – Allow owners corporations to impose and retain penalties.
- **Option 12C** – Retain VCAT's power to impose penalties but allow owners corporations to retain penalties.
- **Option 12D** – Allow owners corporations to impose penalties but retain the requirement to pay civil penalties to the Victorian Property Fund.

4.2.1 Civil penalty maximum amount

Background

Currently under the Owners Corporations Act, VCAT may impose a civil penalty of up to $250 for breaches of the rules. This amount has not changed since the Act commenced in 2006.

Stakeholder feedback

There was general agreement that the current maximum civil penalty for a breach of the owners corporation rules is inadequate as a deterrent, noting that:

- New South Wales has recently increased its maximum civil penalties to $1,100 for a first breach and $2,200 for a subsequent breach, and
- the maximum civil penalty for a breach of the proposed conduct regime for short-stay occupants would be $1,100 under the Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 (Owners Corporations Amendment (Short-stay Accommodation) Bill).

The following stand-alone option to address this issue is presented for feedback.

Option 12A: Increase maximum civil penalties to $1,100

Under this option, the maximum civil penalty would be increased to $1,100, in line with the maximum civil penalty for a breach of the proposed conduct regime for short-stay occupants under the Owners Corporations Amendment (Short-stay Accommodation) Bill.

While this option might address the issue raised, it might not completely address the issue of owners corporations' incentive to pursue civil penalty actions.

4.2.2 Imposition and payment of civil penalties

Background

Currently under the Owners Corporations Act civil penalties are imposed by VCAT and must be paid into the Victorian Property Fund (established under the *Estate Agents Act 1980*) for public-purpose uses. Very few penalties have been imposed since the Act commenced in 2006.

Stakeholder feedback

It was suggested that the requirements for penalties to be imposed by VCAT and to be paid into the Victorian Property Fund explain the low number of penalties imposed, as it reduces the incentive for owner corporations to commit the time and expense necessary to pursue penalty actions.

There was a view that if owners corporations are given the power to impose and retain penalties, many more breaches of the rules would be pursued as owners corporations would be compensated for the breaches. This in turn would establish a greater deterrent for breaches of the rules. On the other hand, there was concern that owners corporations might abuse such a power to victimise unpopular lot owners.

Three alternatives to address this issue are presented for feedback.

Option 12B: Allow owners corporations to impose and retain penalties

Under this option, owners corporations would be allowed to impose and retain civil penalties, with a right of appeal to VCAT by the offender where the burden of proof would be on the owners corporation (as is the case in South Australia).

If there were concerns about abuse of power, that could be alleviated by retaining the current maximum penalty level ($250).

This option might minimise the time and expense in pursuing penalties and maximises owners corporations' incentive to do so. However, it might also maximise the possibility of any abuse of the power.

Option 12C: Retain VCAT's power to impose penalties but allow owners corporations to retain penalties

Under this option, the power of VCAT to impose penalties would be retained but the penalties would go to the owners corporation (as is the case in New South Wales).

This option might minimise the possibility of abuse of power while increasing the incentive for owners corporations to pursue penalties, although the time and expense of applying to VCAT may not always warrant action by the owners corporation.

Option 12D: Allow owners corporations to impose penalties but retain the requirement to pay civil penalties to the Victorian Property Fund

Under this option, owners corporations would be allowed to impose penalties, with a right of appeal to VCAT by the offender, where the burden of proof would be on the owners corporation, but the penalties would still be paid to the Victorian Property Fund.

This option might minimise the time and expense involved in pursuing penalties and tends to minimise the possibility of abuse of power. However, it might also reduce the incentive of owners corporations to pursue actions.

Question

32 What are the benefits and risks of increasing the amount of the civil penalties for breaches of the rules?

33 Which option for reforming the imposition and payment of civil penalties achieves the best balance between fairness and effectiveness, and why?

4.3 Initiating legal proceedings

Issue

The current requirement for a special resolution to initiate any legal proceedings except a debt-collection action in VCAT is too difficult to achieve in most situations leaving owners corporations unable to pursue necessary or desirable legal actions.

Alternative options

- **Option 13A** – Lower the threshold to an ordinary resolution for any legal action.
- **Option 13B** – Lower the threshold to two-thirds support for any legal action.
- **Option 13C** – Apply different thresholds for actions in different Courts.

Background

An owners corporation must not bring legal proceedings unless it is authorised to do so by a special resolution, except for an application to VCAT to recover fees and other money or to enforce the rules of the owners corporation, which only require an ordinary resolution. Special resolutions require the support of 75 per cent of lot owners and can be difficult to pass due to the apathy of lot owners, and can be blocked by a minority of lot owners.

Stakeholder feedback

Feedback confirmed that many owners corporations experience difficulties in commencing legal proceedings (other than debt recovery actions in VCAT) because of the requirement to obtain a special resolution. There was strong support for lowering the threshold to that for an ordinary resolution.

It was reported that lowering the threshold would make it harder for minority interests to block legitimate legal action desired by the majority of lot owners and make it easier for owners corporations with a substantial number of unengaged lot owners to progress necessary (and sometimes urgent) legal action.

Implicitly or explicitly, submissions noted that the current provision of the Owners Corporations Act - whereby a lot owner can apply to VCAT for an order authorising them to commence proceedings on behalf of the owners corporation, in the absence of the appropriate resolution – is insufficient.

That may partly be related to the fact that the power of a single lot owner to do this is only exercisable in relation to an ‘owners corporation dispute’, which is defined in the Owners Corporations Act as a dispute arising under the owners corporation rules, or under the Act or regulations. Therefore, it excludes many types of legal actions against parties *external* to the owners corporation.

Support for retaining the status quo was on the basis of preventing over-zealous fee-recovery actions in courts (which are more costly for the resident than in VCAT) and encouraging owners corporations to resort to alternative dispute resolution processes, with a suggestion that a special resolution should also be required for debt recovery actions in VCAT.

While there was support for lowering the voting threshold, there were differing views as to what that threshold should be, especially given the cost implications for owners corporations in pursuing legal actions, particularly unsuccessful legal actions.

There was some support for simply lowering the threshold to an ordinary resolution for all types of actions, noting that there is already some safeguard in the Act for a special resolution for any levy (including a levy to raise money for legal fees) that would entail expenditure of more than twice the annual fees of the owners corporation.

There was some support for reducing the voting threshold although not to that for an ordinary resolution, but for instance to a two-thirds majority (66 per cent).

Some submissions suggested that the threshold should differ according to the nature of the legal proceedings contemplated. It was suggested that the current requirement of a special resolution to pursue a matter in the Magistrates Court, which cannot hear matters over $100,000, should be dispensed with but should be retained for

actions in the County or Supreme Courts, both of which have an unlimited monetary jurisdiction and where legal costs can be enormous.

It was also suggested that VCAT should be empowered, in the particular circumstances of a case, to order that an ordinary resolution is sufficient.

Three alternatives to address this issue are presented for feedback.

Option 13A: Lower the threshold to an ordinary resolution for any legal action

Under this option an ordinary resolution would be required to commence any legal proceeding. The current safeguard for a special resolution for any levy that would entail expenditure (for example, by borrowing or drawing from general funds) of more than twice the annual fees of the owners corporation would be expanded so that it covered any expenditure on legal proceedings of more than twice the annual fees. If there were progressive levies or drawings from general fees, a special resolution would be required for any levy or drawing that would take the accumulated amount over that limit.

While this option might minimise the restrictions on owners corporations commencing legal actions, it might also remove a safeguard against the possibility of incurring onerous legal costs as the more stringent requirement of a special resolution would only be activated at the level of twice the annual fees.

Option 13B: Lower the threshold to two-thirds support for any legal action

Under this option, the voting threshold for commencing legal proceedings would be reduced to 66 per cent.

The benefits of this option are that it would ensure a clear majority of lot owners supported legal action but without having to meet the exacting requirement of obtaining a special resolution. However, in doing so, it might weaken the safeguard against the possibility of incurring onerous legal costs. It might also make for some extra complexity by introducing a fourth voting threshold into the Act (after ordinary, special and unanimous resolutions).

Option 13C: Apply different thresholds for actions in different Courts

Under this option, the voting threshold would be reduced to an ordinary resolution for any action in the Magistrates Court and for any action in VCAT below the jurisdictional limit of the Magistrates Court ($100,000) without prejudice to the current provisions of the Act relating to actions in VCAT to recover debts from lot owners. The requirement of a special resolution would be retained for commencing actions in the County and Supreme Courts; however, VCAT's power to authorise a lot owner to commence proceedings on behalf of an owners corporation would be extended to authorising the commencement of any legal action (i.e. not just an 'owners corporation dispute').

In such applications for authorisation, where an unsuccessful vote on a special resolution to commence the proceeding reveals that an ordinary resolution would have been passed, the burden of proof would be on the person opposing the application to show why the application should not be granted. Where there has not been such a vote or where any vote shows that an ordinary resolution would not have been passed, the burden of proof would be on the applicant.

