

Consumer Property Acts Review Issues Paper No. 2

Owners Corporations

To: Consumer Property Acts Review, Policy and Legislation Branch, Consumer Affairs Victoria

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TABLE OF CONTENTS

Introduction	1
General Comments	1
Functions and powers of owners corporations	1
The power to commence legal proceedings	1
Personal property and water rights	2
Goods abandoned on the common property	2
The common seal of the owners corporation	2
Financial management of owners corporations	3
Levying of fees and charges – the ‘benefit principle’	3
Late payment of fees and charges	3
Charges for services provided by owners corporations	4
Maintenance	5
‘Prescribed owners corporations’	5
Maintenance plans and maintenance funds	5
Payments from the maintenance fund	6
Contingency funds	6
Repairs and alterations to common property and services	6
Insurance	7
Meetings and decisions of owners corporations	8
Committees	10
Rights and duties of lot owners and occupiers	11
Rules of the owners corporation	12
Owners corporation records	13
Dispute resolution	14
Applications to VCAT	14
Owners corporations in retirement villages	15
Part 5 of the Subdivision Act	16

Introduction

In August 2016, the Minister for Consumer Affairs, Gaming and Liquor Regulation, the Honourable Jane Garrett MP, announced a general review of Victoria's real estate and related legislation. The review examines four key pieces of real estate and property legislation: the *Sale of Land Act 1962* (Vic), the *Estate Agents Act 1980* (Vic), the *Owners Corporations Act 2006* (Vic) and the *Conveyancers Act 2006* (Vic). The objectives of the review are to:

- assess the four Acts to identify improvements that could be made to the legislation;
- examine the efficiency and effectiveness of the regulatory arrangements governing the conduct of licensed practitioners involved in the sale of land, real estate transactions and the management of owners corporations; and
- recommend necessary amendments to improve the operation of legislative arrangements set in place by these Acts.

The Law Institute of Victoria (LIV) provided preliminary comments to Consumer Affairs Victoria (CAV) regarding the review in late 2015 and responded to CAV's Issues Paper 1 on the conduct of and institutional arrangements for estate agents, conveyancers and owners corporation managers in March 2016.

The LIV welcomes the opportunity to continue its contributions to CAV's review. This submission contains the LIV's response to the questions in CAV's Issues Paper 2, which focuses on owners corporations.

General Comments

LIV representatives met with CAV and Strata Community Australia (Victorian Division) representatives in late December 2011 to discuss a range of issues regarding the operation of the *Owners Corporations Act 2006* (Vic) (the Act), and the need for review. At the time, the LIV observed that a full review of the Act is justified for many reasons, noting that there is an increasing number of owners corporations in Victoria and that there are now many more mixed use developments than the traditional smaller residential developments for which the Act seeks to cater. There have also been numerous Victorian Civil and Administrative Tribunal (VCAT) decisions affecting owners corporations since the Act's commencement, including decisions regarding the interpretation of various provisions in the Act. This highlights the importance of addressing legislative anomalies in the Act through a review of its provisions. Therefore, the LIV is pleased that Issues Paper 2 comprehensively considers the broad range of issues that affect owners corporations.

Functions and powers of owners corporations

The power to commence legal proceedings

1 Are the current constraints on owners corporations' powers to commence legal proceedings appropriate?

Section 18(1) of the Act provides that an owners corporation must not bring legal proceedings unless it is authorised by special resolution to do so. A special resolution requires 75% support. As CAV has noted in the Issues Paper, a special resolution can be difficult to pass due to the apathy of lot owners and can also be blocked by a minority of lot owners. The LIV therefore suggests that a lower threshold should be explored; for example, 60% rather than 75% support. A lower threshold again would be that an owners corporation can bring legal proceedings if authorised by ordinary resolution to do so, as this only requires a simple majority of votes. However, the LIV acknowledges that the threshold should not be set too low, as an owners corporation will incur costs when bringing legal proceedings. The LIV suggests that determining an appropriate threshold is a policy decision.

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

The LIV has no further comments relating to the power to commence legal proceedings.

Personal property and water rights

3 Should owners corporations be able to deal with water rights, including water that falls on common property?

The LIV considers that owners corporations should be able to deal with water rights, including water that falls on common property. The examples included in the Issues Paper highlight the various issues that can arise regarding water rights, and the importance of clarifying the rights of owners corporations to deal with them.

4 Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?

The LIV refers to its response to question 5 regarding the power to deal with abandoned goods on common property. The LIV has not otherwise identified any issues regarding the powers of owners corporations to acquire or lease personal property for the use of lot owners or other persons, or to deal with such personal property

Goods abandoned on the common property

5 Do owners corporations need powers to deal with goods on the common property in breach of the owners corporation rules that a person who owns the goods has refused to move or has abandoned? If so, what safeguards should there be, and should there be different safeguards for emergency situations or for goods that are a serious obstruction?

The Issues Paper states that the New South Wales owners corporation legislation allows for regulations to be made that confer powers on owners corporations to store or dispose of goods left on common property, with provision for the serving of notices on the owner or other relevant persons.

