Consumer Property Law Review

Options for reform of the Owners Corporations Act 2006

OWNERS CORPORATIONS

CONSUMER AFFAIRS VICTORIA

Submissions in response to Consumer Affairs Victoria Consumer Property Law Review

About We Live Here Limited.

We Live Here Inc. is a movement founded to advocate and lobby for persons in Victoria that own or reside in an Owners Corporation.
The movement aims to give a voice to, and protect the rights of, the owners and long-term residents in apartment buildings, and to generate changes to legislation to meet their needs as they live their daily lives in an Owners Corporation environment.

We Live Here Inc. was formed in December 2015 and has membership and representation from over 180 high-rise buildings in the Melbourne CBD, Docklands and inner suburbs.

We Live Here Inc. shall also use its broad supporter base to advocate for owners and residents for a range of issues using similar techniques and devices.

About Owners Corporations in Victoria and in Australia.

As of December 2015, there are 166,000 registered Owners Corporations and 747,336 lots in Victoria, and about 1,500,000 Victorians or 1 in 4 people living in or affected by Owners Corporations, it represents the management of property worth $300 billion. More than $1 billion per year is collected and spent.

The industry continues to grow rapidly in Australia with around 270,000 Owners Corporations comprising 2,000,000 lots Australia wide, with approximately 3.5 million

people living or working in Owners Corporation schemes. Urban planning policies around Australia are targeting annual growth of more than 10% for the next 15-25 years, so the prevalence and importance of this sector is increasing.

The following submissions delineate the position of We Live Here Inc. in relation to the matters subject of consultation and review under the Owners Corporations Act 2006.

Through our submissions, we not only aim to provide effective answers to the consultation questions, but also to highlight with a critical and realistic approach the needs to be addressed in order to mould the Victorian Body Corporate Industry to today's standards and expectations.

Representatives of We Live Here Inc. request to be heard orally on the issues raised in this paper, and request to be heard by the Minister and the Senior policy drafters involved with the review of the Owners Corporation Act.

1. Regulation of Owners Corporation managers

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.

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?

We Live Here supports Option 1A for the following reasons:

- The Australian Bureau of Statistics released on the 5th December 2016 the Analysis Result of the Industry Productivity recording in the sector of Rental, hiring and real estate services the strongest growth in gross value added (+9.5%)[1].
Already in 2006 the big population centers of Sydney and Melbourne the number of Owners Corporations made up approximately a third of all dwellings.

[1] *http://www.abs.gov.au/ausstats/abs@.nsf/0/E95A0098761C9EC9CA25807D00172D73?Opendocument*

In particular, in Victoria the number of Owners Corporation continues to drastically increase, as does the range and complexity of issues. Therefore, an adequate reform of the Service Providers in this sector is of primary importance.

An Owners Corporation manager acts not only as mere agent of an owners corporation (duly delegated in writing), but a trusted professional and an expert in the administration of every aspect of a body corporate. A full licensing scheme will deliver **appropriate training and qualification** which will protect the Owners Corporation from mistakes in the management of the scheme due to lack of knowledge, and will contribute to prevent breaches of management agreements and it will increase confidence in the Industry.

- A full licensing scheme would be effective for the industry only where strictly **linked to a structured system of professional indemnity insurance and accountability through professional responsibility**.

- A full licensing system will be a preventive measure against professional misconducts: in NSW consumers and third parties can easily **check online** (NSW Service – licence check) the information related to the Strata Manager and find out if a manager is a disqualified person (meaning as per the *Property, Stock and Business Agents Act 2002)*.
This will be an implementation of the current Public Register of Owners Corporation Managers, currently in place in Victoria[2].

- Currently while in South Australia, Western Australia and Tasmania there are no licensing requirements, in states like NSW and Queensland in addition to the licencing requirement there are qualifications requirements.

In Victoria an Owners Corporation Manager is only required to register with the Business Licensing Authority and they cannot carry out the functions of a Manager for fee or reward without current Professional Indemnity Insurance. Licencing Schemes must be consistent between the States with similar demographic and density, will grant **homogeneity** in the level of service across the entire industry, especially in consideration that more and more Owners Corporation management companies are operating in multiple States.

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

- We believe that too often inexperienced employees are assigned as Owners Corporation managers of large Schemes (difficult to manage) especially without the confidence gained by years of experience and practice. For those reasons, we believe that an essential criterion for the eligibility of an Owners Corporation manager is the completion of a minimum period of **6 months' apprenticeship** with a

[2] In accordance with s 194 of *Owners Corporation Act 2006*

senior manager or/and with each different department within a strata management company.

- A substantial criterion is the **specialised knowledge** as basis for the obtainment and the renewal of a license. The Owners Corporation manager of management agencies, in particular, will also need to be able to understand and report on the tasks and the processes undertaken by the various departments within their agency, therefore a basis of accounting, legal, business administration skills will need to be mastered before a grant of a licence. The part 6 of the *Property, Stock and Business Agents (Qualifications) Order 2009* lists the topics to be assessed in order to obtain the qualification leading to the licence and it ought to be taken into consideration in Victoria.
We also believe that licensing courses should be conducted in a way to encourage everyone to commit to succeeding in the profession and should ascertain basic general knowledge, communication and computer skills.

- Finally there should be an **assessment of the ethical requirements prior to the granting of a licence and annual renewals**. A manager that deals with trust accounts, tenders, investments, must be assessed in the way they conduct themselves in the profession. We believe that unsatisfactory professional conduct and professional misconduct must be considered as potential risks, therefore must be assessed on an ongoing basis in order to maintain a licence and that the knowledge of Rules of Conduct should become an assessable topic for the granting of a licence.

In May 2016, Australia's Vocational Education and Training Institute has presented in the Nationally Recognized Training Register a new package specifically developed to meet the ethical requirements in strata.[3]

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

The licensing and qualification procedures should be offered by flexible methods.
The transitional arrangements must aim to avoid disruption of the Owners Corporation managers' services, therefore we believe that training and assessments should be put in place for a minimum period of 12 months and that effective remedies should be adopted in case of failure of achieving the standards required.

Furthermore, we believe that online portals, courses and video-presentations should be used to facilitate the attendance of the busier managers without creating disruption in the management of their portfolio.

[3] *https://training.gov.au/.../CPP/CPPDSM5040_**AssessmentRequirements**_R1.docm*

An estimated time of the course should be disclosed in advance and extensions for enrolment should be available. The Industry can assist by dispatching subject matter experts (SME's) to conduct certain modules of a specialist nature, relating to law, mediation, dispute resolution, accounting etc.

