

Amendments to the Owners Corporation Act 2006

Presentation to Residents 3000



Introduction

- The Victorian Government has undertaken a significant review of various Acts relating to property matters, including the Owners Corporation Act 2006.
- On 1 December 2021, the Owners Corporation and Other Acts Amendment Act 2021 comes into operation.
- It amends various provisions of the Owners Corporations Act 2006, Retirement Villages Act 1986 & Subdivision Act 1988.



OC Act – Amendments Summary

1. To provide for 5 tiers of OCS with different degree of regulation depending on the number of occupiable lots;
2. To remove the requirement for a seal;
3. To allow OCs to levy fees to cover the premiums for reinstatement and replacement insurance or for an excess amount on an insurance claim;
4. To allow OCs to dispose of goods abandoned on common property;
5. To provide for what may be disclosed at the first meeting of an OC;
6. To amend the duties of members of committees & sub-committees;
7. To further restrict the circumstances in which a person with a criminal record may be registered as the manager of an OC;



OC Act – Amendments Summary continued

8. To insert new duties of managers of OCs relating to contracts for goods or services, money held on behalf of OCs on trust and the obligations to disclose beneficial relationships with suppliers of goods or services;
9. To provide for OCs incorporated in respect of land used or to be used for the purposes of a retirement village; and
10. To empowers VCAT to make orders that authorise lot owners to commence, prosecute, defend or discontinue any proceeding on behalf of the OC OR to require lot owners to pay the reasonable costs of the OCs



Retirement Villages Act – Amendments Summary

To enable the residents of a retirement village to elect a resident committee.



Subdivision Act – Amendments Summary

1. To specify how lot liability and lot entitlement must be allocated; and
2. To require an initial owner to engage a surveyor to set out the initial allocation of lot liability and lot entitlement.



Categories of amendments we will discuss

(this is not an exhaustive list)

- Changes that will affect the Owners Corporation
- Changes that will affect the Manager



Changes that will affect the Owners Corporation



Section 7: The five tiers of owners corporation

Current position:

- OCs are defined as being either prescribed or not prescribed.

Affect of the change:

- There will be five classes of OCs as follows:
 - Tier 1 has > 100 occupiable lots and is not a services only OC;
 - Tier 2 has 51 to 100 occupiable lots and is not a services only OC;
 - Tier 3 has 10 to 50 occupiable lots and is not a services only OC;
 - Tier 4 has 3 to 9 occupiable lots and is not a services only OC;
 - Tier 5 is a 2-lot subdivision or is a services only OC.
 - Services Only OC has no land or building and either the initial owner arranged for a utility company to install common metres that are designated as common property or the subdivision has a common supply or common service that is unmetered.



New definitions

Current position:

- The Act does not differentiate between a services only OC and an OC in the ordinary sense, and all lots are treated as being the same.

Affect of changes:

- lots will fall into one of two categories: occupiable (residential or commercial lot) and not occupiable (non residential or commercial lot); and
- OCs will fall into one of two categories: services only OCs or OCs in the usual sense.



Section 18: Power to commence legal proceeding

Current position:

- Section 18 currently provides that the OC must pass a special resolution to issue any legal proceedings, unless the proceedings are issued in VCAT for the recovery of unpaid monies owing to the OC or a breach of the OC's rule.

Affect of the changes:

- The changes provide that the OC is authorised to issue legal proceedings in VCAT or the Magistrates' Court of Victoria (or other state's equivalent) if it passes an ordinary resolution but only if the matter is within the civil jurisdictional limit of the Magistrates Court.



Section 23: Owners corporation may levy annual fees

Current position:

- Section 23 currently provides that the OC must levy fees in accordance with lot liability in relation to repairs, maintenance or other works even if the works are wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation.

Affect of the changes:

- The changes will allow the OC to:
 - levy additional annual fees against a lot if the OC has incurred additional costs as a result of a particular use of a lot and the fee struck in accordance with it's lot liability would not be sufficient to cover those additional costs; and
 - levy those additional fees using the benefit principle.



Section 23A: Owners corporation may levy fees in relation to insurance

Current position:

- The OC must levy insurance premiums on all lots in accordance with lot liability pursuant to section 23, and can rely on the benefit principle to seek reimbursement of an insurance excess where a lot owner makes a claim on the OC's insurance.
- Model Rule 5.1 provides that an owner or occupier of a lot must give written notification to the OC if the owner or occupier changes the existing use of the lot in a way that will affect the insurance premiums for the owners corporation.
- However, there is currently no provision allowing the OC to seek payment of an increased insurance premium by the lot that has caused the increase, or to seek reimbursement for the cost of damage caused by a lot owner/lessee/invitee where the OC's insurer will not cover the damage or the cost or the damage is less than the cost of the insurance excess.



Section 23A: Owners corporation may levy fees in relation to insurance (continued)

Affect of the changes:

- The changes will allow the OC to:
 - levy the insurance excess against the lot owner that made the insurance claim; and
 - levy the cost of damage caused by a lot owner/lessee/invitee where the OC's insurer will not cover the damage or the cost or the damage is less than the cost of the insurance excess.