This option seeks to more finely tune the current arrangements by retaining the safeguard of a special resolution where, in effect, the 'stakes are higher', while also providing a more flexible procedure for circumventing that requirement by application to VCAT. However, legal actions in the Magistrates Court can still be significantly more expensive than in VCAT, and this option would remove the special resolution safeguard for such actions.

Questions

34 Which option, and why, best balances the need for owners corporations to be able to commence legal actions with protection for those lot owners opposed to an action?

35 If Option 13A was adopted, would the current provision of the Owners Corporations Act that empowers VCAT to authorise a lot owner to commence proceedings on behalf of an owners corporation still be necessary?

36 If Option 13B was considered appropriate but the 66 per cent threshold was considered insufficient to overcome the problems identified, would a further reduction to 60 per cent be appropriate?

5 Differential regulation of different-sized owners corporations

This Chapter sets out stakeholder feedback and presents options on the differential regulation of different-sized owners corporations.

Issue

The current division of owners corporations into 'prescribed owners corporations', 2-lot subdivisions and those in-between, and the different levels of regulation to which they are subject, does not adequately regulate owners corporations.

Alternative options

- **Option 14A** – Introduce three new tiers of owners corporations.
- **Option 14B** – Introduce a four tiered system of owners corporations.

Background

Currently under the Owners Corporations Act, different obligations apply depending on the size of the owners corporation. There are three tiers of regulation:

- 2-lot subdivisions, which are exempt from large portions of the Act
- owners corporations between 3 and 99 lots, which are subject to a higher level of regulation, and
- the largest owners corporations (more than 100 lots or more than $200,000 in annual fees, called 'prescribed owners corporations'), which are subject to the greatest level of regulation.

Stakeholder feedback

Feedback to the review indicated that there is a need to lower the threshold for 'prescribed owners corporations', particularly to ensure that more owners corporations are required to have mandatory maintenance plans and maintenance funds.

It was also apparent that there are inactive owners corporations at the smaller end of the scale that are not meeting their obligations under the Owners Corporations Act. This is of particular concern in relation to public liability insurance cover for common property and insurance of the building itself.

While the common property in such owners corporations may be small and easy to maintain (for example, a common drive way, a set of gates, a mail box or a strip of lawn and garden) stakeholders were concerned about the significant costs that could accrue to the owners corporation (and lot owners) if there is no insurance coverage (for example, if someone is injured on common property).

On the other hand, it was submitted that most of the Act should not apply to owners corporations where the only common property is shared services. In these 'services only' owners corporations, the developer has arranged for utility company to install common meters, designated as common property, with the developer installing sub-meters for each lot. This arrangement takes advantage of cheaper utility connection costs for meters to common property, as opposed to the higher cost of having utility company to install separate meters on each lot.

In these subdivisions, there is no land or building that is common property and that would need to be insured. In all respects other than the shared service, each unit in such a subdivision is unconnected to the other units.

The two options that have been developed would formalise the tiered levels of responsibility that apply under the Owners Corporations Act.

The Associations Incorporation Reform Act provides a guide to how a formalised tiered approach could work in practice. This Act establishes three tiers of incorporated associations designed to cover the broad range of

incorporated associations in Victoria, ranging, for example, from small sporting clubs through to the Melbourne Cricket Club.

Both options adopt a tiered approach; however, Option 14B provides a continuing exemption for 2-lot subdivisions from certain requirements of the Owners Corporations Act.

Option 14A: Introduce three new tiers of owners corporations

This option formalises a tiered approach to obligations by classifying owners corporations into three new tiers, as follows:

- Tier 1: 51 lots or more
- Tier 2: 10–50 lots, and
- Tier 3: less than 10 lots

Table 1 provides an overview of the mandatory requirements proposed for each of the tiers under this option. An outline of the proposed requirements for each of the tiers is provided below while further details are specified in the relevant options in this paper.

These three new tiers would replace the three current tiers. As a result, more owners corporations would be subject to obligations such as increased financial scrutiny and maintenance requirements.

These measures are designed to respond to the feedback that the current 'lighter touch' approach to the regulation of owners corporations with less than 100 lots or annual fees of $200,000 is not working. It also responds to the need for greater regulation, particularly to ensure that maintenance and financial obligations are being carried out.

The proposed new tiers provide graduating levels of obligation depending on the size of the owners corporation. This recognises the increased complexities arising in large owners corporations and multi-story buildings where the consequences of neglect or unforeseen events may be disastrous and have public implications.

In determining the tiers for the purposes of this paper, stakeholder feedback was taken into consideration, in particular the significant support for expanding the thresholds for mandatory maintenance plans and funding.

The issues of inactive and dysfunctional owners corporations were also taken into consideration and this option (together with other options outlined in this paper) attempts to address those issues.

Table 1 – Overview of proposed requirements for new tiers of owners corporations for Option A

	Financial statements	Audit	Mandatory building & public liability insurance	Mandatory committee	Mandatory maintenance plan/fund	Mandatory professional manager	Contingency Fund
Tier 1 (51 lots or more)	Yes	Independent audit	Yes	Yes	Yes	Yes	Yes
Tier 2 (10-50 lots)	Yes	Independent review	Yes	Yes	Yes	No	No
Tier 3 (less than 10 lots)	Yes if fees are levied	No audit or review	No (building) Yes (public liability)	No	No	No	No

Outline of proposed requirements for Tier 1 owners corporations

The obligations for Tier 1 owners corporations would effectively mirror the existing requirements for 'prescribed owners corporations' with additional requirements to establish a contingency fund and employ a professional manager.

This would have the effect of significantly lowering the threshold for the auditing requirement for financial statements to include owners corporations of between 51 and 99 lots.

Outline of proposed requirements for Tier 2 owners corporations

Tier 2 would capture a large proportion of 'older style' properties that are currently not required to have a maintenance plan or fund.

A new obligation imposed on Tier 2 owners corporations would be that they have their financial statements independently reviewed by an accountant, as distinct from audited by a registered auditor, in the same way as Tier 2 incorporated associations under Part 7 of the Associations Incorporation Reform Act. Other new obligations for Tier 2 owners corporations would ensure that all owners corporations with more than 10 lots have maintenance plans and maintenance funds.

These requirements would enable lot owners to have confidence in the actions of their committees and professional managers.

Outline of proposed requirements for Tier 3 owners corporations

Tier 3 is designed to capture the smallest owners corporations, comprising less than 10 lots.

Due to their size, many Tier 3 owners corporations would be inactive. Therefore, it is not proposed to make building insurance mandatory but to give lot owners the option of individually insuring their own lot and their liability for the common property, if collective insurance by the owners corporation is unable to be achieved.

However, this approach would not be applicable to public liability insurance, which involves claims by third parties injured on the common property. The major risk posed by these small owners corporations is being inadequately insured for such claims and it is proposed that Tier 3 owners corporations be required to take out public liability insurance.

Because Tier 3 owners corporations would be collectively insured, at least for pubic liability insurance, fees would be collected and so they would be required to prepare annual financial statements.

This option does not impose any other mandatory obligations on Tier 3 owners corporations. However, it is open to Tier 3 owners corporations to form committees, establish maintenance plans and maintenance funds, and engage professional managers.

Option 14B: Introduce a four tiered system of owners corporations

Under Option 14A, all 2-lot subdivisions and 'services only' owners corporations would fall within Tier 3.

Under this option, 2-lot subdivisions and 'services only' owners corporations would be removed from Tier 3 entirely and be treated as a separate tier, Tier 4.

The current exemptions that apply to 2-lot subdivisions under the Owners Corporations Act would continue to apply and only general obligations would apply to 'services only' owners corporations, such as the duty to act in good faith and the prohibition on carrying on a business.

Questions

37 Which option, and why, represents the most appropriate way to differentiate the level of regulation of owners corporations according to their size?

38 Is the size of owners corporations in each tier appropriate for the requirements imposed on them and, if not, what should be the size requirement for each tier?

6 Finances, insurance and maintenance

This Chapter sets out stakeholder feedback and presents options on the following issues concerning finances, insurance and maintenance arrangements for owners corporations:

- defaulting lot owners
- insurance
- maintenance plans and maintenance funds, and
- increased costs and expenditure arising from lot use.

6.1 Defaulting lot owners

Issue

The current process for recovering unpaid fees from defaulting lot owners is not cost-efficient and imposes inequitable burdens on other lot owners.

Stand-alone options for debt recovery

- **Option 15A** – Require lot owners to lodge bonds for unpaid fees.
- **Option 15B** – Permit owners corporations to adopt payment plans in 'hardship' cases.
- **Option 15C** – Permit owners corporations to recover pre-litigation debt collection costs from lot owners.
- **Option 15D** – Permit VCAT to make default judgements.

Alternative options for litigation costs

- **Option 15E** – Align VCAT's costs power with those of the Magistrates Court.
- **Option 15F** – Empower VCAT and courts to award all reasonable costs.

Background

The Owners Corporations Act allows owners corporations to impose penalty interest on late payments of fees or charges, if authorised by a resolution at a general meeting.

However, when a lot owner is late with their payment or they fail or refuse to pay, the debt collection costs incurred by the owners corporation fall into two categories:

- those incurred before a matter proceeds to litigation (or before the debt is paid without proceeding to litigation), and
- those incurred in litigating a matter through VCAT or the Magistrates Court.