Discounted fees should be put in place for courses organised for groups of 3 or more managers within the same management company, as incentive for the management companies to finance the licensing of their managers.

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.

4) Which option, and why, would be more effective in ensuring the ongoing knowledge and skill of Owners Corporation managers?

We believe that Option 2A is the better option, to ensure the consistency of the standards developed over the coming years.
In consideration of the effects of the socio-economical developments on this industry, it is fundamental that an Owners Corporation manager has adequate knowledge and skills to face the new issues arising in this industry. Moreover, Continuing Professional Development (CPD) maximizes consumer protection, contribute to maintain public confidence and reduce disputes.

The effectiveness of this tool is governed by two aspects: the mandatory nature of the instrument and the yearly periodicity. In NSW it has been ensured that the granting of the licence is subject to the obtainment of CPD points (*s15(4) of the Property, Stock and Business Agents Act 2002*.)

An Owners Corporation manager in attending their numerous daily tasks tends to procrastinate any other activity that is not mandatory for their office; moreover, the participation in any form of training which is not mandatory is not seen as an important and fundamental element of the profession.
Thus, by ensuring the compulsory and ongoing nature of the training we potentially decrease the risks that customers will be left without the necessary support, and we will allow the industry to improve by the intellectual contributions and by new inputs of professionals.

In 2013 the Office of Fair Trading New South Wales published the Director General's Guidelines for Continuing Professional Development[4] which lists the skills to be ascertained for a Strata Manager during the year in order to guarantee a consistency during the years of the high standards of services delivered.

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?

The recent reforms in the industry are the direct consequence of the fast evolution of the Owners Corporations and this evolution is proportionate to the growth of the socio-economical development of the Country, the urbanization of suburban areas and the creation of more business opportunities with the attraction of workforce and the consequential decreasing of the unemployment rate.

Continuing Professional Development (CPD) describes the systematic, ongoing structured process of learning that underpins professional practice.
CPD is usually presented as a combination of approaches, ideas and techniques that help to manage the personal learning and growth while achieving carrier aspirations. The focus of CPD is firmly on results: the capability to face issues and topics related the "real world", the every-day practice and the current situations.

Globally the CPD courses have been in every industry funded on a fiduciary relationship-type of interaction with the clients, so to ascertain the level of the standards and safety in the management of the service: under this aspect the existence of a well-prepared and skilled Owners Corporation manager is a necessity in a fast-growing industry.

As matter of fact, without mandatory and ongoing training, Owners Corporation Managers for instance, would be unable to properly deal with the electronic voting in meetings of the Owners Corporations, or unable to manage and assist in the sale of a building, or unable to answer questions about payment plans for levies or bonds or unprepared for the participation of tenants in meetings of the Owners Corporation: those are all matters recently considered for the new Strata Reform in Victoria, and only by ensuring that the managers are fully prepared on developments in the industry and under the law can we ensure that owners are assisted by the development of this industry.

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?

[4] *www.fairtrading.nsw.gov.au/...**manager**s/**Director_Generals_guidelines**_property_**CP**...*

- The feedback received from strata managers in NSW in relation to the ongoing training courses is that often the topics are arranged without a pre-assessment of the most contentious matters within the industry.
This can be avoided by running surveys where Owners Corporation managers electronically indicate their preference for the suggested topics.

- The targeting of specific issues as topics will be more effective if part of the training is dedicated to general introductory notions aiming to place the audience in such a position so to be able to fully understand the entire content of the lecture.

- The trainings should be held by professionals and qualified and certified organisations: tutors should have practical experience and academic knowledge.
Often Organisations like Tafe have proved to provide competent services for the preparation of professionals.

- The Organisation should avoid contacts with other parties such as contractors or other providers in the industry: it has been the case that often, time has been allocated or reserved for presentation of product or marketing/networking activities defeating the main purpose of the training.

- In NSW there is flexibility related to the type of formula and time to be dedicated to the training: they can be attended in one full day or several sessions of different hours.
We believe that with flexibility of the method of delivery this service will contribute to gaining more active participation.

7) What other options are there to support the ongoing maintenance of the knowledge and skills of Owners Corporation managers?

- Beside the passive participation of the Owners Corporation managers in the training sessions, surveys, tests or assignments should be introduced to be submitted periodically (12 months) to test the knowledge of the Owners Corporation managers.

- Legal Bulletins and newsletters should be sent periodically, via email, to all the Owners Corporation managers.

Recognitions and awards should be put in place as an ultimate incentive to reach high levels of preparation in this industry and to allow interaction between the stakeholders in the industry.

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'.

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

We are in favour of Option 3A.

The Consumer Protection Legislation in Australia has covered the field of the importance of the equality of parties to a contract, however it is essential that the rationale beyond those provisions is adapted to the Owners Corporation context.
A management agreement with unfair terms is a contract with significant imbalance in the parties' rights and obligations, a contract that somehow creates unreasonable advantages and possible detriment to one or both parties[5].
A contract with unfair terms is voidable and therefore put both parties in a position of risk and instability.

Option 3A would be welcomed by the Industry, to regulate an area often affected by unfair terms such as the 'termination of managers'. In the past there have been situations where a Tribunal "flexibly" argued that although the attempt of the Owners Corporation to revoke the appointment of the manager in breach of its terms was invalid it would terminate the appointment because, "in fairness to both parties, it was not beneficial for there to be an ongoing relationship between the parties"[6]

Finally, the prohibition of unfair terms will give VCAT greater discretion and power to rule on particular unfair terms as they may arise in various types of contracts and from time to time.

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?

---

[5] As per the Victorian *Fair Trading (Amendment)* Act *2003* (s3(1) Part 2 ACL) and in line with European Council Directive 93/13/EEC

[6] Network Pacific Real Estate Pty Ltd v O'Rourke (Civil Claims) [2009] VCAT 1194 at [3.7].

One of the areas affected by unfair terms is the duration of the contracts, termination fees and/or automatic renewals that hinder the Owners Corporation in removing underperforming managers.

If we look at the duration of Strata Management Agreements, the new Act in NSW establishes that at the first AGM a strata managing agent can only be appointed for a maximum period of 12 months, while after that initial contract there can be a maximum limit of 3 years for all subsequent contracts. Rollovers will be limited to one month at a time and an agent must notify the Owners Corporation three months before the expiry of the contract.
The ratio beyond these provisions is allowing the Owners Corporation and agent to renegotiate existing arrangements, ensuing that both strata managing agents and Owners Corporations have an agreement in place that meets their current and on-going needs.
It is clear that this kind of provision not only regulates the length of the contracts, but also encourage the performance of the obligations under the contract and ensure that the parties are not lock in unproductive and ineffective agreements.