Section 24: Extraordinary fees and charges

Current position:

- The OC Act does not contain any provisions allowing the OC to charge on the basis of a particular use of a lot.

Affect of the change:

- The addition of section 24(2B) will allow the OC to levy special fees and charges against a lot where the repairs, maintenance and other works are necessary for the use of that lot.



Section 34: Financial Statements

Current position:

- An OC (other than 2-lot subdivision) must prepare annual financial statements for presentation at the AGM. These may be audited. However, for a prescribed OC, they must be audited.

Affect of the change:

- Tier 1, 2 or 3 OC must prepare annual financial statements for presentation at the AGM. Tier 4 OC must also do so for any financial year in which it levies annual fees.
- Tier 1 OC must be audited. Tier 2 OC must cause its financial statements to be reviewed annually by an independent accountant (but can resolve to audit). Tiers 3, 4 & 5 OC may resolve to review or audit



Section 36: Maintenance plan

Current position:

- Prescribed OCs are required to have a maintenance plan, whereas as OCs that are not prescribed OCs can choose whether or not they have a maintenance plan.

Affect of the changes:

- Tier 1 & 2 OCs must prepare and approve a maintenance plan, whereas Tiers 3, 4 & 5 may prepare and approve a maintenance plan.



Section 37: What must a maintenance plan contain?

Current position:

- The Act does not define how the approved maintenance plan can be amended.

Affect of the change:

- The addition of section 37(1A) clarifies that an ordinary resolution is sufficient.



Section 42: Payments into maintenance fund

Current position:

- The OC Act does not stipulate how much must be paid into the maintenance fund for the maintenance plan or how the levy must be raised.

Affect of changes:

- The new provisions clarify that an ordinary resolution is sufficient to raise the levy for the approved maintenance plan, and that the levy raised must be adequate to fund the approved maintenance plan.



Section 78: Can a general meeting proceed even without a quorum?

Current position:

- A general meeting can proceed if there is no quorum. All resolutions passed at the meeting will be interim resolutions.

Affect of the changes:

- The addition of sections 78(1A) and (1B) will allow the manager to pass interim resolutions at a general meeting with no one else present in person or via proxy provided that the manager does not pass an interim resolution with respect to:
 - The manager's contract of appointment;
 - An amount that is greater than 10% of the OC's annual budget or previous annual budget if a new budget has not been set.
- The addition of sections 78(1C) gives the OC the ability to exclude or alter the manager's powers under s. 78(1A) by way of an ordinary resolution.



Section 89C: Proxies

Current position:

- Section 87 provides that lot owners can appoint a proxy to act on their behalf at OC meetings, in ballots and on the committee.
- The OC Act is silent with respect to whether a committee member can appoint a third party to attend a committee meeting on their behalf, if that proxy was not elected to be on the committee.

Affect of the changes:

- The addition of section 89C will preclude committee members from appointing third parties to attend a committee meeting on their behalf. If a committee member is unable to attend a meeting, they will only be allowed to appoint another committee member to act as their proxy at that meeting.



Section 89D: Restriction on number of lot owners on behalf of whom a proxy may vote on a resolution

Current position:

- Section 87 does not limit how many proxy votes a person can cast at an OC meeting.

Affect of the changes:

- The addition of section 89D will restrict a person holding proxies from casting a vote on behalf of:
 - More than 1 lot in an OC that has 20 or less occupiable lots; and
 - More than 5% of the lot owners in an OC that has more than 20 occupiable lots.
- The restriction will not apply to proxies given to a family member or in prescribed circumstances.



Section 89H: Term of contract of sale limiting voting rights void

Current position:

- The OC Act is silent with respect to contracts of sale.

Affect of the change:

- The addition of section 89H will preclude the developer from enforcing terms in the contracts of sale that seek to limit or control an incoming lot owner's voting rights in OC matters.



Section 100: Election of committee

Current position:

- OCs with 13 or more lots must elect a committee, and OCs with less than 13 lots can choose whether or not to elect a committee.

Affect of the changes:

- The change to section 100 will lower the threshold to 10 lots.



Section 103: Membership of committee (continued)

Current position:

- A committee must consist of a minimum of 3 members and a maximum of 12 members.

Affect of the changes:

- The changes to section 103 will mean that the committee must consist of a minimum of 3 members and a maximum of 7 members.
- However, the OC can resolve by ordinary resolution that the committee may have a maximum of 12 members instead of 7.



Section 138B: Power to make rules regarding external alterations and other works affecting lot owners

Current position:

- Section 138 provides that an OC can make rules with respect to matters set out in Schedule 1.
- Further, the Model Rules provide rules in relation to the use of common property, the external appearance of lots and renovations to lots.

Affect of the changes:

- The addition of section 138B will give the OC the power to make rules in relation to external alterations and other works that will affect lot owners.
- However, the OC will not be empowered to make rules that will *unreasonably* prohibit the installation of sustainability items on the exterior of a lot, such as solar panels.



