There has been an increase in owners corporations (formerly known as bodies corporate) in Melbourne over the past decade, largely through increased building of apartments and townhouses, mixed use blocks, and master planned estate developments (MPEs). Where there is common property, there needs to be an owners corporation. To accommodate the increase in residential and mixed use forms that include jointly held assets, more sophisticated legislation has been enacted. In 2006, the Owners Corporations Act 2006 (the Act) was passed and came into force in December 2007.

An important part of this legislation is a structured approach to owners corporation dispute resolution, set out in a three-tier system. This approach allows for an internal dispute process that must occur before litigation. The owners corporation rules will determine the internal process to be followed.

This article outlines the relevant provisions regarding internal dispute resolution under the Act, discusses the context of conflict in this area and considers the lawyer’s role in mediation with reference to the Law Council of Australia’s (LCA) Guidelines for Lawyers in Mediation.

**Dispute resolution under the Act**

The legislative changes to the law dealing with owners corporations have been significant and address issues relating to the functions, powers, rights and responsibilities of these legal entities. This article focuses on one aspect of the Act – Part 10, which deals with dispute resolution. Although dispute resolution was always available to owners corporation members before the new legislation, it was never formalised as such in the Subdivision Act 1988 or the Subdivision (Body Corporate) Regulations 2001.

Dispute resolution under the new Act includes the following three tiers:

**First tier**

Under ss152-159 of the Act, owners corporations will have an internal dispute resolution process, with a default process in the model rules.

Under s152 a lot owner, occupier of a lot or a manager may make a complaint to the owners corporation about an alleged breach of an obligation by a lot owner, occupier of a lot or manager. The complaint needs to be in writing in the approved form. The owners corporation must make a copy of the approved form available at the request of a person who wishes to make a complaint. Such complaints cannot be in regard to a personal injury. If a complaint is made, or it comes to the attention of the owners corporation that a lot owner, occupier of a lot or manager may have breached this Act or the regulations or the rules of the owners corporation, it is a trigger for the owners corporation to use the dispute resolution process to ensure that all is done to enable the dispute to be resolved through that process before any steps are taken for rectification of a breach.

An owners corporation may use the model rules in relation to dispute resolution or craft their own first tier dispute resolution system. Model rule 6 makes it clear that the grievance procedure applies to disputes involving a lot owner, manager or occupier or the owners corporation. The party making the complaint must prepare a written statement in the approved form. If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant. If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute. The party making the complaint must prepare a written statement in the approved form. If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant. If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute. The parties to the dispute must meet and discuss the matter in dispute, along with either the grievance committee or the owners corporation, within 14 working days after the dispute comes to the attention of all the parties. A party to the dispute may appoint a person to act or appear on their behalf at the meeting.
If the dispute is not resolved, the grievance committee or owners corporation must notify each party of their right to take further action under Part 10 of the Act. This is the formal complaint-handling process where the informal process has failed.

Second tier
Under ss160-161 of the Act, a person dissatisfied with the internal process may contact Consumer Affairs Victoria, which can conciliate or mediate between parties in a dispute.

Third tier
The Victorian Civil and Administrative Tribunal (VCAT) has been awarded broad powers to resolve disputes and make binding determinations: s162. However, the owners corporation may not take a matter to VCAT unless the dispute resolution process outlined in the rules and complaints procedure in the Act have been exhausted: s153(3). Once the matter is listed at VCAT it may be sent to mediation.

Arguably, dispute system design in this area, where owners corporations craft their own systems, is likely to include mediation in the first tier of dispute resolution. Mediation, as the third party facilitation of conflict, offers the opportunity for parties to engage with interpersonal issues, as well as substantive concerns relating to assets held and maintained by owners corporations. Small owners corporations may be satisfied with the model rules as a means of dealing with disputes as cost may be a concern in designing their own model.

The context of conflict
There has been a steady increase in the types of developments that may include an owners corporation within their ownership structure. These fall into two main types: apartments and other multi-unit (including mixed use) developments and single residential houses that are built within an MPE. The former accounts for a far greater number of owners corporations, but MPEs may result in more complex issues and disputes. MPEs are generally defined as large scale, private sector driven integrated housing developments on green-field suburban sites. Where an MPE holds a great range of facilities (for example, a swimming pool, tennis courts, gymnasium or country club), there may be a greater likelihood of disputes due to differing priorities and levels of use among residents in the community. This potential is also evident in multi-unit and high-rise developments that provide their members with a variety of on-site facilities. There may be, for example, disagreements over restrictions of use of the facilities or over the need to expand, repair or upgrade them. Not everyone living in a large estate or apartment complex is likely to use and value the facilities to the same degree.

The new Act regime provides for a better system for dealing with the kinds of disputes that arise in owners corporations and potentially resolving them in such a way that neighbours, living in close proximity, can reside more harmoniously. A considered approach to the role of the lawyer in mediation can assist with the resolution of conflict in these types of disputes.
In owners corporations, relationships between disputants will be ongoing and thus efforts should be made to ensure that the process of mediation does not further strain relationships.

The lawyer’s role in owners corporation mediations

The LCA in its Guidelines for Lawyers in Mediations gives lawyers unfamiliar with mediation the opportunity to reflect on the process and role of the legal representative. To help those new to this area of practice, the authors apply these guidelines to mediation in owners corporations. There are seven guidelines for lawyers: 1. Role; 2. Ethical issues; 3. When to mediate; 4. Selecting the mediator; 5. Preparing for the mediation; 6. At the mediation; and 7. Post mediation.