Therefore, we believe that earlier termination fees should be only allowed for termination within the first year of the agreement or where the earlier termination is without reasons. This kind of construction will allow the manager to have the time to familiarise with the scheme and be willing perform in order to obtain a renewed agreement.
The earlier termination fee however should not be punitive and unreasonable and must be inferior in value to the remaining length of the contract.

The capacity for Owners Corporations to roll over the agreement has been provided to the strata committee so that a general meeting of the Owners Corporation is not required. In addition, regulation-making powers allow the regulations to provide for special meeting procedures of committees for this purpose, for example, by circulated resolution and approval in writing.

In relation to terms of the effect of allowing the manager to renew the contract where the Owners Corporation fail to give notice of the intention not to renew, this should be limited to 3 months.

The Owners Corporation should always be allowed to rescind the contract by ordinary resolution and as balancing exercise the ability of the managers to sue for damages for wrongful termination should be retained.

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

Currently there is a well prescribed process for termination of a manager:
First the Owners Corporation must comply with the contract and the contractual termination clause should be consistent with s.119 of the *Owners Corporations Act*

2006 (ordinary resolution), then the manager must return all the records or funds within 28 days from the termination.

We support retention of this clause.

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

Only after the first year of the contract and by resolution at a general meeting or committee meeting, which the manager would be entitled to address.

The manager should be allowed to familiarise with the scheme and prove themselves within the time frame of one year, which seems reasonable in the average circumstances and at the same time the balance of power between the parties should be always preserved.

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.

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?

We believe that the disclosure requirements proposed under Option 4A are sufficient to ensure transparency and accountability.
Option 4 A and 4 C Options addresses some aspects of the issue in a similar way to the NSW Strata Schemes Management Act 2015 and NSW Strata Schemes Management Regulations 2016.

"*A strata managing agent must not, in connection with the provision of services as a strata managing agent or the exercise of functions as a strata managing agent, request or accept a gifts or other benefit from another person for himself or herself or for another person*".

In addition, some managers will only procure quotations or engage certain contractors on the proviso that a commission of set % of the value of the works shall be paid to the manager. This practice is akin to a secret commission, and is

obviously fraudulent behaviour and is an offence under the Criminal Code. However, this practice is rife in Victoria, and must be stamped out.

As mentioned in the Hansards for the new NSW Act, the duty to act honestly and fairly, to act in the best interests of the Owners Corporation has now been made effective by the introduction of provisions related to disclosure of private information, disclosure any conflict of interest, barriers for developers etc.

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?

No. Option 4B relies strongly on managers' compliance and the current system is not set up to operate successfully in the industry: it would require a radical change in the office of Owners Corporation manager.

Importantly, strata schemes are also a way of pooling resources and are additionally regulated as managed investment schemes under the Corporations Act 2001 (Cth): together with the Owners Corporation Act 2006, it has been created as dual layers of regulation that must primarily, although not exclusively, rely on disclosure mechanisms.

The Corporations Act 2001 (Cth) provides for a unified system of regulation and disclosure, with respect to corporations throughout Australia, while ASIC, is responsible for administering the Corporations Act.[7]

Pooling of funds by Owners Corporations Managers should be prohibited accordingly, to avoid the exploitation of managers by the banking services industry.

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

The holding and management of trust accounts is a complex task which will require further training, provision, and regulations and the set up of specialised departments to control and check the trust accounts managements.

In NSW the new legislation has introduced full disclosure. Risks related to fraud, misappropriations and uncontrolled pooling practices are issues associated with Option 4B and 4 C.

[7] *Serviced Strata Schemes: Real Property or A Financial Product?* Of Dr Sophie Riley and Dr. Grace Li (Law Lecturers at lecturer at the Faculty of Law, University of Technology, Sydney)

However, it is noted that if this measure is introduced, Managers shall not generate as much income (and therefore profit) from the management of the Owners Corporations, and this may discourage them from investing their profit back into the industry to grow their businesses.

On balance, the benefits from the increased consumer protection measure far outweigh the risks to Managers being unable to derive income from pooling the trust account funds.

2. Responsibilities of developers, occupiers and committee members

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

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?

Option 5A is insufficient: the existing developers' obligations in Victoria do not tackle the imbalance of power between the developer and the single purchaser.
We believe that the additional obligations under options 5B, 5C and 5D will provide a better solution to this issue.

Developers have run roughshod over the interests of Owners Corporations in Victoria for too long.

Currently there is no prohibition on a developer to appoint managers and service providers that are not connected to them, and the current Section 68 of the Owners Corporation Act 2006 is far too generalist and non-descriptive to have any teeth. Furthermore, any such allegation would require major litigation in the Supreme Court to bear out. Recently, an Owners Corporation was involved in such Supreme

Court proceedings making out these such allegations, although the matter settled on confidential terms prior to trial.

In NSW, the maximum length of a caretakers agreement with an Owners Corporation cannot exceed 10 years (Section 40B of the SSMA). In Queensland, the maximum length of a caretakers agreement with an Owners Corporation is 25 years.

In Victoria, there is no such prohibition, and developers have taken the opportunity to 'sell' or assign caretaker agreements exceeding 50 years to caretaker companies, and for substantial profits.

As a vulnerable entity prior to settlement, Owners Corporations all over Melbourne find themselves locked into uncommercial and unreasonable caretaker agreements with no recourse outside of passing a special resolution to file legal proceedings in VCAT or the Supreme Court. Clearly, a 50-year or 60-year agreement is not in the best interests of the lot owners and occupiers, and stands only to benefit the service provider and the developer.

The Victorian regime is out of lockstep with the rest of Australia and is to be denounced. The legislation must be amended to ensure that a developer (initial owner) can only sign an Owners Corporation up to a caretaker agreement for a maximum length of 5 years. Thereafter, the Owners Corporation (once it is under the control and direction of the lot owners) may then decide to renew or extend the agreement or to engage an alternative caretaker on perhaps more competitive terms, and for a maximum length of 10 years.

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?

For the reasons mentioned above, we believe that further expanded obligations should be adopted to regulate and improve the system.

We Live Here submits that initial owners (developers) be required to ensure that the Maintenance Fund is accurate, and that at any time prior to the 5-year period after the Owners Corporation was registered, if the Maintenance Fund is found to be deficient, then the developer ought to be required to fund the differential.

In addition, we support the position that, Maintenance funds ought to be compulsory. While owners are best placed to make decisions regarding the repair and maintenance and renewal of its own fixtures and fittings, from a best practice point of view, Owners should be required to compulsorily save for 'the rainy days ahead.'