The Act does not allow owners corporations to levy a defaulting lot owner for the pre-litigation costs it incurred nor does it allow owners corporations to recover from the defaulting lot owner the difference between the litigation costs awarded to it by VCAT or the court and the actual litigation costs it incurred.

If the matter is litigated in VCAT, as most are, it may be that *no* litigation costs are awarded to the owners corporation, as there is no presumption in VCAT that a successful party is awarded its litigation costs (as is the case in the courts).

Stakeholder feedback

Issues raised included concerns that owners corporations were 'out of pocket' when they pursued the recovery of debts from lot owners, and there was general support for improving the capacity of owners corporations to recover pre-litigation debt collection costs from defaulting lot owners.

However, some submissions pointed to the fact that under the *National Consumer Credit Protection Act 2009*, legal and administrative costs incurred by a creditor prior to legal action are generally not recoverable. It was also noted

that the mutually-dependent relationship between lot owners is not analogous to the commercial creditor-debtor relationship.

A key issue identified was the difficulty for owners corporations in recovering moneys owed by lot owners and the consequences for other lot owners. Some of the problems raised were:

- difficulties in budgeting if a large number of lot owners have not paid their fees
- inequity for non-defaulting lot owners where the owners corporation's costs in pursuing debts may not be recovered or only partially recovered from the defaulting lot owner, or are as much as or greater than the debt
- further inequity for non-defaulting lot owners who effectively subsidise a defaulting lot owner, potentially for years, before the debt becomes sufficiently large to justify the owners corporation incurring the costs to recover it
- inability to obtain default judgements in VCAT for undefended debt-recovery matters, necessitating unnecessary expenditure of resources in attending a hearing to obtain a judgement, and
- even when VCAT orders a defaulting lot owner to pay outstanding fees, it may allow the defaulting lot owner to pay by instalments, meaning further delay in recovering the debt.

Submissions noted that VCAT generally adheres to its policy of requiring each side to bear its own litigation costs in owners corporation debt-collection matters. While the Magistrates Court's basic position is that the winner gets its litigation costs according to a statutory scale, submissions noted that the Magistrates Court is rarely used for debt collections because a special resolution is required to litigate in the courts (only an ordinary resolution is required for litigation in VCAT).

It was also noted in submissions that where VCAT or the Magistrates' Court do award costs, the amount almost invariably falls well short of the actual litigation costs incurred by the owners corporation.

There were some reservations expressed about whether owners corporations should be able to recover pre-litigation costs in excess of the amount owed and it was suggested that placing a limit on the amount of such costs would discourage owners corporations from acting hastily and excessively. On the other hand, some stakeholders considered that owners corporations should act quickly to recover a debt and if the matter becomes protracted and costs escalate, the ultimate blame for that lies with the defaulting lot owner.

Most stakeholders did not consider that recourse to the internal dispute resolution process was suitable or appropriate for debt recovery from lot owners. Instead, it was seen as another way that lot owners could delay payment.

It was suggested that the problems caused by defaulting lot owners could potentially be avoided if owners corporations could require bonds to be lodged by lot owners against such defaults, which is essentially a prepayment of fees.

Some stakeholders considered that capacity to pay and hardship should be considerations in any debt-recovery discussion. The point was made that if financial hardship policies are in place, owners corporations could identify earlier lot owners who are genuinely experiencing difficulty in paying fees and allow for payment arrangements that avoid incurring recovery costs that may, in any case, only result in a VCAT or court-ordered instalment order.

There was little support for allowing owners corporations to offer discounts for early payment of fees. Some submissions considered that it would simply encourage owners corporations to engage in 'zero sum games' whereby they set their fees according to the estimated amount of discounts that would be payable, in order to meet the amount budgeted for expenditure. In other words, it was felt that there would be no real benefit to owners corporations but that the practice could result in divisiveness as it could appear to reward those who simply comply with their obligations while those who do not or cannot pay on time, and who are liable to pay penalty interest, might feel doubly penalised.

There was some support for regulating the provision by owners corporations of utility services to lot owners, in a similar way to the regulation of such services by landlords to tenants under the Residential Tenancies Act. On the other hand, others saw this as an unnecessary interference in the affairs of owners corporations and that equity issues should be left to consumer utility laws. No option for legislative change is put forward in relation to this issue.

In regard to the 'benefit principle', the experience was that it is rarely applies. Concern was expressed that any attempt to clarify the operation of the principle in the Owners Corporations Act might be counterproductive. As such, no options for legislative change are put forward in relation to this issue.

Finally, submissions from lot owners in mixed-use buildings reported that some lot owners use their lots in ways that cause more wear and tear on common property and that give rise to other costs that are not covered by any differential lot liability attached to those lots. They suggested that owners corporations should be able to recover these extra costs from such lot owners.

The following stand-alone options to address this issue are presented for feedback.

Option 15A: Require lot owners to lodge bonds for unpaid fees

Under this option, owners corporations would be given the authority to require lot owners to lodge a bond from which unpaid fees could be drawn, with the balance refunded to lot owners upon the sale of their lot. If the owners corporation could not get the consent of the lot owner for a draw-down, it would need to obtain an order from VCAT.

The fee bonds could be held by the Residential Tenancies Bond Authority (RTBA), the owners corporation itself or by the owners corporation manager. If bonds were held by the owners corporation or its manager, it would be easier for owners corporations to recover unpaid fees than applications to the RTBA.

The amount of the bond could be left to owners corporations to set although a maximum amount could be set out in the Act, for example, fees for a quarter of a year.

The power to require a bond could include requiring the bond to be maintained at the set level, in the event of any draw-down by the owners corporation.

Any application of bonds to *new* lot owners would be by ordinary resolution but any application to *existing* lot owners would be by special resolution, given that it would represent a significant departure from lot owners' expectations.

For those interested in buying a lot, any bond amount would be required to be disclosed in the owners corporation certificate and settlement of a sale contract would be conditional on payment of the bond (which could be dealt with as an adjustment between seller and buyer).

This option provides for defaulting lot owners in a way that tends to minimise owners corporations' exposure to debt collection costs, particularly if bonds are retained in owners corporations' accounts or those of their managers. However, it might be said to constitute a financial imposition on lot owners, particularly those who find it difficult to pay lump sums and those who never default.

Option 15B: Allow owners corporations to adopt payment plans in 'hardship' cases

Under this option, owners corporations would be given the power to make rules providing for the payment of fees by instalments by lot owners in financial difficulty, with individual arrangements requiring the committee's endorsement.

If a lot owner defaulted on a payment plan, the full amount of the remaining debt would become immediately payable and the owners corporation would have the option of sending a demand for payment to the lot owner or applying immediately to VCAT or the courts to recover the amount owing.

Where a lot owner enters into a financial hardship arrangement, no additional fees or charges (such as penalty interest) would be permitted.

This option provides for lot owners in financial difficulty, without requiring owners corporations to do so, and may avoid wasted debt-collection costs. However, it may be difficult for owners corporations to ascertain the bona fides of applicants and non-defaulting lot owners may dispute the process.

Option 15C: Allow owners corporations to recover pre-litigation debt-collection costs from lot owners

Under this option, owners corporations would be allowed to levy lot owners with the reasonable legal and administrative costs of recovering debts where a matter does not proceed to litigation or, if it does, with the reasonable legal and administrative costs incurred prior to the commencement of legal proceedings.

This option would address the problems raised about debt collection in this context but could reduce the incentive for owners corporations to resolve disputes before taking debt recovery action and could result in further disputes about the reasonableness of the costs sought to be recovered.

Option 15D: Empower VCAT to make default judgements

Under this option, owners corporations would be able to obtain default judgements in undefended debt-recovery actions against lot owners at VCAT, in the same way that default judgements can be obtained in the courts.

This option would make it simpler and cheaper for owners corporations to obtain judgements in undefended matters but might be considered to be inconsistent with the informality and directness that is intended to characterise VCAT's operations. If the option to reduce the voting threshold for legal actions in the Magistrates Court is adopted, this might make it easier for owners corporations to seek default judgements in that court, although that might still be somewhat more expensive than obtaining a default judgement in VCAT. On the other hand, it might be said that disputes between owners corporations and lot owners are so different to those between unrelated parties at arm's length that special efforts should be made to reduce owners corporations' costs.

Litigation costs

Two alternatives to address this issue are presented for feedback.

Option 15E: Align VCAT's costs power with those of the Magistrates Court

Under this option, VCAT's power to award costs in an action by an owners corporation to recover a debt from a lot owner would be on the same basis as that of the Magistrates Court, i.e. the basic position would be that the successful party would be entitled to its costs according to the applicable statutory costs scale.

This option would address the problems raised about debt collection in this context but, normally, there would still be a shortfall between the costs awarded and the actual cost incurred. Even so, it might still reduce the incentive for owners corporations to resolve disputes before taking legal action. It may also increase the incentive for owners corporations to use lawyers in VCAT (although this requires the relevant VCAT member's approval) which might increase costs and reduce VCAT's informality.