The LIV supports the adoption of the New South Wales position in Victoria. The LIV considers that an owners corporation should have the power to dispose of goods left on the common property provided that the owners corporation has given notice to the lot owners and occupiers (except in an emergency where notice should not be required) and no one has responded to that notice within a certain period of time. The LIV suggests consideration of relevant provisions in the Part 9 of the *Residential Tenancies Act 1997* regarding goods left behind by tenants and residents.

The common seal of the owners corporation

6 Do the requirements for a common seal still serve a useful and legitimate purpose? If not, who should be able to sign contracts on behalf of the owners corporation, after the necessary resolutions and procedural steps have occurred?

The LIV considers that common seals no longer serve a useful purpose. The LIV suggests that two lot owners should be able to execute a contract on behalf of the owners corporation, which would closely align with the requirements under the *Corporations Act 2001* for companies to execute a contract. Execution by the lot owners should be stated to be pursuant to a resolution, and the details of the resolution should be specified.

Financial management of owners corporations

Levying of fees and charges – the ‘benefit principle’

7 What are your views about the operation of the benefit principle? What is the experience of your owners corporations in applying the benefit principle?

The Issues Paper indicates that there is a lack of guidance in the Act about the application of the benefit principle, and the LIV agrees that clarification would be beneficial. The LIV notes that Macauley J, in the decision of *Mashane Pty Ltd v Owners Corporation RN 328577* [2013] VSC 417, expressed concern about the operation of the benefit principle, and suggested that the question of its application ‘exposes apparent tensions or conflicts in the statute that need to be resolved’.

The LIV suggests that the guiding principles identified by VCAT in *Mashane Pty Ltd v Owners Corporation RN328577* [2013] VCAT 118 regarding operation of the benefit principle should be set out in the Act or, alternatively, in a guide. As specified in the Issues Paper, VCAT noted that:

- the assessment is ‘a matter of judgment, not science’ and need only be ‘within a range of what would be reasonable’; and
- an owners corporation could apply the benefit principle, and still end up with a fee or charge that is effectively based on lot liability where:
 - o a lot owners benefits more, but this is offset by their larger annual fees; or
 - o work on one lot directly benefits the owner of that lot, but the other lots also benefit indirectly (for example, through enhancements to the value of the building, or reduced possibility of legal actions against the owners corporation).

There should also be scope for lot owners to challenge the owners corporation’s application of the benefit principle (or its failure to do so) by commencing VCAT proceedings.

LIV members have indicated that to date their experience has been that the benefit principle rarely applies.

Late payment of fees and charges

8 Should an owners corporation be able to recover debt collection costs from defaulting lot owners where a matter does not proceed to a VCAT or court application, or for any costs incurred before an application is made?

As indicated in the Issues Paper, the Act does not currently allow owners corporations to charge a lot owner any additional fee to cover the administration and other costs of collecting arrears, or to make rules to require such a lot owner to pay such costs. In principle, the LIV considers that an owners corporation should be able to recover debt collection costs from defaulting lot owners where a matter does not proceed to a VCAT or court application, as well as any costs incurred by the owners corporation before an application is made. However, the LIV notes that the Act currently provides for penalty interest to be charged on arrears payable by a lot owner to the owners corporation if authorised a resolution at a general meeting.

If there is additional scope for amounts to be recovered by an owners corporation beyond penalty interest, the LIV suggests that an owners corporation could pass a resolution at the annual general meeting which confirms that the owners corporation may claim and recover such costs from a defaulting lot owner. This would ensure that all lot owners are aware of the owners corporation’s position regarding costs recovery.

However, the LIV acknowledges that there may be instances where the costs of debt recovery incurred by the owners corporation (for example, if a debt collector is engaged) exceeds the amount of the debt,

or where an owners corporation use its ability to recover debt collection costs in a punitive way. These types of issues would need to be addressed if an owners corporation is to be able to recover debt collection costs.

9 If your owners corporation has won a debt recovery action at VCAT or a court, what was your experience in getting a costs order against the lot owner?

In terms of debt recovery actions at VCAT, feedback from LIV members indicates that VCAT very rarely exercises its discretion under ss109(2) and (3) of the *Victorian Civil and Administrative Tribunal Act 2006* to make a costs order. In the instances where VCAT makes a costs order, only nominal costs are awarded in debt recovery matters. While the LIV appreciates that the standard rule in VCAT is that each party is to bear their own costs in a proceeding (s109(1) of the *Victorian Civil and Administrative Tribunal Act 2006*), the LIV suggests that the successful party in an owners corporation matter should be able to recover its costs, and suggests that consideration be given to the introduction of a specific scale of costs for that type of action.

While there is scope to initiate debt recovery proceedings in the Magistrates' Court, LIV members have indicated that this does not often occur.

10 Should owners corporations be able to apply a discount for the timely payment of fees or charges?

The LIV considers that owners corporations should be able to apply a discount for the timely payment of fees or charges. In the experience of LIV members, this is an effective incentive for lot owners to pay fees and charges by the due date.