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

The advantages of introducing 'building defects' obligations as per the NSW model have been well described in the article published in February 2016 and written by Simon J. McMahon, barrister at the Hunters Street Chambers which we have referred addressing this question.

However, a building bond as per the NSW model, is not the answer. The bond system only protects the builder and the developer by ring-fencing their liability. In doing so, it tramples upon owner's long-recognised common law rights to sue for negligence. The bond system erodes consumer protection and dents consumer confidence and may lead to a downturn in the demand for apartments. The current regime in Victoria is adequate, and should be preserved.

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.

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?

- In the Supreme Court judgment *Owners Corporation PS 501391P v Balcombe*, Riordan J closely analyses the rule-making powers of Owners Corporations under both the Subdivision Act and the Owners Corporation Act.

In our view, Riordan J's judgment ought to be closely analysed and followed by Consumer Affairs as part of any clarification of an Owners Corporation's Rule-Making Powers.

In general, Owners Corporations ought to be given wider rule-making powers to govern their particular buildings, subject to the doctrine of reasonableness and ultra / intra vires.

The reliance on model rules in Victoria has led to great confusion amongst Owners Corporations. It would be estimated that over 50% of Owners Corporations in Victoria have unenforceable Rules registered on their Certificates of Title. Developer's Rules that were registered upon creation of the Owners Corporation are usually purchased off the shelf by developers. The majority of these rules are unenforceable, due to the strict operation of Riordan's judgment.

There is no consumer confidence in the enforceability of Rules in Victoria. The state has a reputation now as being 'lawless' and 'toothless' in being able to bring a transgressor of Rules to task.

In NSW Models Rules have been introduced on all of the above matters and in relation to specific subjects such as smoking and keeping pets the Owners Corporation were given the possibility to opt on two different kind of By-law: more restrictive or more permissive.

As the adoption of Model Rules is, by nature, not compulsory, it is essential that the Owners Corporation is invested with the powers to tailor its own set of rules to suit the demand of the owners in that specific scheme.

Owners Corporations should have the ability to enforce a Model Rule to deal with pets that cause nuisance, or occupiers that smoke in common area and much more because from the regulation of those type of behaviours depends the peaceful and full exercise of the right of ownership.

In NSW an Owners Corporation is able to make by-laws which deem certain types of work to be cosmetic or minor renovation for the purpose of their scheme, as long as the by-law is consistent with the Act. Accordingly, the Scheme is effectively expanding its power to determine whether to easily allow certain type of works or not.

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

Fire- safety is one of the primary concerns in the management of a Scheme.
The Owners Corporation has a duty to maintain the common property and the exercise of this duty must not be frustrated by tenants.

In the NSW legislation it is established that a lease has an implied covenant by the lessee to comply with by-laws of the Scheme, moreover a lessee must be provided with a copy of the by-laws.

Indeed, Model Rules are statutory contracts between the Owners Corporation and the owners, however while tenants can be bound through the lease agreements, for the privity of the contract, it is not possible to bind the invitee.

In addition, we believe that a Model Rule enforcing the compliance with fire-safety requirements is fundamental to protect the personal safety of the occupiers, to avoid obstruction to the investigations and inspections carried out by the Fire Companies and Council and to prevent issuing of Fire Orders that sometime can be fatal for the finances of the Owners Corporation.

Therefore, rules should be drafted so to create joint and several liabilities on owner, tenant and invitees.

20) Do all or only some of the options improve the position of Owners Corporations and why?

All of the above Options are essential to the regulation of duties and rights of owners and Owners Corporation.

In particular, alterations to the external appearance of the lot ought to be a decision that can only be authorised by the Owners Corporation (after any town planning approval process has been completed).

We support the adoption of an additional Model Rule to deal with this situation, with the proviso that if the external appearance of the lot is being altered but only involves changes or additions to lot property, then the approval of the Committee (or an ordinary resolution of the Owners Corporation) is required. However, if the external appearance of the lot is being altered and that involves changes or additions to common property, then a special resolution ought to be required.

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?

Beside the impossibility of enforcing by-laws upon invitees, it is sometime extremely difficult to single out the material executor of the breach: allowing joint and several liabilities with the lot owners we avoid the risk of creating a veil on the liability.

The owner of a lot should be made responsible for the actions of the invitees affecting the common areas.

This situation, unfortunately opens to complicated academic debates related to the configuration of the legal concept of responsibility and liability.
In Civil Law Countries, but lately approved as well in U.S.A. and other Common Law Countries a similar kind of responsibility is reached by way of types of vicarious liability or strict liability: those are exception to the doctrine of "no liability without fault"; the rationale is the determination of a liability system based on the risk rather than on the "*culpa*".

In Common Law system to achieve an extra-contractual liability it has been used the concept of negligence, standard of care etc.[8])

In South Australia a famous Supreme Court case [9] established that there is a specific limitation of liability to trespassers: under s 20(6) of the *South Australia Civil Liability Act* 2003, the occupier owes no duty of care to trespassers unless 'the presence of trespassers, and their consequent exposure to danger, were reasonably foreseeable', and 'the nature or extent of the danger was such that measures which were not in fact taken should have been taken for their protection.[10]

Beside legal speculations on the legal nature and the extent of the responsibility of the owner for his invitee's actions, we believe that the similar kind of approaches could be considered to appropriately regulate this aspect so that if an Owners Corporation has a duty to make the property safe for the owner's invitee, as balancing exercise the owner of the lot he should be responsible for the invitees' action against the common property.

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.

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?

---

[8] In Australia the case *Australian Safeway Stores Pty Ltd v Zaluzna ('Zaluzna')* (1987) 162 CLR 479 determined the concept of occupiers' liability for injuries to entrants on their premises.

[9] *Dilettoso v Strata Corporation 10135 Inc* (Unreported, Supreme Court of South Australia, Williams J, 21 October 1995)

[10] *Two Problems of Occupiers' liability of Peter Handford and Brenda McGivern (Professors, Faculty of Law, The University of Western Australia)*

No. Changes are required. Committee members have a thankless job and the government ought to adequately protect and indemnify committee members (provided they act in good faith).

Committee Members are personally liable for decisions made on behalf of the Owners Corporation outside his authority (ultra vires).

The current laws in the OC Act 2006 are adequate to deal with any situation arising.

Owners Corporations are complex entities, in some cases managing annual budgets in excess of $1 million. They have all sorts of governance requirements and legislative duties, and yet these persons are volunteers.

Even very large Owners Corporations struggle to have a quorum at Committee meetings, and would struggle to have more than 4 meetings a year.