Option 15F: Empower VCAT and courts to award all reasonable costs

Under this option, the presumption in VCAT or a court would be that the successful party in an action by an owners corporation to recover a debt from a lot owner is entitled to all their reasonable litigation costs, rather than the costs as assessed from the applicable statutory costs scale.

This option accounts for the problem that normal cost awards, whether by VCAT or the courts, do not equate to the litigation costs actually incurred. Again, it might reduce the incentive for owners corporations to resolve disputes before taking legal action and may also increase the incentive for owners corporations to use lawyers in VCAT (although this requires the relevant VCAT member's approval) which might increase costs and reduce VCAT's informality.

Questions

39 What other options could be considered to enable owners corporations to recover debts?

40 Should the amount of any fee bond be left to owners corporations to set and, if so why?

41 Should a maximum amount be set out in the Act and, if so, what should that amount be?

42 Would it be more efficient if fee bonds were held by the owners corporation itself, the owners corporation manager or the RTBA?

43 Should owners corporations be able to recover costs that exceed the debt or should they be capped at level of the debt?

44 Which of the 'litigation costs' options better achieves a balance between financial equity for lot owners, encouraging alternative dispute resolution and discouraging unnecessary use of lawyers?

6.2 Insurance

Issues

There are a range of issues relating to the insurance obligations of owners corporations. However, it was unclear from submissions whether only minimal changes are required - to increase the level of public liability insurance and correct anomalies concerning plans of subdivision that contain separate buildings - or whether more substantial changes are required to allow owners corporations to impose a range of levies relating to insurance issues.

Alternative options

- **Option 16A** – Increase the level of public liability insurance and correct anomalies concerning plans of subdivision that contain separate buildings.
- **Option 16B** – Option 16A plus allowing the owners corporations to impose a range of levies relating to insurance issues.

Background

Owners corporations, except those in two-lot subdivisions, must take out:

- reinstatement and replacement insurance for the common property, including the owners corporation's portion of any shared services, and
- public liability insurance for the common property to a minimum liability of $10 million for any one claim.

Additionally, prescribed owners corporations (those with more than 100 lots, or levying more than $200,000 in annual fees a year) must obtain a valuation of the buildings they are liable to insure at least every five years.

Issues Paper 2 identified a number of issues with owners corporations' insurance including the adequacy of the prescribed minimum amount of public liability insurance, whether the requirement for a building valuation every five years remains relevant, and the need for other types of insurance.

Stakeholder feedback

There was some support for increasing the minimum public liability insurance coverage to either $20 million (the new level in New South Wales) or even $30 million, to take account of rising court payouts for negligently-caused injuries. It was also noted that State and local government contracts often require contractors to take out $50 million of cover.

It was noted that the premium increase involved in going from $10 million to $20 million of cover would be substantial but that it would not be much more if the level was increased to $30 million.

There was support for owners corporations to be required to take out:

- professional indemnity insurance for committee members, to complement or supplement the immunity for committee members against claims under section 118 of the Owners Corporations Act
- any fidelity guarantee option in the mandatory building policy (which covers defalcations of owners corporation money by the manager or committee members and which is usually but not invariably included in the building policy), and
- contents insurance for items on the common property, such as carpet, artworks and white goods in communal laundries.

Submissions noted that the section 118 immunity is not complete, as it does not cover the costs incurred by a committee member in successfully defending a legal action by relying on the immunity.

There was a view that providing more complete protection for committee members would encourage more lot owners to participate in committees. However, while these insurances may be desirable, no compelling reason was put forward as to why these types of insurance should be made mandatory and, therefore, no option for legislative change is put forward in relation to this issue.

The exclusion of 2-lot subdivisions from the public liability insurance requirement was criticised on the basis that there is no link between the size of a development and the risk of injury to third parties on the common property.

Problems were noted with the insurance and valuation requirements under sections 61 and 65 of the Owners Corporations Act as they relate to plans of subdivision that contain separate buildings, one or more of which is multi-level, each with its own owners corporation. Under these provisions, owners corporations in multi-level buildings are required to take out building insurance and public liability insurance for all lots and the common property.

If these provisions are applied literally to a plan of subdivision that:

- contains separate buildings
- one or more of which is multi-level, and
- each building has its own owners corporation,

then *each* owners corporation must insure *all* the lots on the plan.

Further, in the case where only one of the buildings is multi-level, the owners corporation for that building must insure all the lots on the plan.

Similar issues arise with the requirement for 'prescribed owners corporations' to obtain five-yearly valuations of all buildings they are liable to insure. If applied literally to a plan of subdivision that:

- contains separate buildings
- one or more of which is multi-level
- each has its own owners corporation, and
- one or more is a prescribed owners corporation,

then *each* owners corporation must obtain valuations of *each* building on *each* lot in the plan.

Further, in the case where only one of the buildings is multi-level and the owners corporation is a prescribed owners corporation, that owners corporation must obtain valuations of each building on each lot in the plan.

It was suggested that, in relation to these subdivisions, the requirements were intended to apply *separately* to each owners corporation and its multi-level building.

It was noted that owners corporations in *multi-level* buildings are required to insure all lots in the plan of subdivision and that owners corporations *without* common property may decide by unanimous resolution that each lot owner should be responsible to insure their lot. However, the position of 'single dwelling' (townhouse) subdivisions with common property is unclear. It was suggested that in single dwelling subdivisions owners corporations were not intended to be required to insure all lots and, therefore, that lot owners should be able to decide by unanimous resolution to be individually responsible for the insurance of their lots.

It was also suggested that, as is the case in Queensland, the cost of building insurance should be levied according to lot entitlement, not lot liability. This was on the basis that lot entitlement better reflects how lots will benefit from such insurance because it reflects lot size or value.

There was little support for allowing lot owners to opt out of mandatory owners corporation insurance and take out their own policies as it would be impossible to monitor whether those policies were actually taken out (and renewed) or were adequate.

Some submissions supported enabling owners corporations to:

- levy lot owners for excesses payable on claims and on increased premiums resulting from claims, where the claim arose from the culpable or wilful act or the gross negligence of a lot owner, their lessee or guests
- levy lot owners for the cost of damage to common property caused by them, their lessees or guests that was not covered by insurance or where the cost is less than the excess payable
- levy lot owners for the excess where a claim relates only to their lots, i.e. not to the common property or to all lots (as is the case in Tasmania), and
- apply differential levies for insurance policy premiums where a particular use of a lot increases the risk (as is the case in New South Wales).

Two alternatives to address these issues are presented for feedback.

Option 16A: Increase the level of public liability insurance and correct anomalies concerning plans of subdivision that contain separate buildings

Under this option, the only changes to the insurance requirements under the Owners Corporations Act would be to increase the public liability insurance level to that in New South Wales ($20 million). Amendments would also be made to sections 61, and 65 of the Owners Corporations Act to address the problems outlined above by ensuring that the requirements apply separately to each owners corporation and its multi-level building. Also, owners corporations in single dwelling subdivisions with common property would be able to decide by unanimous resolution section to enable lot owners to take individual responsibility for insuring their lots.

This option addresses the basic (and mostly uncontroversial) issues relating to the insurance provisions of the Act but not the more contentious issues regarding cost recovery levies and the basis for levying building insurance premiums.

Option 16B: Option 16A plus allowing owners corporations to impose a range of levies relating to insurance issues

Under this option, further and more substantial changes to the Act's insurance provisions would be made to enable owners corporations to

- levy the cost of building insurance premiums on the basis of lot entitlement
- levy lot owners with excesses payable on claims and on increased premiums resulting from claims, where the claim arose from the culpable or wilful act or the gross negligence of a lot owner, their lessees or guests
- levy lot owners for the cost of damage to common property caused by them, their lessees or guests that is not covered by insurance or where the cost is less than the excess payable
- levy lot owners for the excess where a claim relates only to their lots, i.e. not to the common property or to all lots, and
- apply differential levies for insurance policy premiums where a particular use of a lot increases the risk.

This option seeks to more finely tune the insurance provisions of the Act to enable owners corporations to achieve more equity. However, the application of at least some of these powers might lead to disputes within owners corporations.

Questions

45 What would be the cost of increasing the minimum public liability insurance amount to $20, $30 and $50 million?

46 How might the equity achieved by the powers proposed under Option 16B outweigh the potential problems?

47 In relation to the proposal under Option 16B for differential levies for insurance policy premiums (where a particular use of a lot increases the risk) should owners corporations be:

(a) required to apply to VCAT for the appropriate order, or

(b) permitted under the Act to apply the appropriate levy as of right, leaving it to an aggrieved lot owner to apply to VCAT for any remedial order?

6.3 Maintenance plans and maintenance funds

Issue

The existing requirements for maintenance plans and maintenance funds are inadequate to address maintenance requirements, particularly in apartment buildings with extensive infrastructure.

Stand-alone options

- **Option 17A** – Introduce new thresholds for mandatory maintenance plans and funds.
- **Option 17B** – Require mandatory funding of mandatory maintenance funds.
- **Option 17C** – Introduce mandatory contingency plans and funds for Tier 1 owners corporations.