11 Should the internal dispute resolution process be completed before an owners corporation can send a final fee notice, or proceed to VCAT or a court?

The Issues Paper provides that the Act requires an owners corporation to have a dispute resolution process, but does not specify that the process must be completed before the owners corporation can commence a debt recovery matter at VCAT or a court. The LIV does not consider that this process should need to be completed as a pre-condition to an owners corporation commencing debt recovery proceedings.

12 Are there any other issues relating to payment of fees or charges?

The LIV has not identified any other issues relating to payment of fees and charges.

Charges for services provided by owners corporations

13 What is your experience with the fees or charges for goods or services provided by owners corporations to lot owners? For utility charges passed by the owners corporation, should recovery be linked to the actual amount charged?

LIV members have had limited experience with fees or charges for goods or services provided by owners corporations to lot owners.

For utility charges passed by an owners corporation, the LIV submits that recovery should generally be based on the principles under s56 of the *Residential Tenancies Act 1997* which provide that:

- the landlord of separately-metered rented premises cannot seek payment or reimbursement for a cost or charge that is more than the amount that the relevant supplier of the utility would have charged the tenant; and
- if the relevant supplier of the utility has issued an account to the landlord, the landlord cannot recover from the tenant an amount which includes any amount that could have been claimed as a concession or rebate by or on behalf of the tenant from the relevant supplier of the utility.

However, the LIV suggests that an owners corporation should be able to charge a reasonable administration fee for processing the utility charges to the individual lot owners.

Maintenance

‘Prescribed owners corporations’

14 Is there a continuing need to differentiate between smaller and larger owners corporations? If yes, what characteristics should an owners corporation possess in order to trigger additional financial and maintenance planning obligations as a prescribed owners corporation?

The LIV submits that there is a continuing need to differentiate between smaller and larger owners corporations, with larger owners corporations necessarily being subject to additional obligations. The LIV suggests that appropriate thresholds for a ‘prescribed owners corporation’ which is subject to additional obligations should be:

- where there are 13 or more lots in the development; and/or
- where the lots are within a multi-storey development.

Prescribed owners corporations should be subject to the additional obligations in the Act, except the audit requirements. The audit requirements in s35(2) of the Act that apply to prescribed owners corporations should only apply if the owners corporation has 100 or more lots.

Maintenance plans and maintenance funds

15 What are your views on the adequacy of planning for maintenance that is currently undertaken by owners corporations? In your experience, are owners corporations turning their minds to the future maintenance needs and setting aside adequate funds?

Section 36 of the Act currently only requires prescribed owners corporations to prepare a maintenance plan. The LIV suggests that the scope for all owners corporations to prepare a maintenance plan for the property for which it is responsible should be explored, but acknowledges that such a requirement might be perceived as excessive for a small owners corporation.

Any maintenance plan should be provided to prospective lot owners as part of the owners corporation certificate, as this will ensure that potential purchasers are aware of the potential maintenance liabilities.

The maintenance plan should include the information referred to in s37 of the Act such as regarding major capital items anticipated to require repair and replacement within the next 10 years and the estimated cost of the repair or replacement.

The LIV also submits that for any new development, an obligation should be imposed on the developer to prepare and provide to the owners corporation a maintenance plan which includes the information referred to in s37 of the Act.

16 Should maintenance plans be mandatory for all owners corporations, or should there be a distinction between smaller and larger owners corporations in relation to maintenance planning and funds? If yes, where do you see the distinction being drawn?

Please see the LIV’s response to question 15.

17 What procedures should be in place to ensure owners corporations implement maintenance plans and the associated funding requirements?

The LIV considers that maintenance plans should be mandatory for all owners corporations, but that the implementation of any such plan should be at the discretion of the owners corporation.

Payments from the maintenance fund

18 Should there be capacity for money to be paid out of maintenance funds for unplanned works and if yes, in what circumstances should this be allowed?

The LIV submits that the current provisions regarding payments from the maintenance fund are adequate. The LIV agrees that there should be capacity for money to be paid out of maintenance funds for unplanned works, as is currently the case when there is a special resolution of the owners corporation. The LIV also considers that money should be able to be paid out of the maintenance fund for urgent matters as provided for by s45 of the Act.

19 Should funds for implementing the maintenance plan come only from the maintenance fund?

The LIV does not consider that funds for implementing the maintenance plan should only come from the maintenance fund. LIV members have indicated that not all owners corporations have a maintenance fund. It is therefore important that an owners corporation have the flexibility and discretion to determine how implementation of the maintenance plan is to be funded.