In addition, the role, powers and functions of the Chairperson ought to be constrained and limited only to the conducting of business at Meetings.

Too often, the Chairperson is viewed as 'the leader' of the Owners Corporation, and their 'decision' tends to be viewed as final. This does not accord with the traditional legal role of a chairperson, whose sole authority is limited to running the meetings, organizing the order of speakers and debate, making rulings on motions out of order and declaring votes and declaring decisions.

Consumer Affairs ought to review *Horsley's Law of Meetings* and ensure that the Chairperson's role is constrained accordingly, otherwise the Chairperson's powers may displace hundreds of years of common law

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.

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?

Community building should be carefully set up and regulated where allowed. While they can contribute to create harmony and active participation to the community life,

they can expose the Owners Corporation to unnecessary risks leading to litigation and disputes.
We believe that the creation of community building functions should be kept severed in terms of administration, management and funds.

In relation to the abandoned goods, a specific provision in line with the new NSW approach on this topic should prevent unintended consequence caused by ad –hoc decisions of the committee members.
For instance, a decision of the owner corporation to allow for several days personal goods on common property could have the unintended consequence of creating a lien which will make the Owners Corporation responsible for the keeping of the status of the goods; on the other hand a regulated power conferred to the Owners Corporation to dispose of abandoned goods on common property could contribute to avoid obstructions, safety risks and difficult situations leading to potential liability of the Owners Corporation.

We Live Here, also agrees that Owners Corporations should be able to deal with water rights, including water that falls on common property.

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

We Live Here supports the adoption of legislation and regulations to match the NSW legislation in this regard.

However, Owners Corporations should elect whether they wish to exercise this power by passing an Additional Rule (together with conditions on the exercise of the power) as some Owners Corporations would be reluctant to take on storage costs / removal fees and potentially face legal proceedings from the owners for removing goods without authority or for conversion or for property damage.

The new NSW Legislation has offered a specific approach to deal with abandoned goods establishing that The Owners Corporation has the power to store, dispose or sell goods (anything moveable) left on the common property if:

(a) a disposal notice has been placed on or near the goods and the goods have not been removed from the common property within the period specified in the disposal notice (usually minimum 48 hours- as per Regulations), or
(b) they are perishable goods, or
(c) they consist only of rubbish.

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

If goods are placed in such a position that they block an entrance or exit, the Owners Corporation may move the goods to another place on the common property before placing a disposal notice on or near the goods, and for that purpose the Owners Corporation is taken to be the owner of the goods.

Therefore, the Owners Corporation may dispose of the goods by selling them or in any other lawful manner and for that purpose is taken to be the owner of the goods.

3. Decision-making within Owners Corporations

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.

26) How might the limitations on proxy farming have negative consequences for the governance of inactive Owners Corporations?

- We support the restriction of proxy farming and the consistency to the NSW legislation: it has been experienced that proxy farming allows "manipulation, threatening behaviour and subjugation of others".

- We believe that the availability of an electronic voting system should nullify the fear of difficulties in the efficient governance of the strata scheme.

Managers should not be granted any decision-making authority. They are strictly to act as agents and as trusted advisors.

An owner that is involved in the management decisions of the schemes and has knowledge of the issues and the financial aspects of the building will be a supportive tool for the effective management of the scheme and certainly more valuable as an external representative.

In relation to the aspect of limitations in sale contract we believe that it is common practice for developers to insert special conditions into contracts to carve out the ability of a lot owner (or subsequent lot owners) to vote against the developer or any connected entity for all time in a manner that may cause the developer or any connected entity any loss or damage.

In addition, some developers insert a special condition that direct purchasers to provide their irrevocable proxy to the developer for certain specified acts.

These two types of special conditions ought to be prohibited. However, in the author's view, this would require an amendment to the Sale of Land Act, as well as the Owners Corporation Act 2006.

In relation to proxy farming, it is noted that Victoria has no restrictions in place on the maximum number of proxies. Queensland and NSW by contrast have put in place amendments to their legislation to deal with this issue.

We respectfully submit that either the Queensland **or** NSW model ought to be adopted in Victoria.

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

Option 9B is more appropriate but must be regulated so that the implementation of the decision-making power can only be allowed for urgency as the stake is the actual disposition of an individual property right.

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?

Putting such power in the hands of individuals does not conform with the overall scheme of the Act, which directs that governance and decisions ought to be done via the Committee.

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?

An interim resolution can effectively solve the issue of inactive Owners Corporation and will be an incentive to a more active approach to revert the resolution in the future.

Indeed, the second approach under Option 9C, without contemplating the alternative of a quorum approving the resolution, it seems more protective towards the interests of the individual owners.

3.2 Committee size and process.

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.

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

Even very large Owners Corporations struggle to have a quorum at Committee meetings, and would struggle to have more than 4 meetings a year.

More needs to be done to ensure that Committees have strong and robust participation. The current requirement for Committees to have no more than 12 on the Committee is adequate. Reducing the maximum number of committee members (which is being considered) would be a mistake, as it would concentrate responsibility and liability to a smaller class of persons.

However, the above suggestion should perhaps apply only to prescribed Owners Corporations (those with 100 lots or more). For smaller Owners Corporations, a smaller number of Committee members may be preferable but should be kept flexible to suit their own individual needs.

4. Dispute resolution and 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).

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?

We believe that Option 11A well addresses the issues related to the internal dispute resolution process and it can be beneficial for the industry: the Dispute Resolution process is only relevant and helpful as a grievance procedure for dealing with disputes between residents.

However, the current Dispute Resolution process does not work, and is of no benefit at all in the situation where an Owners Corporation has discussed an issue and has decided to pursue a potential breach of Rules. The Dispute Resolution process in this instance should be dispensed with.

It is noted that CAV offers conciliation. Furthermore, the VCAT process offers Mediation and / or a Compulsory Conference as a first step before hearings, and we endorse those processes as more helpful than the internal Dispute Resolution process.

In relation to the procedure under Model Rule 6, if, in accordance with Option 11A, an owners corporation is not required to engage in the dispute resolution process, the creation of an alternative optional dispute resolution must be regulated to ensure that the process remain quick and informal.

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.

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

We Live Here Inc. supports VCAT and its jurisdictional measures and the legislation that supports it. Currently, VCAT may make rulings and declarations about the validity of Rules, and that jurisdiction ought not be removed.

Otherwise, parties in dispute regarding the validity of a Rule -for example- would be required to file an application with a Court of equity such as the Supreme Court, thus increasing the costs for all parties concerned. VCAT was established as an informal and cheap and effective means of determining disputes in community living. It is vital for the community that VCAT's jurisdiction to hear these types of disputes remains.