Section 169I & J: Lot owner may apply to VCAT to commence, prosecute, defend or discontinue any proceeding on behalf of owners corporation

Current position:

- Section 163(1A) allows lot owners to apply to VCAT on behalf of the OC to resolve an OC dispute.

Affect of changes:

- Section 163(1A) will remain in the proposed amended Act. However, the addition of section 169I will expand on section 163(1A) to:
 - allow lot owners to seek orders from VCAT authorising the lot owners to commence, prosecute, defend or discontinue a particular proceeding on behalf of the OC.
- The applicant(s) will have the burden of proving why the orders should be made where the OC has not passed a special resolution or where the special resolution has failed and an ordinary resolution would not have been passed.
- The respondent(s) will have the burden of proving why the orders should not be made where the special resolution has failed and an ordinary resolution would have passed



Division 5A—Disposal of goods abandoned on common property

Current position:

- The OC Act does not have any provisions with respect to abandoned goods on common property.

Affect of changes:

- The addition of Division 5A will mirror the provisions in the Australian Consumer Law and Fair Trading Act 2012.



Sections 162 & 165(1) - VCAT powers extended

Affect of changes:

- VCAT may hear and determine a dispute relating to:
 - The disposal of goods abandoned on the common property;
 - A term of a contract of appointment of the manager (including whether a term is unfair).
- VCAT can make orders requiring:
 - A lot owner to pay to the OC reasonable costs incurred by the OC in recovering an unpaid amount from the lot owner (other than costs in the proceeding);
 - An occupier of a lot to grant entry to a lot or a building on a lot for the purposes of section 50.



Changes that affect the Manager



Section 119: Appointment and removal of manager

Current position:

- The OC can appoint and revoke the appointment of a manager.

Affect of the changes:

- The changes to the section 119 require tier 1 OCs to appoint an OC manager, unless it is authorised by special resolution to opt-out of the requirement. However, this can be reversed by a subsequent ordinary resolution.
- Tier 2, 3, 4 or 5 OCs may appoint an OC manager.
- Term of appointment must not exceed 3 years.



Section 119A: Contract of appointment of manager

Current position:

- Section 119 of the Act provides that the contract of appointment must be in the prescribed form. Further section 202 provides that any provision of a contract that purports to exclude, modify or restrict the operation of the OC Act is void.

Affect of the changes:

- Section 119A makes void terms in contracts of appointment which:
 - Makes conditional the revocation of the contract on the OC pass a resolution other than an ordinary resolution or requires it to convene a general meeting to vote on the resolution;
 - Allows the manager to renew the contract at its option;
 - Requires a tier 1 or 2 OC to give 3 months or more notice of its intention to revoke the contract;
 - Requires a tier 3, 4 or 5 OC to give 1 month or more notice of its intention to revoke the contract;
 - Cause the contract to automatically rollover if the OC fails to give notice of its intention not to renew the contract; or
 - Restricts the ability of the OC to refuse consent to an assignment of that contract (other than a requirement that such consent must not be withheld unreasonably).



Section 122(1): Duties of manager

Current position:

- The manager must:
 - act honestly, in good faith and with due care and diligence; and
 - Not use their position to gain a direct or indirect advantage for themselves or someone else.

Affect of the changes:

- The changes to section 122(1) will impose further obligations on the manager in carrying out its manager's functions being:
 - Take reasonable steps to ensure that any goods or services procured for the OC are competitively priced and on competitive terms;
 - Must not exert pressure on any member to influence the outcome of a vote; and
 - Before entering into a contract, disclose any benefit that the manager will receive by reason of the OC it is managing entering into a contract.



Section 122(2): Duties of manager

Current position:

- The manager must hold OC funds in trust on behalf of the OC.

Affect of the changes:

- The changes to section 122(2) will impose further obligations on the manager in respect of the OC's accounts, including holding the money separately for each OC on a plan of subdivision on trust (unless the OCs agree to the money being held in the same account) and must include interest earned.



122A Manager must disclose beneficial relationship with supplier

Current position:

- There are no provisions in the OC Act that require the manager to disclose if it has a beneficial relationship with a supplier.

Affect of the changes:

- The changes to section 122A require the manager to disclose if it has a beneficial relationship (which is defined in the section) with a supplier prior to entering into any contract for the provision of goods and services.



Section 122B: Manager must disclose commission, payment or other benefit

Current position:

- There are no provisions in the OC Act that require the manager to disclose whether it receives a benefit when it contracts a particular company for the supply of goods or services.
- However, it is usual for the contract of appointment to contain a term with respect to payment of commission for insurance.

Affect of the changes:

- The changes to section 122B require the manager to disclose if it will receive a benefit prior to entering into any contract for the provision of goods and services.



Transitional Provisions

- Tier 1 OC has until 1 December 2022 to approve and adopt a maintenance plan;
- Tier 2 OC has until 1 December 2023 to approve and adopt a maintenance plan;
- Contract of Appointment terms voided by new Act applies to those terms from 1 December 2021 even if the contract is pre-existing;
- New financial reporting obligations apply from the commencement of the OC's next financial year after 1 December 2021.



Questions and answers