Contingency funds

20 What are your views about contingency funds, including:

- **whether contingency funds are necessary**
- **what type of owners corporations should have them, and**
- **how they should be funded, the purposes that the funds can be used for, and how such purposes should be determined?**

The Issues Paper explores whether it is desirable or feasible for owners corporations to have contingency funds to cover unplanned maintenance or repair costs or legal bills from unforeseen litigation involving the owners corporation and notes that the Act does not require owners corporations to set aside any funds for such contingencies. The LIV does not consider that there should be any requirement for contingency funds to be set aside and notes that this would undermine the need for and efficiency of the maintenance fund. It should be for each owners corporation to determine whether funds should be set aside, as each owners corporation has different characteristics and requirements.

Repairs and alterations to common property and services

21 How should urgent and non-urgent repairs to the common property be dealt with where the owners corporation has failed or refused to do them?

As specified in the Issues Paper, the Act requires owners corporations to repair and maintain:

- the common property and the goods, fixtures fittings and services related to the common property (section 46); and
- a service in, or relating to a lot that is for the benefit of more than one lot and the common property (section 47)

These functions can be delegated by the owners corporation to a manager of the owners corporation.

Where an owners corporation fails or refuses to carry out repairs, the LIV suggests that the maintenance plan should specify the circumstances in which lot owners can gain consent to undertake those repairs. A lot owner will also have recourse to VCAT in circumstances where an owners corporation has failed or refused to carry out repairs.

22 What are your views about how to deal with lot owners or occupiers who cause damage to common property, or who want to alter the common property?

As indicated in the Issues Paper, the Act does not contain any specific provision enabling an owners corporation to seek rectification or compensation from a lot owner or occupier who has caused damage to the common property. The LIV submits that lot owners or occupiers who have caused damage to the common property should be liable to the owners corporation for the costs of repair.

Currently, if a lot owner proposes to alter the common property, a unanimous resolution is required. The LIV considers that the status quo should be maintained.

23 Are there any other issues relating to repairs to common property or services?

The LIV has not identified any other issues relating to repairs to common property or services.

Insurance

24 What are your views about the type and level of insurance cover that should be required?

As specified in the Issues Paper, the main insurance requirements are that owners corporations (except those in two-lot subdivisions), must take out:

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

The LIV considers that the minimum level of \$10 million public liability insurance cover for the common property is inadequate, and suggests a minimum level of \$30 million. The LIV is of the view that the current reinstatement and replacement insurance requirements are acceptable.

25 Should lot owners be able to 'opt out' of the insurance policy taken out by the owners corporation when they take out their own insurance (and not, therefore, pay their portion of the owners corporation's policy)?

The LIV does not consider that lot owners should be able to 'opt out' of the insurance policy taken out by owners corporations when they take out their own insurance.

26 What are your views about lot owners' responsibilities for any excesses or increased premium payable by the owners corporation?

The Issues Paper indicates that there may be situations where a claim on an insurance policy by an owners corporation concerns work done to only one or some lots, or relates to the common property but is attributable to an individual lot owner or occupier. In principle, the LIV considers that the relevant lot owners should be responsible for excesses or increased premium in those circumstances.

However, the LIV acknowledges that there may be instances where work is required to a lot through no fault of the lot owner but instead as a result of the peculiarities of that lot. In those circumstances, it might be an unfair outcome for the lot owner to be responsible for an excess or increased premium.

Meetings and decisions of owners corporations

Developers' obligations

27 What are your views about the appropriate obligations for developers who control owners corporations, including the:

- obligations concerning any contracts they cause the owners corporation to enter into
- interests they must consider, and whether there are any matters they should be prohibited from voting upon, and
- duration of their obligations?

The LIV supports the Queensland and New South Wales positions detailed in the Issues Paper which provide that:

- a developer who in any way controls the voting must consider the interests of future members of the owners corporation, and ensure that management contract terms are appropriate for the development
- any developer with more than two-thirds of the voting entitlement may only appoint a non-connected manager until the holding of the first annual general meeting.

The LIV also submits that developers should be required to provide a copy of the management contract to the owners corporation at its inaugural meeting and disclose the developer's current and future pecuniary relationship with the owners corporation manager.

The Issues Paper details the existing obligations in Victoria on developers:

- to act honestly and in good faith with due care and diligence in the interests of the owners corporation; and
- states that these obligations apply for a 5-year period from the date of registration of the plan of subdivision where the developer owns a majority of the lots.

Some LIV members have suggested that the existing 5-year period is very long and that 2 or 3 years might be adequate to protect the interests of lot owners. However, the LIV acknowledges that this is a policy decision for government.

28 What other changes should be made to developers' obligations?

The LIV refers to its response to question 15, and submits that for any new development, an obligation should be imposed on the developer to prepare and provide to the owners corporation a maintenance plan which includes the information referred to in s37 of the Act.

Voting and proxies

29 What is your experience of voting and the use of proxies within an owners corporation?

In 2010, the LIV made a submission to CAV regarding proposed amendments to the Act, and expressed concern about proxies for committee members. The submission relevantly provided as follows:

The members of the owners corporation appoint a committee member – they do not appoint a proxy for that member. The LIV is concerned that a proxy might not be familiar with the operation of the owners corporation, and therefore should not have the right to vote on a matter affecting the owners corporation. The LIV observes that in the case of a corporation, directors of a corporation are elected by shareholders. Under the Corporations Act 2001 (Cth), directors of a corporation are not entitled to

give a proxy to another person to represent the director at a directors' meeting. This is because directors are not representatives of particular shareholders, but owe their duty to the corporation as a whole. In contrast, shareholders of companies owe their duty to themselves only, so it is appropriate that they have the ability to appoint proxies to represent them at shareholder's meetings.