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

We support the implementation of Option 12 A and we also seek the implementation of Option 12 C.

VCAT ought to rule on the matters to ensure that proper procedure and natural justice may be observed.

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.

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?

We Live Here supports Option 13A.

The requirement to pass a Special Resolution in order for the Owners Corporation to bring legal proceedings in its own name works well for developers, builders and other service providers that are seeking to avoid liability.

However, for Owners Corporations it is administratively burdensome, expensive and in some cases, infeasible and practically impossible to pass a special resolution of 75% of owners. The high threshold acts as a bar to Owners Corporations bringing proceedings and is not in the interests of justice. By way of comparison, a publicly listed company is not held to the same account as an Owners Corporation in this regard.

We Live Here Inc. supports the amendment of the legislation to require an **Ordinary Resolution** to be passed prior to the commencement of legal proceedings. This will bring Victoria in line with the Strata Schemes Management Act 2015 (NSW) and the Body Corporate and Community Management Act 1997 (QLD).

The requirement to pass an Ordinary Resolution would still mean that the decision to file legal proceedings would not be taken lightly or on a whim, and the requirement to convene a Special General Meeting and to pass an ordinary resolution would still provide members of Owners Corporation with the requisite opportunity to scrutinize and consider the prospective decision.

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.

In a recent NSW case[11], the Supreme Court recently considered a derivative action of a lot owner on behalf of an Owners Corporation and the application of the 'proper plaintiff' rule.

The 'proper plaintiff' rule is derived from, a landmark English case[12], which held that in an action where a wrong is alleged to have been done to a company, the proper plaintiff is the company itself. This rule is subject to a number of exceptions, including the so-called "interests of justice" exception.

The Court found that in certain circumstances, a lot owner who is a member of the Owners Corporation could be permitted to bring a derivative action on behalf of an Owners Corporation and be entitled seek indemnification for its costs from the owners corporation.

Despite non-compliance with section 80D of the Strata Schemes Management Act 1996, a lot owner who is a member of the Owners Corporation could be permitted to bring a derivative action on its behalf if that action was found to fall within one of the exceptions to the 'proper plaintiff' rule. To the extent that such an action was in the interests of the Owners Corporation the plaintiff may be entitled to be indemnified by the Owners Corporation for their costs of taking those proceedings[13].

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?

No, we believe that Option 13A would me more appropriate to address issues and risks related to this matter.

5. 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

[11] *Tan v The Owners Strata Plan No 22014 (No2)* [2015] NSWSC 1885
[12] *Foss v Harbottle* (1843) 67 ER 189
[13] *http://www.chambersrussell.com.au/media/1137/tan-010616.pdf*

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

We Live Here believes that the Victorian Legislation, on this matter, should be consistent with the NSW legislation.
In NSW, the legislation currently prescribes that a 'Large Owners Corporation' is one that comprises 100 lots or more (not including car parking lots, utility lots and storage lots). A Large Owners Corporation is then subjected to stricter governance requirements and oversight.

It is suggested that the OC Act ought to be amended to accord with the NSW definition that a Prescribed Owners Corporation should be one with **100** lots or more per the above definition.

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?

We refer to our previous answer.

6. Finances, insurance and maintenance

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.

39) What other options could be considered to enable Owners Corporations to recover debts?

One of the widespread practices in the industry is adding 'debt recovery expenses' to the lot owner's levy account.

In a recent NSW case[14], it was clarified that this practice is against the law: expenses should not appear on a lot owner's account unless they have been subject to assessment either by a court or a costs assessor, moreover this practice has the effect of placing the account into arrears when actual levies were up to date.

To avoid this issue, we believe that a pre- established debt recovery process and fees should be part of the yearly AGM Minutes which each lot owner receives so that all the lot owners are aware of the procedure if they do have difficulty paying their strata levies and at the same time it will function as a reminder.

Importantly, the Fee Notice to start a recovery debt proceeding against a specific lot owner should be marked as "Important" to communicate the sense of urgency and not be disregarded by the owner.

To avoid ambiguous or hefty charges being imposed on lot owners, there ought to be a maximum fee that can be awarded. The majority of Owners Corporation Managers would charge a flat $50 + GST ($55) fee for debt recovery reminder notices and letters.

Once the matter is referred to a debt collection agency or to a law firm, that law firm might then set a further fee for a Letter of Demand prior to issuing a Statement of Claim.

40) Should the amount of any fee bond be left to Owners Corporations to set and, if so why?

Once the Statement of Claim is lodged at VCAT and the filing fee is paid, it is estimated that over 50% of the defaulting lot owners then contact the Owners Corporation and either clear the outstanding balance or enter into an acceptable payment plan arrangement with the Owners Corporation. This, then leaves the Owners Corporation out of pocket with (i) the Administration Fees charged by the Manager, (ii) solicitors fees for letters of demand and for preparing the application, and (iii) the VCAT or Court filing fees.

In most cases, this would add up to between $500 - $600. The Owners Corporation should not be out of pocket for these expenses that are necessarily incurred.

For these reasons it will be easier and more effective if the Owners Corporation will be able to decide the amount to be lodged as fee bond based on the financial situation of the Scheme, so as to be prepared to the possible expenses without affecting the financial status of the Scheme.

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

[14] *Owners – Strata Plan No 52098 v Khalil* [2014] NSWLC 2

It would be hard for the Legislator to determine a fee that could be adequate for every Owners Corporation, but different caps based on the size of the Scheme could be reflective of the type of expenses and Owners Corporation can face.

Certainty, as every financial aspect in the management of the Scheme there should be principles of good faith and reasonableness applied in the determination of the maximum amount.

42) Would it be more efficient if fee bonds were held by the Owners Corporation itself, the Owners Corporation manager or the RTBA?

Fee bonds should be held by the RTBA, but with the involvement of the Owners Corporation Manager to be the bridge between the single owner and the Authority.

Committee members are volunteers and do not have the time to attend grievance meetings to discuss with lot owners about the reasons **why** fees and levies have not been paid

Defaulting lot owners might raise concerns that place committee members in difficult situations (i.e. – recently got made redundant, health concerns, trouble meeting payment plans etc.). Committee members should not be placed in the position of having to deal with these types of issues, as it could lead to inconsistent decisions being made. Ultimately, the Owners Corporation could end up 'carrying' debts for prolonged periods of time, leading to inefficiencies and higher overall costs;

43) Should Owners Corporations be able to recover costs that exceed the debt or should they be capped at level of the debt?