Background

The Owners Corporations Act requires 'prescribed owners corporations' to prepare a maintenance plan for major capital items (including lifts, and air conditioning and heating plants) that are expected to require repair and replacement within the following 10 years. The maintenance plan does not have any effect until it is approved by the owners corporation, but there is no set time by which this must be done.

Where the owners corporation approves such a plan, it is required to establish a maintenance fund for the purposes of implementing the plan, and certain moneys are permitted to be paid into the fund, such as any part of the annual fees designated for maintenance. However, even if a plan is approved, there is no express requirement for any portion of annual fees to be set aside to fund the plan.

Stakeholder feedback

There was some support for making maintenance plans and maintenance funds mandatory for all owners corporations, not just for prescribed owners corporations, on the grounds that:

- there is no link between the size of an owners corporation, as measured by the definition of 'prescribed owners corporation' (more than 100 lots or more than $200,000 in annual fees), and the maintenance needs of an owners corporation
- all owners corporations can suffer through public liability claims caused by lack of maintenance of the common property, and
- lot owners in all owners corporations have a duty to each other to maintain the value of their lots, which is affected by the level of maintenance of the common property.

There was also support for simply reducing the threshold for a 'prescribed owners corporation' to fewer lots (13 or more was suggested, with no fee threshold) but include *all* owners corporations in multi-level buildings, regardless of the number of lots.

In relation to owners corporations that are required to have a maintenance fund, there was mixed feedback on whether there should be a requirement to *fund* the plan. Some submissions stated that this matter should be left to owners corporations and that no changes should be made. Others submissions noted that even if no express funding requirement was instituted, then at least the 'approval' step for maintenance plans should be eliminated, i.e. there should be a simple requirement to have a maintenance plan.

However, there was support for an obligation on owners corporations to provide for the funding of the maintenance plan in annual fees.

There was also support for:

- relaxing the current requirement for a special resolution to authorise the use of maintenance funds for *unplanned* works, at least to the extent of allowing such works to be done if the maintenance plan is amended, by ordinary resolution, to include the works, and
- clarifying that owners corporations are not bound only to use the maintenance fund for implementation of the maintenance plan.

On the issue of *contingency* plans and funds, some submissions said that they should be mandatory for all owners corporations, to supplement the maintenance fund in relation to unplanned works or other contingencies, such as litigation costs, especially where the matter is urgent and there is no time to arrange a special levy. These submissions also said that it would be pointless to mandate a maintenance fund without an obligation to maintain it at an adequate level.

On the other hand, it was noted that a requirement for a contingency fund, particularly if a minimum level was also mandated, would undermine the efforts being made for owners corporations to maintain an adequate maintenance fund.

The following stand-alone options to address these issues are presented for feedback.

Option 17A: Introduce new thresholds for mandatory maintenance plans and funds

Under this option, the issue of the appropriate threshold for a prescribed owners corporation would be addressed by providing for three new tiers of owners corporations (see Chapter 5) under which maintenance plans and funds would be mandatory for all owners corporations with 10 lots or more (Tiers 1 and 2).

Tier 1 owners corporations (51 or more lots) currently not within the definition of a 'prescribed owners corporation' would be given 12 months to comply; and 24 months for Tier 2 owners corporations (10 to 50 lots) not within the definition.

Further, unplanned works would be able to be included in a maintenance plan by ordinary resolution and the costs drawn from the fund by ordinary resolution. Owners corporations would not be bound only to use the maintenance fund for implementation of the maintenance plan.

Option 17B: Require mandatory funding of mandatory maintenance plans

Under this option, owners corporations that are required to have a maintenance plan would be required to implement it by designating part of the annual fees for the maintenance fund, unless it had been resolved *not* to approve the plan.

This option addresses the issue of unfunded maintenance plans. However, it effectively requires lot owners to pay extra fees for long-term maintenance, from which they may not benefit and it might be regarded as interfering with their right to deal with the common property as they see fit. On the other hand, without a maintenance fund, the cost of repairing or replacing a major capital item, which benefits current and future lot owners, falls only on current lot owners and the existence of a maintenance fund can be advantageous when selling a unit.

Option 17C: Introduce mandatory contingency plans and funds for Tier 1 owners corporations

Under this option, Tier 1 owners corporations (see Chapter 5) would be required to have a contingency plan detailing the circumstances in which it applies and be required to implement it by designating part of the annual fees for a contingency fund, unless it had been resolved *not* to approve the contingency plan. This requirement would not apply to smaller owners corporations as it would be too onerous for them if they must also have a maintenance fund.

This option addresses the problem of unexpected costs in large owners corporations other than those related to capital items covered by the maintenance plan and fund. The arguments for and against mandatory maintenance funds would also apply to this option.

Questions

48 Which option or options do you prefer for maintenance plans and funds, and how does the option or options address the issue?

49 Should a general obligation be imposed to deposit in a fund the amount necessary to implement the relevant plan, leaving it to individual owners corporations to resolve on the appropriate part of annual fees or should some fixed proportion of fees be set in the Owners Corporations Act?

50 If a general obligation, should the resolution as to the amount to be set aside be an ordinary or special resolution and should it also be stipulated in the Act that the designated part of the fees must be adequate to fund the plan?

51 If a fixed proportion of fees, what should that be for both types of fund?

6.4 Increased expenditure arising from lot use

Issue

Increased costs to owners corporations arising from particular uses of lots that are not factored into their lot liability cannot be recovered and must be shared by all lot owners.

Stand-alone option

- **Option 18** – Allow owners corporations to recover costs arising from particular uses of lots.

Background

The differential costs to the owners corporation arising from particular lots is, or can be, factored into the differential lot liability attached to the lots in the plan of subdivision. However, the initial allocation of lot liability might not have been appropriate (see Section 7.2.2 regarding options for reform of initial settings of lot liability and entitlement) or the use of a lot might change over time, involving more costs to the owners corporation. For example, a unit with lot liability appropriate to long-term residence might be let out as a short-term serviced apartment, which might involve more wear and tear on common property and other expenditure by the owners corporation.

Owners corporations do not have the power to increase the fees for such lots or to impose a special levy on the lot owner to recover the extra costs.

The only way to address this issue under the Owners Corporations Act is to organise a unanimous resolution to amend the plan of subdivision to change lot liability to the appropriate levels. This is difficult, and impossible if the relevant lot owner does not agree, although, in that situation the owners corporation can apply to VCAT for the appropriate order in the absence of a unanimous resolution.

Stakeholder feedback

Stakeholders in buildings where some lots are used for commercial purposes, for example, serviced apartments, and other lots are only used as long-term residences, reported that it was unfair that they had to subsidise these commercial operations through the extra fees they pay towards repairs and maintenance or towards other items, such as increased security measures. For example, higher repair and maintenance fees are caused by the additional wear and tear to the common property arising from the extra traffic the commercial operations generated.

The following stand-alone option to address this issue is presented for feedback.

Option 18: Allow owners corporations to recover costs arising from particular uses of lots

Under this option, where the lot liability attached to a lot does not take into account the extra costs arising from the particular use of the lot, owners corporations would be permitted to increase the fees for that lot to the necessary extent or to impose a special levy on the lot owner to recover extra costs. In the normal way, any such resolution

could be challenged in VCAT on the basis that the owners corporation was not acting honestly and in good faith or that the resolution was oppressive to, unfairly prejudicial to or unfairly discriminated against the lot owner.

This option seeks to address the grievances of one group of lot owners in an owners corporation but might increase disputes.

The amount of extra costs will be clear where a particular use of a lot requires specific works but will not necessarily be clear where a particular use only causes longer-term extra wear and tear. In that case, the owners corporation would need to make an assessment of the extra cost and increase that lot's share of general fees.

Question

52 Where an owners corporation needs to make an assessment of how much of its general repair and maintenance costs arise from a particular use of a lot, what criteria or principles should it apply in making the assessment?

7 Part 5 of the Subdivision Act

Issues Paper 2 included an examination of Part 5 of the Subdivision Act, which provides for the creation of owners corporations, the vesting of and dealings in the common property, and changes to plans of subdivisions.

This Chapter sets out stakeholder feedback and presents options on the following issues concerning the Subdivision Act:

- common seal
- procedures for initial setting of lot entitlement and liability, and
- the sale and redevelopment of apartment buildings.

7.1 Common seals

Issue

The requirement for owners corporation to execute contracts and other official documents with a common seal no longer performs a meaningful function.

Stand-alone option

- **Option 19** – Remove the requirement for an owners corporation to have a common seal.

Background

The Subdivision Act requires every owners corporation to have a common seal and to pass a resolution to authorise the use of the seal on a document. Issues Paper 2 sought feedback on whether this requirement is outdated.

Stakeholder feedback

Feedback on this issue favoured removing the requirement for a common seal on the basis that it is an outdated practice that does not conform to the current requirements for companies. Most stakeholders considered that, as with other types of incorporated bodies, where a transaction has been authorised by the owners corporation, two committee members should be able to sign for the owners corporation.

The following stand-alone option to address this issue is presented for feedback.

Option 19: Remove the requirement for an owners corporation to have a common seal

Under this option, there would be no requirement to have a common seal. Where a transaction has been authorised by the owners corporation, two committee members would be able to sign for the owners corporation.