The LIV also notes that members of an owners corporation who have elected a committee might not be comfortable with a committee member appointing a proxy for the purpose of a committee meeting. This could mean that all committee members might not be personally present but could appoint proxies for the meeting. Therefore, persons who are not members of the owners corporation could make decisions affecting the owners corporation, in particular, matters of a financial nature.

Section 138A of the Act gives owners corporations a power to make a rule restricting the voting rights of any person who has been appointed as a proxy to represent a lot owner on the owners corporation committee if that person has not been elected or co-opted to the committee. In these circumstances, the other committee members must consent to the proxy voting, but consent must not be unreasonably withheld. While the LIV acknowledges that s138A partially addresses some of the LIV's concerns, the LIV maintains that committee members should not be able to appoint a proxy for the purposes of the committee meeting. Appointment to the committee is a personal appointment.

30 Should there be restrictions placed on the appointment of proxies, and if yes, in what circumstances?

The LIV refers to its response to question 29.

The LIV also submits that a lot owner with unpaid fees should not be able to act as proxy for another lot owner or appoint a proxy.

31 What are your views about the adequacy of the provisions that set out the Chairperson's voting rights?

The Act does not require the Chairperson of the meeting to refrain from voting in their own right, or to vote impartially when voting in their own right or when exercising a casting vote. The LIV suggests that for owners corporations other than prescribed owners corporations (where a casting vote is less significant), the Chairperson of the meeting should only have a casting vote if lot owners have voted in favour of this at the annual general meeting.

The LIV also submits that the Chairperson of the meeting should be required to act in good faith when exercising a casting vote.

32 Should a contract of sale be able to limit the voting rights of lot owners?

The LIV does not consider that a contract of sale should be able to limit the voting rights of lot owners, and submits that the Act should be amended to expressly specify this.

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

Feedback from LIV members indicates that it is very difficult to have special resolutions passed, as this requires 75% support. However, as stated in the Issues Paper, s97 of the Act provides for:

- an interim special resolution where more than 50% of the total votes are in favour, and no more than 25% of the total votes are against the special resolution;
- the interim special resolution to become a special resolution. Once notice of the interim special resolution is provided to all lot owners, the interim resolution becomes a special resolution 29 days after the interim special resolution was passed unless lot owners who hold more than 25% of the total votes of all lots petition the owners corporation secretary against the resolution.

It appears that the interim special resolution process in s97 of the Act is working well.

The LIV also submits that s93 of the Act should be amended so that a manager may not exercise a casting vote even if he holds proxies.

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

The Issues Paper notes that there is no process for interim unanimous resolutions as there is for interim special resolutions. CAV has suggested possible requirements for an interim unanimous resolution as follows:

- at least 75% of the total votes for all lots in favour of the unanimous resolution; and
- no votes against the unanimous resolution.

The LIV supports an interim unanimous resolution process in principle. However, given that unanimous resolutions are required for decisions that significantly affect property rights (such as to sell any part of the common property, alter lot liability or entitlement or wind up the owners corporation), the LIV submits that a percentage greater than 75% of total votes should be required to achieve an interim unanimous special resolution, as well as no votes against the unanimous resolution.

Resolutions

35 What are your views about the adequacy of the provisions for convening meetings?

LIV members have not experienced any issues regarding the provisions for convening meetings.

36 What has been your experience of annual general meetings and other owners corporation meetings that you have attended?

Based on the experiences of LIV members, the LIV considers that the following would be useful to adopt regarding annual general meetings and owners corporation meetings:

- the Chairperson should be required to read out a statement at the commencement of the meeting about how meeting attendees should conduct themselves;
- the Chairperson should be able to stand down the meeting for a period of time if the Chairperson considers that to be an appropriate course of action; and
- the Chairperson should be required to act in good faith.

37 How can the views of tenants be most effectively shared with the owners corporation?

The LIV does not consider that the Act requires amendment to provide for the views of tenants to be shared with the owners corporation. The tenant instead can communicate its views to the landlord of the premises, as the landlord is a lot owner.

Committees

Requirements for a committee

38 What are your views about committees, including the threshold for and size of committees, who should be able to arrange a ballot, the chairperson's role, and minutes?

The LIV suggests that non-prescriptive guidance should be provided in the Act regarding the establishment of an owners corporation committee. For example, the guidance could provide that it would be beneficial for the owners corporation to establish a committee, regardless of the number of lots within the owners corporation.

In terms of the size of an owners corporation committee, a guiding principle could be that the size of the Committee must be sufficient to be reflective of, and representative of, all lot owners. In general, if the owners corporation has more than 7 lots, 5 to 7 owners corporation committee members seems appropriate. A committee of this size could adequately share the responsibility without management of the committee becoming too cumbersome.