Section 109 of the *Victorian Civil and Administrative Tribunal Act* establishes the general principle that each party to the proceeding bears their own costs, but allows in s109(2) orders that a party pay all or a specified part of the costs of another party in a proceeding.

The Owners Corporations should be able to recover as a debt **all of the expenses** connected with the proceeding for the recovery, being the reasonable legal and administrative costs of recovering debt.

The solution is for the Owners Corporation Act to be amended to prescribe that the costs of the debt recovery (prior to judgment) are recoverable by the Owners Corporation as a debt. Consumer Affairs should simply adopt and insert the wording of s 86 (2A) of the Strata Schemes Management Act 2015:

> *"An Owners Corporation may, without obtaining an order under this section, recover as a debt in a court of competent jurisdiction, a contribution not paid at the end of 1 month after it becomes due and payable, together with any interest payable*

on that unpaid contribution and the reasonable expenses of the Owners Corporation incurred in recovering those amounts".

Common law has provided numerous precedents[15] establishing that an Owners Corporation will be entitled to recover such expenses only if they are reasonably incurred, reasonable in amount, and if the application for costs is made in the same proceedings as the proceedings for recovery of the subject unpaid contributions.

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

In keeping with the policy of the legislation and the Courts (particularly the higher Courts) that the judicial system is not to be used merely as a debt collection agency for Owners Corporations and in line with the general guiding principle of just quick and cheap resolution of the real issue in the proceeding, we believe that Option 15F would be able to deliver a more just and fair assessment of the costs while alternative dispute resolutions should be used to avoid litigation costs and at the same time avoid 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.

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

As it stands, the insurance regime under the current legislation is perfectly adequate, and no changes are necessary. Any amendment to impose Owners Corporations with the requirement to take up additional voluntary policies would only lead to higher annual fees for the Owners Corporation, and increased insurance premium

[15] Owners of *Strata Plan 36131 v Dimitriou* [2009] NSWCA 27, *The Owners - Strata Plan No 52098 v Khalil* [2014] NSWLC 2 and *McClymont & Anor v The Owners Strata Plan No 12139* [2009] FMCA 1079.

commissions for the insurance brokerage industry and for Owners Corporation Managers.

Each year at the AGM, the Owners Corporation must decide the level of insurance cover that best suits their needs. A one size fits all approach is not required, and would be perceived by Owners Corporations as the Victorian government 'helping out' the insurance industry.

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

We refer to our answer to question n.45. We do not see 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?

We refer to our answer to question n.45.

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.

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

Implementing a Building Maintenance Plan can be a quick and painless way to protect the value of the building and be made aware of potential issues ahead of time, taking the pressure off scheduling and budgeting for works, but it should be managed in accordance with the circumstances of the case.

Anecdotally, it is reported by some Owners Corporations that the developer and those in control of the Owners Corporation at the initial stages ensure that the Maintenance Plan is 'basic' and devoid of accurate and specific ongoing costs. A

particular Owners Corporation in Southbank comprising over 300 lots (less than 4 years old) has found that its Maintenance Fund did not accurately prescribe all sorts of elevator and roof maintenance costs – which now means that an extra $400,000 per year is required to be raised.

Those associated with the development have the ability to carve out certain big-ticket items from the Maintenance Fund in order to ensure that the apartments can settle on the grounds that the estimated annual fees are kept low, or in accordance with the annual fees that were estimated and disclosed prior to purchase.

It is submitted that initial owners (developers) be required to ensure that the Maintenance Fund is accurate, and that at any time prior to the 5-year period after the Owners Corporation was registered, if the Maintenance Fund is found to be deficient, then the developer ought to be required to fund the differential.

We support the NSW position that, while Maintenance funds must be established, owners are best placed to make decisions regarding the repair and maintenance and renewal of its fixtures. For example, a well-maintained piece of common property might not have to be replaced strictly in line with the Maintenance Plan, especially if it is fit for purpose and showing no signs of dilapidation.

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?

We refer to our previous answer as per above.

In all circumstances, the Owners Corporation ought to be able to access its funds from the Maintenance Funds to meet the costs of unplanned works that might arise.

Indeed, in NSW, under Section 76 of the Strata Schemes Management Act 2015, an Owners Corporation may decide to borrow money from its sinking fund provided that it re-pay those funds within 3 months.

Moreover, There are presently 3 financial institutions[16] that provide finance to Owners Corporations in circumstances where urgent payments are required (to fund legal costs, carry out necessary repairs etc.).

However, the interest rates can vary considerably, and from a range of between 9 - 15%.

Despite this, we do not support any amendments to the legislation that would require or obligate Owners Corporation to set aside funds for contingencies. As it

[16] Bank of Queensland, Macquarie Bank and Lannock Finance.

stands, it is very difficult for Owners Corporations to keep budgets to a reasonable level, and apartment owners are very sensitive to any increase in the yearly levies and fees.

The solution as we see it is for Owners Corporations to be granted wider powers to borrow money from its Maintenance Fund

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?

We refer to the above answer: our position is that this matter should be left to Owners Corporation and that there can be a simple requirement to have a maintenance plan, but its administration should be regulated by the Owners Corporation.

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

We refer to our answer as per above.

6.4 Increased expenditure arsing 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.

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 Victorian Supreme Court[17] ruled on this point that Mashane did not benefit from certain repair and maintenance costs to common property, therefore was not required to contribute to a special levy or levies relating to those works.

We Live Here supports the codification of the Mashane Principle.

The wear and tear and dilapidation to common property is affected by differing uses of lots within buildings, and the lot entitlements basis does not and cannot reflect the real cost that a specific lot should contribute.

For these reasons we believe that whether a lot has a specific use that affects the common property, the Owners Corporation should be able to recover, by way of

[17] *Mashane Pty Ltd v Owners Corporation* RN 328577 [2013] VSC 417

differential levy, the associated costs for the repairs, maintenance or replacement directly to the owner of the lot, and upon an expert valuation.

In line with this procedure, VCAT should be vested with the power to issue orders accordingly.

7. Part 5 of the Subdivision Act

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.

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

The use of the common seal is an important issue for Owners Corporations.

Should the current requirements in the OC Act be relaxed in this regard there is the potential for its improper use and in the absence of full authority.

For instance, section 127(1) of the Corporations Act 2001 (Cth) provides that a company may execute a document without using a common seal if the document is signed by:

- two directors of the company;
- a director and secretary of the company; and
- for a proprietary company that has a sole director who is also the sole company secretary – that director.

A similar provision for the Owners Corporations will create impediment for the quick execution of documents because the committee members are volunteers and often not available, in fact the Owners Corporation Manager, utilizing the common seal is able to speed up procedures.