Question

53 What, if any, risks arise from removing the requirement for owners corporations to have and use a common seal?

7.2 Procedure for initial setting of and changes to lot liability and lot entitlement

Issue

The current process for setting initial lot liability and entitlement does not ensure fairness and the current process for changing lot liability and entitlement requires some improvement.

Alternative option for initial setting of lot liability and lot entitlement

- **Option 20A** – Retain the developers' discretion but place a time limit on their application.
- **Option 20B** – Apply the current criteria for *changes* to lot liability and entitlement to *initial* settings – simple principles.
- **Option 20C** – Set lot liability and entitlement according to more detailed principles.
- **Option 20D** – Set lot liability and entitlement according to specified criteria.

Stand-alone option for changing lot liability

- **Option 20E** – Improve the current provisions for changes to lot liability and entitlement.

7.2.1 Initial settings of lot liability and entitlement

Background

Lot liability determines a lot owner's share of the annual fees and special levies not governed by the 'benefit principle', and lot entitlement determines a lot owner's voting power.

The initial settings of lot liability and lot entitlement on the plan of subdivision are essentially at the developer's discretion. Different developers have different preferences about the settings, depending on such things as how much control they want to retain, their own views of equity issues and how they want to market their developments. This is a reflection, or an incident of the developer's property rights as owner of the land. Any subsequent change by an owners corporation to lot liability and entitlement must have a unanimous resolution and be based on the criteria set out in section 33 of the Subdivision Act.

Issues Paper 2 asked whether matters as important as lot liability and lot entitlement should be at the developer's discretion and what should the criteria be for the initial settings of lot liability and entitlement.

Stakeholder feedback

There was strong support for changing the arrangements for the initial setting of lot liability and lot entitlement, with criticism of practices such as:

- developers retaining lots with disproportionately low liability or disproportionately high entitlement
- lot liability, as well as entitlement, being set according to estimated sale prices, which are affected by factors such as location and amenity that are irrelevant to liability, and
- equal setting of liability and entitlement where lots are of unequal size.

There was also criticism of the fact that while the Subdivision Act sets out criteria for *changing* the settings for lot liability and entitlement, it does not set out the criteria for the initial establishment. This makes it difficult for lot owners to understand the rationale for the initial settings.

There was support for taking the initial allocation of lot liability and lot entitlement away from the discretion of developers and for lot liability and lot entitlement to be set by an independent licensed surveyor.

In terms of the criteria for establishing the initial settings, it was suggested that they should be same criteria as for changes, so that:

- *in setting lot liability*, the surveyor must consider the amount that would be just and equitable for the lot owner to contribute towards the administrative and general expenses of the owners corporation, and

- *in setting lot entitlement*, the surveyor must consider the value of the lot, and the proportion that value bears to the total value of the lots.

Another, more staged approach to establishing the initial settings, was suggested whereby:

- lot entitlement is determined according to the market value of the lot at the time of the lodgement of the plan of subdivision, and
- lot liability is determined on the basis of equality unless there are substantial differences in lot size, in which case it should be based on relative lot size unless:
  - different lot uses have a bearing on consumption of common utilities or the cost of maintaining the common property, in which case it should be based on lot size and use, or
  - the number of occupants has a greater bearing on consumption of common utilities or the cost of maintaining the common property than lot size, in which case it should be based on the number of bedrooms rather than lot size.

The current position for initial lot liability and entitlement is based on the unfettered exercise by developers of their property rights. The Owners Corporations Act also recognises that developers have fiduciary obligations to the owners corporations they create including their application beyond the period the developer controls the owners corporation. The extension or expansion of developers' fiduciary obligations to the owners corporations is discussed in Section 2.1. If it is accepted that developers have fiduciary duties to owners corporations, this could extend to controls over the initial settings of lot liability and entitlement to ensure fairness.

Further, there is a degree of public interest in the regulation of owners corporations to ensure that they are democratically operated. This could extend to ensuring fairness in the initial allocation of lot liability and entitlement, which would promote and underpin the democratic processes established under the Owners Corporations Act.

Four alternatives for a process for setting initial lot liability and entitlement are presented for feedback, three of which envisage a licensed surveyor undertaking the relevant assessments.

Option 20A: Retain the developers' discretion but place a time limit on their application

Under this option, the developer's initial settings would apply for a certain time, say, five or 10 years, at which time they would have to be reassessed. The reassessment could be based on options 20B, 20C or 20D, unless the owners corporation decides by unanimous resolution to affirm the settings. The time period would need to allow room for developers to market their developments as they wish but also allow for the earliest possible introduction of a fairness-based assessment.

This option would not exclude the ability of owners corporations to change lot entitlement or liability by unanimous resolution during the period that the developer's settings applied (of course, the basis for making changes during that period would need to be the same as the basis for changes after that period expires).

This option allows developers to exercise their property rights but places a time limit on their application and allows for owners corporations that are satisfied with the settings. However, where changes to the settings are desired, the problems and expense in organising a reassessment may make it difficult.

This option would not apply to the special situation of owners corporations in retirement villages. The issue of developers who retain control of such owners corporations is considered in Chapter 8.

Option 20B: Apply the current principles for changes to lot liability and entitlement to initial settings – simple principles

This option is based on the principles set out in section 33 of the Subdivision Act for changes to lot liability and entitlement and would require the surveyor:

- *in setting lot liability*, to consider the amount that would be just and equitable for the lot owner to contribute towards the administrative and general expenses of the owners corporation, and
- *in setting lot entitlement*, to consider the value of the lot, and the proportion that value bears to the total value of the lots.

This option is relatively simple and logical inasmuch as it applies the current 'change' principles in the Subdivision Act to the initial settings. The principle for setting lot liability is quite broad, allowing a relatively wide discretion in its

application, and with limited guidance. On the other hand, the principle for setting lot entitlement is relatively narrow, providing more guidance but less discretion. The option removes the developer's discretion, thereby seeking to ensure fairness from the outset and reduce disputes, but constitutes an interference in developers' property rights.

Option 20C: Set lot liability and entitlement according to more detailed principles

Under this option, more detailed principles would be established for the initial settings and for any subsequent changes by unanimous resolution, based on the Queensland model. The surveyor would be required to establish:

- *lot liability* according to –
  - an 'equality principle', i.e., lot liability should be equal unless that is not just and equitable having regard to how the subdivision is structured, the nature, features and characteristics of the lots, and the purposes for which the lots are used, or
  - a 'relativity principle', i.e. lot liability should reflect the relationship between the lots by reference to how the subdivision is structured, the nature, features and characteristics of the lots, the purposes for which the lots are used, the impact the lots may have on the costs of maintaining the common property, and the market values of the lots, and
- *lot entitlement* according to the respective market values of the lots unless that it is not just and equitable having regard to how the subdivision is structured, the nature, features and characteristics of the lots and the purposes for which the lots are used.

This option, like Option 20B, provides principles for the guidance of the surveyor but they are more detailed than those under Option 20B, and, in the case of lot entitlement, provides an additional 'just and equitable' factor. In the case of lot liability, it allows less discretion than under Option 20B in the application of the principles. It removes the developer's discretion, thereby seeking to ensure fairness from the outset and reduce disputes, but constitutes an interference in developers' property rights.

Option 20D: Set lot liability according to specified criteria

Under this option, a more prescriptive approach would operate for the initial settings of lot liability and for any subsequent changes by unanimous resolution. Lot liability would be determined on the basis of equality unless there were substantial differences in lot size in which case it would be based on *relative* lot size unless –

- different lot uses had a bearing on consumption of common utilities or the cost of maintaining the common property, in which case it would be based on lot size *and* use, or
- the number of occupants had a greater bearing on consumption of common utilities or the cost of maintaining the common property than lot size, in which case it would be based on the number of bedrooms.

On the other hand, lot entitlement would be determined by the surveyor according to the principle of market value at the time of the lodgement of the plan of subdivision.

Unlike options 20B and 20C, this option provides criteria, rather than principles, for the setting of lot liability and seeks to minimise discretion and maximise guidance. The criteria are relatively technical. On the other hand, this option employs the relatively simple principle of market value for lot entitlement, as in Option 20C. Like options 20B and 20C, this option removes the developer's discretion, thereby seeking to ensure fairness from the outset and reduce disputes, but constitutes an interference in developer' property rights.

7.2.2 Current provisions for changes to lot liability and entitlement

Background

As noted, any subsequent change by the owners corporation to the initial lot liability and lot entitlement settings must be based on the criteria set out in section 33 of the Subdivision Act, and require a unanimous resolution. The owners corporation must lodge any changes to lot liability and entitlement with Land Victoria, which records the changes on the plan of subdivision. There is no time limit for lodging the changes with Land Victoria.

In the absence of a unanimous resolution by an owners corporation, an application may be made to VCAT to order a change the plan of subdivision.

Stakeholder feedback

In terms of the criteria for changes to settings, it was suggested that a time limit be imposed on owners corporations to lodge a notice of change with Land Victoria. It was noted that the standard time frame for actions under the Subdivision Act (and under the *Transfer of Land Act 1958*) is 30 days.