Section 111 of the Act regulates the conduct of a committee ballot, but does not state who may arrange a ballot. The LIV submits that s111 should be aligned with s83 of the Act, which sets out that a ballot of the owners corporation may be arranged by the chairperson or secretary.

The LIV considers that it would be useful for the role and voting power of the chairperson of the committee to be set out.

The LIV suggests that minutes of the meeting should be provided to all lot owners within 14 days of the meeting. There should be scope for the minutes to be circulated via email where lot owners have provided their email addresses.

Rights and duties of lot owners and occupiers

Changes to the external appearance of lots and access to the common property

39 In what circumstances should a lot owner be able to change the external appearance of their lot? Is there a need for agreement to be reached with other lot owners, and if yes, who should have a say?

The Act does not currently specify a process to deal with proposals by lot owners to change the external appearance of their lot. The LIV therefore considers that a Model Rule would be useful to deal with proposals for minor changes. Any proposed major change which will affect the appearance or amenity of the whole development should require a special resolution.

40 Are there any other issues about the external appearance of lots? What has been your experience?

The approach to external appearance of lots differs from person to person. Some lot owners favour a uniform appearance to enhance amenity while others prefer to express their individuality. A lot owner should have some assurance that the development will remain the same in appearance as when the lot owner purchased it unless the owners corporation resolves otherwise. Planning permits sometimes include conditions relating to appearance but many lot owners and managers of owners corporation are not aware of or forget to review the planning permit which issued when the plan of subdivision and/or the development was approved by the relevant authority.

Access to the common property

41 What are your views about access by lot owners and occupiers to the common property or services? Should the rights and responsibilities of lots owners or occupiers be specifically provided for in the Owners Corporations Act or model rules?

The LIV considers that lot owners and occupiers should have unrestricted access to the common property and services provided there is no disturbance to others unless the owners corporation has unanimously resolved to the contrary.

Rules of the owners corporation

Visitors and guests

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

The LIV submits that where an owners corporation is a certain size (for example, a prescribed owners corporation), all lot owners, tenants, occupiers and invitees should be bound by the owners corporation rules. Any such owners corporation should be required to post a notice at the entrance to the property stating that any person entering the property must comply with the owners corporation rules. If possible, a copy of the rules should be displayed at the front entrance or information should be provided as to where the rules are available for viewing.

The LIV considers that if the Model Rules apply, ignorance of the rules should not be a defence to a breach.

43 Should a person bound by the rules (for example, an invitee) be the only person responsible for their own breaches, or should someone else (for example, the lot owner or lessee) also have responsibility? If someone else is also responsible, should that responsibility depend on whether the person 'permitted' the breach, and should there be any other limitations?

The LIV submits that a person bound by the rules should be:

- responsible for their own breaches;
- be required to exercise reasonable care to ensure their invitees comply with the owners corporation rules, including but not limited to:
 - o providing details to the owners corporation of the name and contact details of any invitee who has entered a lot or the common property and has caused damage to a lot or common property or failed to comply with the owners corporation rules; and
 - o details of the conduct of such invitee whilst on a lot or on common property which resulted in the damage to a lot or common property or a breach of the owners corporation rules.

Model Rules: pets and smoke drift

44 Should there be Model Rules regarding pets and smoking? If so, should there be a choice of rules such as is allowed in New South Wales (with or without a default option)?

As stated in the Issues Paper, the regulation of pets and smoke drift in owners corporations are commonly raised issues in owners corporation. The LIV therefore submits that there should be Model Rules about pets and smoking.

The LIV supports the New South Wales position which enables owners corporations to select one of three model rules. If a rule is not selected, there should be a default option.

45 Are there any other issues relating to the coverage of the Model Rules?

Some LIV members have suggested that there should be a right to make rules for matters in addition to those set out in Schedule 1 of the Act and for purposes in addition to section 138(3), provided there is a unanimous resolution by members. However, other members have cautioned against this, noting that this effectively allows an owners corporation to make rules about any matter.

Energy saving and other sustainability measures

46 What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?

The LIV submits that owners corporations should have the right to prevent lot owners installing 'sustainability' items in or on their units, and supports the current status quo which entitles owners corporations to make restrictive rules regarding such installations. The LIV considers that a person who purchases a lot affected by an owners corporation should have some control as to the amenity of their surroundings through the owners corporation.

Penalties for breaches of the rules

47 What are your views about civil penalties for breaches of owners corporation rules?

The LIV submits that civil penalties for breaches of the owners corporation rules should be linked to penalty units so that they increase over time.

48 Are there any other issues relating to the rules of owners corporations?

As stated in the Issues Paper, penalties for breaches of the rules of owners corporations are paid to the Victoria Property Fund. The Issues Paper also provides that in South Australia, owners corporation rules can provide for the owners corporation to impose a penalty for breach of the rules (with a prescribed maximum amount) that is payable to the owners corporation.