We Live Here support the retention of the current legislative requirements in relation to the use of the 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.

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

We reject Option 20A and support Option 20C and Option 20E.

There have been many examples where Developers have set lot liabilities at 1 and lot entitlements at 20 for the lots that they own and retain. Developers have a conflict of interest and ought not to be entrusted with the responsibility to set lot liabilities and lot entitlements how they see fit.

Instead, the lot liabilities and lot entitlements ought to be determined by an independent licensed surveyor and an independent licensed valuer, taking into account the size and value of the respective lots. This will need to be done at an early stage when the lots are offered for sale 'off the plan.'

The benefit of the lot and the apportionment of the levy can be determined not only in relation to the size and the market value, but also to the consumption of common utilities, expressing the proportion of the administrative and general expenses of the Owners Corporation which the lot owner is obliged to pay.

Importantly it will be required a certificate signed by qualified valuer certifying that the unit entitlements of the lots are apportioned on a market value basis.

In all other instances, a special resolution ought to be set, in regards to changing the lot liabilities and lot entitlements.

Furthermore, VCAT should be provided of similar power as determined in section 236 of the strata Scheme Management Act 2015 (Order for reallocation of unit entitlements)

> *(1) Tribunal may make order allocating unit entitlements*
> *The Tribunal may, on application, make an order allocating unit entitlements among the lots that are subject to a strata scheme in the manner specified in the order if the Tribunal considers that the allocation of unit entitlements among the lots:*

(a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered, or
(b) was unreasonable when a revised schedule of unit entitlement was lodged at the conclusion of a development scheme, or
(c) became unreasonable because of a change in the permitted land use, being a change (for example, because of a rezoning) in the ways in which the whole or any part of the parcel could lawfully be used, whether with or without planning approval.

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?

All of those Options removing the developers' discretion ensure fairness in the process, but a combination of the principles in 20C, the criteria in 20D and the procedure for subsequent changes in 20E should be adopted.

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)?

Under no circumstances should a developer be entrusted with this responsibility. There are hundreds if not thousands of buildings in Victoria where this has had unfair consequences for owners.

It is common practice that in the Off the Plan sales the Developer reserves its rights to change the lot entitlements until registration of the Plan.

A Developer cannot be trusted in the position to adequately allocate lot entitlements as it may be influenced by the urgency of the sales to gain funds for the completion of the works.

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

See above answer.

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?

Yes.

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?

A special resolution may be required. Alternatively, VCAT may be empowered to rule on the matter, in the interests of justice and in the absence of a special resolution.

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.

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?

We believe that Option 21A is the most appropriate option because a higher threshold would be extremely hard to reach and often schemes in status of disrepair of financial difficulties can see the collective sale or redevelopment the most adequate solution.

As appropriately mentioned in the Legislative Council Hansard of the 21 October 2015 to the Strata Schemes Management Bill 2015 by the Hon. Niall Blair[18], as the number of lots in a strata scheme increases, it becomes harder to achieve unanimous agreement on any issue. When the Strata Titles Act was introduced in 1973, all the decisions affecting the common property required a unanimous resolution. This requirement was relaxed in 2001 because of the difficulty of obtaining a unanimous resolution.

A similar situation is in Victoria. However, we suggest that a conservative approach ought to be taken in relation to this issue. Anecdotally, many leading NSW academics and lawyers consider that the 75% re-development threshold will not be successful in its current form, nor will be there a high uptake of schemes to commence such a process.

Additionally, the rights of minority owners may not be adequately addressed under the new NSW legislation, and it is highly likely there will be legal challenges to the model.

[18] *https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLC/3204/2R%20Strata%20and%20cognate_1.pdf*

In our view, Victoria should adopt a wait and see approach. By keeping a close eye on the success (or otherwise) of the NSW legislation, Consumer Affairs ought to consider raising this issue as part of a standalone review after say, 5 years has passed. This should give sufficient time for case studies in NSW to come through.

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

Tier 1 would present some conformity with the NSW Legislation in the process to be adopted and the NSW industry presents several points in common with the Victorian industry in regards to the type, size and the demographic of the buildings.

An approach similar to the one in Option 21A would grant the safeguards for the minorities or disadvantaged residents such as the dual special resolution, the several consultations, the regulation of compensation and most important the VCAT supervision to give effect to the resolution ensuring that the good faith principle has been complied with at every stage of the process and implementing dispute resolution procedures, where necessary.

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

Option 21 E-1 for the same reasons mentioned above, in addition the Owners Corporation manager together with the Renewal Committee should ensure that the process is supported and overviewed by capable parties (eg. Lawyers, financial advisers, real estate agents, etc.) to ensure that the collective sale is:

- strategically planned to ensure efficient alignment of concurrent processes both statutory and within the Owners Corporation;
- governed by an appropriate project framework to manage contractors, costs, timing and work streams; and
- structured to provide stakeholders with the most tax efficient redevelopment model.

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?

Commercial buildings are characterised by different requirements and dynamics. We are not in the position to suggest more appropriate solutions for commercial buildings.

However, we are of the opinion that a 75% resolution seems more adequate to reach the balance between the competing interests in the collective sale or redevelopment.

64) To what extent do the options to reform the Subdivision Act improve decision-making processes within Owners Corporations?

As an aspirational tool, one would hope that decision-making effectiveness would be improved, however it remains to be seen whether the proposed options for reform would assist.

Around the world most other jurisdictions with strata or condominium legislation (United States, Japan, United Kingdom, Singapore, New Zealand) have a provision for the termination of the scheme with less than unanimous agreement. We would have to adopt a wait and –see approach.

8. Retirement villages with Owners Corporations

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.

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?

This is no doubt a complex issue however We Live Here can offer no insights or solutions in this regard, save that in principle, an Owners Corporation and a retirement village as separate entities are incompatible and this model should not be encouraged nor allowed to flourish.

The Retirement Villages Act ought to be strengthened to oversee the entire range of governance issues. Existing Owners Corporations (with a retirement village operator) ought to be encouraged to extinguish and de-register the Owners Corporation and move across to the Retirement Villages Act jurisdiction.

Nevertheless, Option 22A seems to preserve the different approach of the two Acts, recognizing the different nature of the schemes, conveniently combining the similar provisions

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?

The combination of annual meetings adjusting the voting entitlements for resolution and applying procedures under the Retirement Villages Act, it seems more appropriate.

Residents of a Retirement Village should not follow procedures and dispute resolution process within the Owners Corporation Act as they are not reflective of the type of problems and environment within a Retirement Village where external factor play an essential role in create distance from an Owners Corporation.