There was also some commentary on the process for applying to VCAT to make changes to a plan of subdivision, including to change lot entitlement or liability, in the absence of the required unanimous resolution. The Subdivision Act requires that more than half of the lot owners with more than half of the total lot entitlement consent to such applications. However, stakeholders considered that some account should be taken of the situation where *one* lot owner who owns more than half of the total lot entitlement does not consent.

The following stand-alone option to address the issues of a time limit on lodging notices of change with Land Victoria and of the process for applications to VCAT in the absence of a unanimous resolution is presented for feedback.

Option 20E: Improve the current provisions for changes to lot liability and entitlement

Under this option:

- owners corporations would be required to notify Land Victoria of changes to lot liability and entitlement within 30 days, and
- where an application has been made to VCAT to change a plan of subdivision, including to change lot entitlement or liability, in the absence of a unanimous resolution and one lot owner who owns more than half of the total lot entitlement has not consented to the application, VCAT would be able to hear the application if all other lot owners consented.

If this option was adopted, the criteria for subsequent changes to lot liability and entitlement would be amended to be consistent with these criteria for setting initial lot liability and entitlement.

Questions

54 How much should developers' property rights regarding initial settings of lot liability and entitlement give way to considerations of fairness?

55 If developers' rights should give way to fairness, which of options 20C to 20E for the initial setting of lot liability and entitlement best ensures fairness, and why?

56 Under what circumstances could options 20B to 20D be implemented by the developer rather than a licensed surveyor (which would be cheaper and quicker)?

57 To what extent should the surveyor (or developer) be required to set out how the criteria were applied in achieving the settings?

58 Under Option 20E, is 30 days a reasonable time for an owners corporation to notify Land Victoria of changes to lot liability and entitlement?

59 How might the proposal to reform the process for VCAT applications be sufficient to balance the rights of the majority of lot owners against those of a holder of the majority lot entitlement?

7.3 Sale and redevelopment of apartment buildings

Issue

The current requirement for a unanimous resolution for the sale of a building governed by an owners corporation, including for redevelopment, is difficult to achieve and may prevent more efficient land use.

Alternative options

- **Option 21A** – Reduce the threshold to 75 per cent for all owners corporations - New South Wales model.
- **Option 21B** – Reduce the threshold to 75 per cent for all owners corporations - less restrictive model.
- **Option 21C** – Adopt a tiered approach to the threshold according to building age - Northern Territory four-tiered model.
- **Option 21D** – Adopt a tiered approach to the threshold according to building age - simpler three-tiered model.
- **Option 21E** – Reduce threshold to 75 per cent for commercial buildings only.

Background

Currently under the Subdivision Act, any proposal to sell a building governed by an owners corporation, including for redevelopment, requires a unanimous resolution of the owners corporation to sell the common property and wind up the owners corporation, and an agreement by and between all lot owners to sell their lots. Issues Paper 2 sought feedback on whether these requirements were still appropriate.

Stakeholder feedback

The feedback from submissions was not clear cut. Some submissions supported the status quo (i.e. the requirement for unanimous agreement) and emphasised the right of a lot owner to defeat such a radical change and to deny compulsory acquisition of their unit.

However, there was significant support for lowering the current requirements, particularly in the form of the new provisions in the New South Wales legislation, which contain a range of safeguards for minority lot owners opposed to the sale.

There was also support for having different requirements depending on the age of the building and whether the building was entirely commercial (where the issue of evicting people from their homes is not relevant).

Five alternatives to address these issues are presented for feedback. In referring to the sale of a building, each option includes the sale of the common property, the winding up of the owners corporation and the compulsory sale of all units.

Option 21A: Reduce the threshold to 75 per cent for all owners corporations – New South Wales model

Under this option, the threshold for the sale of a building would be a special resolution (75 per cent of total lot entitlements) as is the case in New South Wales. No distinction would be made between buildings.

There would be protections for dissenting lot owners. One approach is for a detailed process along the lines of the New South Wales legislation, under which:

- a sale or redevelopment plan must be developed and approved for consultation with lot owners by a special resolution
- lot owners must then be given at least 60 days to consider the plan
- the plan lapses if a special resolution for its final approval is not obtained within 12 months, and
- any approved plan must be referred to VCAT for its approval, including consideration of the amounts of compensation for lot owners.

This option reduces the barriers for the sale of a building governed by an owners corporation but this is offset by safeguards in the requirements for dual special resolutions, consultation and mandatory VCAT supervision.

Option 21B: Reduce the threshold to 75 per cent for all owners corporations – less restrictive New South Wales-type model

This option involves only one special resolution and non-mandatory VCAT supervision but with other protections for minority lot owners. It would require:

- a sale or redevelopment plan being developed and approved for consultation by an ordinary (rather than a special) resolution
- lot owners being given at least 60 days to consider the plan
- the plan lapsing if a special resolution is not obtained for its approval within 12 months
- the special resolution threshold being 75 per cent of total lots *and* 75 per cent of lot entitlement (not just 75 per cent of lot entitlement as is currently the case for a special resolution)
- a right of a lot owner to apply to VCAT (rather than mandatory referral to VCAT) within a reasonable time of the special resolution to cancel or amend the approved plan, with the onus on the *respondents* (i.e. the proponents of the plan) to show that –
  - it is likely to bring economic or social benefits to the subdivision as a whole that are greater than any economic or social disadvantages to the lot owners who do not consent (a condition currently applicable under the Owners Corporations Act for other types of application to VCAT for orders in the absence of a unanimous resolution), and
  - the proposed compensation is fair, and
- a prohibition on any cost orders being made against applicants in unsuccessful challenges.

This option modifies the New South Wales position by requiring a special resolution only for the critical decision to approve the plan but increasing the threshold for such a special resolution. This would ensure that the overwhelming majority of lot owners with the overwhelming majority of lot entitlements are in favour. Also, VCAT's supervision is only engaged on an application by a dissenting lot owner. The ability of such a lot owner to make such an application is facilitated by incorporating two criteria for approval, by reversing the onus of proof and by ensuring that the lot owner is not 'punished' by any costs order if they lose.

Option 21C: Adopt a tiered approach to the threshold according to building age – Northern Territory four-tier model

Under this option, the level of support required for a sale would depend on the age of the building and be tiered in line with the Northern Territory model, namely:

- *Tier 1* – 80 per cent of lot entitlement for wholly residential or mixed residential-commercial buildings more than 30 years old and for wholly commercial buildings (regardless of age)
- *Tier 2* – 90 per cent of lot entitlement for wholly residential or mixed residential-commercial buildings 20-30 years old
- *Tier 3* – 95 per cent of lot entitlement for wholly residential or mixed residential-commercial buildings 15 to 20 years old, and
- *Tier 4* – a unanimous resolution for younger wholly residential or mixed residential-commercial buildings.

This option represents a more conservative approach to voting thresholds compared to Options 21A and 21B particularly for Tiers 1, 2 and 3. Therefore, because the voting thresholds are high (80 per cent or more) VCAT's supervision would not be mandatory. VCAT would only be engaged on an application by a dissenting lot owner and in any such application for cancelation or amendment of a plan, the onus would be on the *applicant* to show that it:

- is *not* likely to bring economic or social benefits to the subdivision as a whole that are greater than any economic or social disadvantages to the lot owners who do not consent, and
- the proposed compensation is *not* fair.

The 'no cost order' protection for unsuccessful applicants would be retained.

This option applies a different process depending on the age (and use) of a building, on the basis that it should be made easier to sell:

- an older residential building because the need to redevelop would be greater, and
- a wholly commercial building because the problem of evicting someone from a home does not arise.

The thresholds are quite high, which might be regarded as increasing the safeguards or, alternatively, as increasing the barriers.

Option 21D: Adopt a tiered approach to threshold according to building age – simpler three-tiered model

Under this option, the Northern Territory model would be simplified to three tiers, with reduced thresholds, as follows:

- *Tier 1* – 75 per cent of lot entitlement, alternatively 75 per cent of lot entitlement *and* 75 per cent of lots, for wholly residential or mixed residential-commercial buildings older than 25 years and for wholly commercial buildings, with a mandatory VCAT process as for Option 21A or alternatively Option 21B
- *Tier 2* – 80 per cent of lot entitlement alternatively 80 per cent of lot entitlement *and* 80 per cent of lots, for wholly residential or mixed residential-commercial buildings 10 to 25 years old, with a VCAT process only on the application of a dissenting lot owner as for Option 21C, and
- *Tier 3* – a unanimous resolution for younger wholly residential or mixed residential-commercial buildings.

This option seeks to retain the rationale underlying Option 21C but to reduce the number of tiers and the thresholds, which might be regarded as reducing the safeguards or, alternatively, as reducing the barriers.

Option 21E: Reduce threshold to 75 per cent for commercial buildings only

Under this option, the status quo would be retained for wholly residential or mixed residential-commercial buildings governed by owners corporations (i.e. requirement for unanimous agreement) but only a special resolution would be required for wholly commercial buildings and VCAT's process would focus on *economic* rather than social considerations.