Role

The LCA states that the lawyer’s role will vary depending on the nature of the mediation process and the conflict in which the client is involved. Some mediations will primarily focus on commercial matters and some conflicts will relate mainly to the use of facilities or neighborhood concerns. The lawyer must consider whether their presence at the mediation is necessary to safeguard the client’s interests and the best approach to take in the mediation given the type of dispute.

Ethical issues

This guideline advises of the need to keep the details of a mediation confidential and for lawyers and clients to act in good faith during the process. There is no requirement under the Act for clients to engage “genuinely” in a dispute resolution process to ensure that the mediation does not become a mere procedural step. Lawyers working in this area should not forget that under s140 owners corporation rules that are inconsistent with the law or unfairly discriminate against lot owners will have no effect and this may restrict the range of settlements that might be considered (for example, if in a mediation process it was agreed that a new owners corporation rule should be passed, that rule would have to be lawful).

When to mediate

Section 153(3) of the Act requires that dispute resolution be undertaken before litigation. If mediation is available in the first tier of the dispute resolution scheme, it has the benefit of providing an early opportunity for owners corporation members to meet and discuss the dispute, facilitated by a skilled professional mediator. Guideline 3 notes that “timing is an important factor in establishing a framework conducive to settlement”. Under the Act the opportunity for an early resolution of a dispute through mediation can be designed into the first tier or the opportunity for mediation at Consumer Affairs Victoria can be taken up in the second tier. Consumer Affairs Victoria offers both conciliation and mediation and processes can be undertaken by telephone.

Selecting the mediator

Under guideline 4, lawyers are advised that the choice of the right mediator will enhance settlement prospects. If lawyers are advising clients on the choice of mediator in owners corporation disputes, the National Accreditation System, which came into operation on 1 January 2008, will be of interest. This system provides for new Australian National Mediator Standards that include mediators’ knowledge, skills and ethics. The system may assist with the choice of a mediator. The style of the mediator and the model of mediation that the mediator practises may also be important when selecting a mediator.

Preparing for the mediation

In preparing for the mediation, guideline 5 asks for the lawyer to “look beyond the legal issues and consider the dispute in a broader, practical and commercial context”. The commentary section of the guideline notes that this may include “personal needs”. A distinguishing feature
Guideline 7 suggests that lawyers generally need to report to their clients in writing regarding the mediation. In the context of owners corporation disputes, parties will not be able to litigate at VCAT without first establishing that they have engaged in dispute resolution.

Conclusion

Owners corporations are growing in Victoria and the new Act provides for a more comprehensive and considered dispute resolution system. For those lawyers unfamiliar with this area of practice, the LCA’s Guidelines for Lawyers in Mediation applied to owners corporation disputes is a useful framework for considering how best to assist a client in these circumstances.

At the mediation

The LCA notes in guideline 6 that mediation is a problem-solving approach. In light of this, the skills for the lawyer to use in mediation should on most occasions be non-adversarial: “A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result”.

6 In owners corporations, relationships between disputants will be ongoing and thus efforts should be made to ensure that the process of mediation does not further strain relationships. One of the most useful roles for a lawyer in mediation is to assist in “brainstorming” options for settlement and assessing the offers made to their client. Lawyers can also take responsibility for drafting settlements.

7 Post mediation

Guideline 7 suggests that lawyers generally need to report to their clients in writing regarding the mediation. In the context of owners corporation disputes, parties will not be able to litigate at VCAT without first establishing that they have engaged in dispute resolution.

Conclusion

Owners corporations are growing in Victoria and the new Act provides for a more comprehensive and considered dispute resolution system. For those lawyers unfamiliar with this area of practice, the LCA’s Guidelines for Lawyers in Mediation applied to owners corporation disputes is a useful framework for considering how best to assist a client in these circumstances.

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1. Under the Act “owners corporation” replaces the term “body corporate”. Section 3 provides that owners corporation means “a body corporate which is incorporated by the registration of a plan of subdivision or a plan of strata or cluster subdivision”.
3. Owners Corporations Act 2006 s27A.
4. In some instances ADR processes including mediation will not be appropriate. This may be the case where there has been a history of violence in the relationship. See National Alternative Dispute Resolution Council, Legislating for Alternative Dispute Resolution: A guide for government policy-makers and legal drafters (2006), p37.
5. By default, the model rules apply unless or until new rules are passed by the owners corporation. Part 8 of the Act.

7. For an overview of the legislation see Neil McPhee, “Big changes for the world of communal living” Jan/ Feb 2008 LII 38.
14. Research generally into neighbourhood disputes shows that there are often underlying issues to the conflict centred around behaviour and a tendency to “demonise” the other party. See Carole Kayrooz, Celildh Dalton, Filomena Colavecchio and Carol Hibberson, “Barking dogs, noisy neighbours and broken fences: neighbourhood dispute mediation” (2003) 14 Australasian Dispute Resolution Journal 71.
15. This kind of requirement is a feature of some other legislation dealing with dispute resolution schemes such as family dispute resolution under s60I Family Law Act 1975 (Cth). For a discussion of the requirement for parties to a mediation to negotiate in “good faith” see Western Australia v Taylor (1996) 134 FLR 211 and Aiton v Transfield (1999) NSWSC 996.
17. Note 6 above, p7.