The LIV supports adopt of the South Australia position so that owners corporations can impose a penalty for breach of the owners corporation rules. The owners corporation has incurred loss as a result of a breach of an owners corporation rule and it should be compensated for its expenses (to a prescribed maximum amount) arising from the breach. The LIV suggests that appeals could be made to VCAT, where the owners corporation would have the burden of proving the breach.

Owners corporation records

Availability of owners corporation records

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

Based on LIV member feedback, the current provisions in the Act are working well. There is a possibility of abuse of the right to inspect, but that has rarely occurred. Most managers have invested in providing online access to their website to lot owners and are also willing to email occasional documents to lot owners. During inspections, many lot owners photograph documents with their smart phones in order to avoid costs.

The LIV considers that owners corporation managers should be entitled to charge fees when the manager's time is required for the purpose of inspections. The LIV suggests that the fees could be set by CAV similarly to the way it sets fees for owners corporation records and certificates.

50 Are there any other issues relating to owners corporation records you wish to raise?

The LIV submits that the Act should require that the owners corporation management contract should be executed in duplicate with one original held by the owners corporation chair. The current practice is that

only one copy is executed which is kept by the owners corporation manager. LIV members have indicated that owners corporation managers have sometimes interpreted requests to view the contract with suspicion, and that the process of inspecting the contract is not always efficient.

Owners corporation certificates – short stay accommodation

51 What are your views about the inclusion of information on short-stay accommodation in owners corporation certificates?

In the LIV's view, most owners corporation managers would not be aware whether a planning instrument allows apartments in the building to be used for short-stay accommodation or whether any apartment is used in that way. Also, lot owners are not required to advise the owners corporation about use of their lot. Therefore, the LIV does not consider that information on short-stay accommodation should be required for an owners corporation certificate.

52 Are there any other issues relating to owners corporation certificates?

The Act is currently silent on the issue of requests to update information on recently issued owners corporation certificates. The LIV considers that the Act should impose a reasonable small fee for updated information.

The current position of allowing lot owners to complete owners corporation certificates can be problematic as they often do not have the information required to provide a complete and accurate certificate and risk contravening provisions in the *Sale of Land Act 1962* that may void the sale. However, a vendor who does not have the requisite knowledge to complete the owners corporation certificate can ask the owners corporation manager to complete the certificate.

Dispute resolution

53 What are your views about recourse to the dispute resolution process when an owners corporation is acting on its own initiative in pursuing a breach?

The Issues Paper provides that CAV has received feedback stating that the internal dispute resolution process is only relevant and helpful as a grievance procedure for dealing with disputes between residents. The LIV agrees with this assessment. In the experience of LIV members, a good owners corporation manager will seek to resolve disputes to avoid litigation. However, if communication cannot resolve the dispute, owners corporations would generally prefer to avoid the dispute resolution process under the Act and instead, apply to VCAT.

54 Are there any other issues relating to dispute resolution?

The Act and the *Retirement Villages Act 1986* contain conflicting dispute resolution processes. In the case of a retirement village and based on the experiences of LIV members who are familiar with both Acts, the LIV submits that the dispute resolution process under the *Retirement Villages Act 1986* should apply to the exclusion of the dispute resolution process under the Act.

Applications to VCAT

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

The LIV considers that the current provisions in the Act are adequate.

Section 138 of the Act specifies the owners corporation's power to make rules regarding any matter set out in Schedule 1 of the Act. VCAT must therefore consider whether any disputed owners corporation rule falls within any of the categories in Schedule 1, as the disputed rule may not be enforceable because the owners corporation did not have the power to make the rule.

Section 140 of the Act provides that a rule of an owners corporation is of no effect if it unfairly discriminates against a lot owner or an occupier of a lot. The Issues Paper suggests that it is unclear whether VCAT must consider:

- the rule itself, that is, whether the rule unfairly discriminates against a lot owner or an occupier; and/or
- the resolution authorising the rule, that is, whether the resolution is oppressive to, or unfairly prejudicial to, or unfairly discriminates against, a lot owner.

The LIV submits that VCAT should be required to consider both points. Once it is established that the resolution authorising the rule is valid in terms of procedural and voting requirements, VCAT should apply an objective test to determine whether the rule is discriminatory with regard to members of the owners corporation as a whole.

56 Are there any other issues relating to applications to VCAT?

LIV member feedback indicates that there are often delays in having owners corporation matters heard at VCAT. The LIV submits that this needs to be addressed.

The LIV also queries whether VCAT is the appropriate forum for claims which are largely an accounting exercise, for example, challenges regarding expenditure.

Further, the LIV considers that the 'opt in' procedures for lot owners regarding common property building claims for large scale developments are cumbersome and should be simplified.

Lastly, the LIV has previously made submissions about the process for appealing a VCAT decision. It is currently necessary to seek leave from the Supreme Court to appeal on a question of law, and then appeal. The LIV submits that a process within VCAT for decisions to be reviewed should be explored.