Two approaches could be considered for wholly commercial buildings – the New South Wales model detailed in Option 21E-1 and a less restrictive model detailed in Option 21E-2.

Option 21E-1: New South Wales model

Under this approach:

- a sale or redevelopment plan must be developed and approved for consultation with lot owners by a special resolution (75 per cent of lot entitlement)
- lot owners must then be given at least 60 days to consider the plan
- the plan lapses if a special resolution for its final approval is not obtained within 12 months, and
- any approved plan must be referred to VCAT for its approval, including consideration of the amounts of compensation for lot owners.

Option 21E-2: Less restrictive model

Under this approach:

- a sale or redevelopment plan must be developed and approved for consultation with lot owners by an ordinary resolution (rather than a special resolution)
- lot owners must then be given at least 60 days to consider the plan
- the plan lapses if a special resolution (75 per cent of total lots *and* 75 per cent of lot entitlement) for its final approval is not obtained within 12 months, and

- a lot owner can apply to VCAT within a reasonable time of the special resolution to cancel or amend the approved plan with the onus on the *respondents* (i.e. the proponents of the plan) to show that –
  - the plan is likely to bring economic benefits to the subdivision as a whole that are greater than any economic disadvantages to the lot owners who do not consent, and
  - the proposed compensation is fair, and
- the 'no cost orders' protection would apply to unsuccessful applicants.

This option retains the existing right of dissenting residential lot owners to resist compulsory acquisition but presumes that the 'human' issues involved in residential buildings do not apply to wholly commercial buildings, where only economic considerations apply.

Questions

60 Which option, and why, is the best and fairest way to provide for a more flexible process to sell buildings governed by owners corporations?

61 Under Option 21D, which voting thresholds and VCAT processes are preferable, and why?

62 Under Option 21E, which sub-alternative is preferable, and why?

63 If the 'less restrictive' sub-alternative, should the special resolution be 75 per cent of lot entitlement only and should the burden of proof be on the applicant rather than the respondents?

64 To what extent do the options to reform the Subdivision Act in improve decision-making processes within owners corporations?

8 Retirement villages with owners corporations

This Chapter sets out stakeholder feedback on and presents options for reform of the situation where an owners corporation exists within a retirement village.

Issue

The current provisions of the Owners Corporations Act do not provide for the operation of owners corporations in retirement villages that is consistent with the aims of the *Retirement Villages Act 1986* (the Retirement Villages Act) regarding the conduct of annual meetings, increases in owners corporation fees and the participation of lessee-residents.

Alternatives for reform

- **Option 22A** – Require separate committees for owners corporations and retirement village residents.
- **Option 22B** – Require separate committees and annual general meetings for owners corporations and retirement village residents.

Background

The arrangements between a retirement village operator and the residents are generally governed by the Retirement Villages Act. However, if an owners corporation exists within a retirement village, all residents who own their units are members of the owners corporation and subject to the requirements of the Owners Corporations Act. The Retirement Villages Act makes some attempt to reduce the regulatory overlap between it and the Owners Corporations Act, but Issues Paper 2 noted the following issues that arise in such villages:

- confusion caused by the provisions of the Retirement Villages Act that allow the annual meeting of the owners corporation to double as the annual residents meeting under the Retirement Villages Act
- the role of village operators who have majority voting power in the owners corporation and whether they should have limited powers when voting on proposals to increase owners corporation fees and to change the owners corporation rules
- the exclusion of lessee-residents from decisions that affect them about the common property of an owners corporation, and
- the exclusion of lessee-residents arising from the provisions of the Retirement Villages Act that replace the residents committee under the Retirement Villages Act with the owners corporation.

Stakeholder feedback

Feedback from stakeholders was that:

- owners corporations in retirement villages are on average much larger than other residential owners corporations, both in terms of the number of lots and the services provided by the owners corporation
- the common property of an owners corporation in a retirement village is typically more extensive and significant than in other residential owners corporations and may include swimming pools, bowling greens, gymnasiums, libraries and theatres, and
- as the owners corporation doubles as the village residents committee, its decisions cover a wider range of matters directly affecting the living standards of all residents, including leasehold residents.

There was general support for removing the provisions of the Retirement Villages Act that provide that meetings of the owners corporation double as meetings of the village residents committee, on the basis that they exclude lessee-residents.

However, there were mixed views on the issue of annual meetings. Some stakeholders supported combining the two meetings on convenience grounds. Others supported separate, even if consecutive, meetings, on the basis that the two Acts have different processes and voting entitlements for their respective meetings.

There was also mixed views on the issue of the power of village operators in owners corporations where they control the voting. Some stakeholders considered that the normal rights of an operator as a lot owner should not be disturbed. However, other stakeholders considered that control by operators over increases in owners corporation fees and changes to owners corporation rules is inconsistent with the scheme of the Retirement Villages Act, which gives a high degree of control to residents over their living costs and the rules of their village.

Two alternatives to address these issues are presented for feedback.

Option 22A: Require separate committees for owners corporations and retirement village residents

Under this option, the only changes to the current position would be to:

- repeal the provisions of the Retirement Villages Act that provide for combining the owners corporation and the village residents committee (to allow for participation by lessee-residents in the village committee), and
- resolve the problems involved in the combining annual meetings either by:
  - retaining combined meetings but –
    - requiring different voting entitlements for resolutions under each Act, including the rights of leasehold residents regarding resolutions under the Retirement Villages Act, and
    - applying the meeting procedures and dispute resolution processes under the Retirement Villages Act to the combined meeting, or
  - allowing the village operator to decide whether to hold joint or separate meetings, taking into account whether most of the village facilities are on the common property of the owners corporation and whether there is a significant number of leasehold residents.

This option seeks only to clarify the provisions of the Retirement Villages Act that control the interplay with the Owners Corporations Act, and so to retain the convenience of combined meetings. It does not seek to interfere with the normal operation of the Owners Corporations Act as it relates to voting power in an owners corporation.

Option 22B: Require separate committees and annual general meetings for owners corporations and retirement village residents

Under this option, no special provision would be made in the Retirement Villages Act for owners corporations. This would mean that annual meetings of owners corporations and of village residents would be separate (although they could be conducted consecutively) and that village resident committees would be separated from the owners corporation.

Specific provisions would be inserted into the Owners Corporations Act to provide for the special position of owners corporations in retirement villages by:

- prohibiting village operators with a majority of lot entitlements in the owners corporation from voting on owners corporation fee levies, and
- providing that proposals to change owners corporations rules must be conducted according to the meeting rules under the Retirement Villages Act, including to allow leasehold residents to vote but not village operators.

This option seeks to address the issues raised about meetings and residents committees by *not* trying to provide for combined meetings. While that would provide more clarity and reduce disputes, a level of convenience might be lost. It recognises the inconsistency between the Owners Corporations Act and seeks to apply the policy behind the Retirement Villages Act and reduce disputes but in doing so, makes a fundamental change to a controlling operator's normal rights.

Questions

65 Which option, and why, better achieves the aim of ensuring that the operation of owners corporations in retirement villages conforms with both the Owners Corporations Act and the Retirement Villages Act?

66 If Option 22A, which sub-alternative, and why, better resolves the problems involved in the combining of annual meetings for owners corporations and retirement villages?

Attachment A – Abandoned goods

Residential Tenancies Act 1997

Part 9 – Goods left behind in rented premises

That Act provides that landlords:

- may remove and destroy or dispose of abandoned goods if they are of no monetary value or are perishable foodstuffs or dangerous
- may remove and destroy or dispose of goods of monetary value if the estimated cost of the removal, storage and sale is greater that their value
- may request the Director of Consumer Affairs Victoria to give an opinion as to whether or not particular goods may be so removed and destroyed or disposed of
- must store other types of abandoned goods in a safe place for at least 28 days
- must notify the owner of the intention to sell such goods if an address is known or lodge the notice in a newspaper if unknown
- must sell unclaimed goods by public auction
- must deal with any money left over after deducting expenses in accordance with the *Unclaimed Money Act 200*8
- may apply to VCAT for compensation from the Residential Tenancies Fund for any deficit, and
- may dispose of unsold goods.

Australian Consumer Law and Fair Trading Act 2012

Part 4.2 – Abandoned goods

Under that Act, abandoned goods of low value (less than $200 or a vehicle less than $1000) may be disposed of in any way 28 days after notice of intention to do so has been given to the owner or, if notice cannot be given after reasonable attempts, 60 days after abandonment.

Similarly for:

- medium value goods (between $200 and $5000 or a vehicle less than $1000), except the latter period is 90 days and the goods must be sold at public auction or by private sale, and
- high value goods (over $5000 or a vehicle over $1000) except that the latter period is 180 days and the goods can only be sold by private sale if there is a reasonable belief that the best price cannot be achieved at a public auction.

Perish*able* goods may be disposed of in any way if notice has been given to the owner and a reasonable time for collection has elapsed. Perish*ed* goods may be disposed of in any way at any time but a reasonable attempt must be made to inform the owner.

Any money left over from a sale after deduction of expenses must be dealt with in accordance with the *Unclaimed Money Act 2008* and the owner may be sued for any deficit.