Owners corporations in retirement villages

57 What are your views about how annual meetings under the Owners Corporations Act and under the Retirement Villages Act should be conducted in retirement villages with an owners corporation?

The LIV considers that the annual general meeting of the owners corporation should continue to double as the annual general meeting of the retirement village. Any other approach may result in conflicting decisions leading to uncertainty for both operators and residents of retirement villages. However, the LIV acknowledges that the issue of different voting rights for an owners corporation and a retirement village will need to be addressed.

The LIV is of the view that timing and procedures for calling the meeting should be in accordance with the *Retirement Villages Act 1986* rather than the Act. This is because the two Acts contain different requirements, and retirement village operators and residents need greater certainty as to which set of requirements apply. It is also extremely difficult and costly to resolve a dispute where both Acts apply.

58 What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?

LIV member feedback indicates that retirement village operators play an important part in meetings in that they have background knowledge with regard to the operation of the retirement village, and can answer resident queries. However, there are instances where retirement village operators 'bully' lot owners.

Operators who are lot owners have a statutory right to participate in meetings. The LIV does not support the exclusion of operator lot owners from meetings, as this would effectively mean that a unanimous resolution could never be passed, and special resolutions would also be difficult to achieve.

59 How can the views of retirement village residents who do not own their units be taken into account in managing common property within the owners corporation?

Section 36 of the *Retirement Villages Act 1986* provides that in the case of a retirement village where there is no owners corporation, residents may elect a residents' committee to represent the interests of the residents of the village. However, section 36(8) provides that where there is an owners corporation, the owners corporation has the powers of a residents' committee.

The LIV submits that section 36(8) should be repealed, as this would allow both leasehold residents and residents with a strata title to serve on the residents' committee.

Part 5 of the Subdivision Act

Sale of apartment buildings

60 What are your views about the process for the sale/development of apartment buildings?

As specified in the Issues Paper, the consent of all lots owners is required to sell or redevelop an apartment building, but this level of consensus is often difficult to attain. The Issues Paper provides that the New South Wales legislation includes a process for the collective sale or development of a building that requires an owners corporation to form a strata renewal committee and develop a strata renewal plan. The LIV supports amendment of the Act to adopt the New South Wales approach and suggests that plans for renewal could be considered by VCAT or a specialist panel established to specifically analyse collective sales or developments.

61 What are your views about:

- **who should set the initial lot liability and entitlement, and any criteria that should be followed**
- **how lot liability and entitlement should be changed, and**
- **any time limits for registering changes to the plans of subdivision with Land Victoria.**

The LIV does not consider that developers should be able to set lot entitlement and lot liability, and that this should instead be allocated by a licensed surveyor or other appropriate person pursuant to specified legislative criteria. Consideration could be given to persons other than licensed surveyors who might be appropriate to set lot entitlement and liability.

Independence of the licensed surveyor or other person setting the lot liability and entitlement should not be critical if the licensed surveyor or other person is bound to follow certain criteria. One of the specified criteria could be to take into account the anticipated types of expenditure that will be incurred by the owners corporation and which lots will benefit from such expenditure. The LIV suggests that prior to the licensed surveyor or other person setting the lot entitlement and liability, the developer should be obliged to provide the licensed surveyor or other person details of the anticipated market value of each lot and the anticipated budget/expenditure of the owners corporation.

The LIV also suggests that an independent person or referral authority could review plans for creation an owners corporation and the proposed allocation of lot liability and entitlement. For example, a role of Owners Corporation Commissioner could be established to carry out this and other roles.

The LIV is of the view that the current procedures for changing lot entitlement and lot liability appear to be adequate.

The LIV submits that there should be strict time limits on owners corporations to register changes to the plan of subdivision (including lot entitlement and lot liability) so that the register always has current information.

62 In the absence of a unanimous resolution, what requirements should be met before VCAT can be empowered to change the lot liability and lot entitlement on a plan of subdivision?

The Issues Paper notes that s34D of the *Subdivision Act 1988* empowers VCAT to make an order to change a plan of subdivision in the absence of an unanimous resolution, provided that more than 50% of lot owners with more than 50% of lot entitlements support the change. The LIV considers that VCAT should be able to hear matters where one lot owner controls more than 50% of lot entitlements.

The LIV also refers to the decision in *Conroy v Owners Corporation SP 30438* [2014] VCAT 1413 and suggests that amendments to s34D should be explored in light of that decision. There is scope for a lot owner to apply to VCAT to alter the plan of subdivision under s34D(1)(a) or 34D(1)(b), but the test in s34D(1)(b) is difficult to satisfy as it requires the applicant to prove that the purpose for which the action is taken is likely to bring economic or social benefits to the subdivision as a whole greater than any social disadvantages to the members who did not consent to the action. This presumably means that lot owners will always choose to make an application under s34D(1)(b).

63 Are there any other issues relating to Part 5 of the Subdivision Act?

The LIV has not identified any other issues relating to Part 5 of the *Subdivision Act 1988*.