



BUGDEN
ALLEN
GRAHAM
LAWYERS

Owners Corporations Act – changes & implications

Presentation to LookUpStrata
10th November 2021



Our topic today:

Owners Corporation Act - changes and implications

A presentation for strata managers, committees and owners of Owners Corporations in Victoria.

Presented by Tim Graham
Partner, Bugden Allen Graham Lawyers





Hemingway's "Moveable Feast"

- Fair Trading and Consumer Acts Further Amendment Act 2008
- Consumer Affairs Legislation Amendment Act 2010
- Consumer Affairs Legislation Amendment (Reform) Act 2010
- Fair Trading Amendment (Australian Consumer Law) Act 2010
- Consumer Acts Amendment Act 2011
- Australian Consumer Law and Fair Trading Act 2012
- Owners Corporations Amendment Act 2013
- Sale of Land Amendment Act 2014
- Victoria Police Amendment (Consequential and Other Matters) Act 2014
- Veterans and Other Acts Amendment Act 2015
- Owners Corporations Amendment (Short-stay Accommodation) Act 2018
- Residential Tenancies Amendment Act 2018
- Guardianship and Administration Act 2019





Owners Corporation Act 2006

- When Consumer Affairs Victoria released its Final Report of the Body Corporate Review (“A review of the effectiveness and efficiency of the Subdivision Act 1988 and Subdivision (Body Corporate) Regulations 2001 as they relate to the operation of bodies corporate”, Consumer Affairs Victoria, December 2005 (“Final Report”)) there were more than 65,000 bodies corporate in Victoria.
- Two significant developments since 1988:
 - Firstly, there has been an enormous increase in the number of Victorians living and working in bodies corporate.
 - Secondly, the average body corporate is growing in size with more lots per body corporate.
- A one-size-fits-all approach was adopted under the Subdivision Act and Regulations, with a relatively minimal regulatory framework encouraging informal dispute resolution.
- Owners Corporations Regulations 2018 define prescribed OCs:
 - (a) an OC that levies annual fees in excess of \$200,000 in a financial year;
 - (b) an OC that consists of more than 100 lots.





Owners Corporations and Other Acts Amendment Act 2019

- Commences 1 December 2021
- Introduces 5 tier system:
 - **Tier 1:** more than 100 occupiable lots is not a services only OC
 - **Tier 2:** 51 to 100 occupiable lots and is not a services only OC
 - **Tier 3:** 10 to 50 occupiable lots and is not a services only OC
 - **Tier 4:** 3 to 9 occupiable lots and is not a services only OC
 - **Tier 5:** 2 lot subdivision; or services only OC
- Services only OC has no:
 - common property land or building; and
 - common property services, or services not separately metered
- “Occupiable lot”: lot that is ordinarily used for residential or business purposes;
- “Non-occupiable lot”: carpark, storage locker or a lot that is not ordinarily used for residential or business purposes



A national juxtaposition

- In Queensland, most bodies corporate are a community titles scheme registered under the *Body Corporate and Community Management Act 1997* (the BCCM Act).
- In addition to the BCCM Act, each scheme is registered under 1 of 5 regulation modules:
 - Standard Module
 - Accommodation Module
 - Commercial Module
 - Small Schemes Module
 - Specified Two-lot Schemes Module
- **ACT**
 - Unit Titles (Management) Act 2011
 - Community Title Act 2001
- **NSW**
 - Strata Schemes Management Act 2015
 - Strata Schemes Development Act
 - Community Land Development Act 1989
 - Community Land Management Act 1989
- **SA**
 - Strata Titles Act 1988
 - Community Titles Act 1986
- **WA**
 - Strata Titles Act 1985
 - Community Titles Act 2018



Requirement for a seal dispensed with

- An owners corporation may, in its own name or on behalf of its members, execute any document or do anything necessary or convenient to enable it to carry out its functions, powers, rights and obligations.
- A document executed or any thing done under subsection (1) has effect as if the document was executed or the thing was done by the members of the owners corporation.





Water on common property

S.17A

Any water that falls, is located or flows on the common property is taken to be the property of the owners corporation.

Water Act 1989

“if there is a flow of water from the land of a person onto any other land...”

Spagnolo & Anor v Body Corporate Strata Plan 418979Q & Anor
[2007] VSC 423 (31 October 2007)

The respondents submitted that the flow of water would begin at the reservoir and pass through and over many lands of people before it reached the spa in room 609, and it could be argued just as validly on this basis that Melbourne Water caused the flow of water from the reservoir all the way to the spa in room 609.





Power to bring legal proceedings

OC must not commence any legal proceeding unless it is authorised by special resolution to do so.

But if a matter is within the civil jurisdictional limit of the Magistrates' Court and an owners corporation is authorised to do so by ordinary resolution, the owners corporation may commence any legal proceeding in—

- a. the Magistrates' Court; or
- b. VCAT or any other tribunal; or
- c. a court of another State or a Territory that corresponds to the Magistrates' Court."

Removes any doubt on OC's ability to bring debt recovery proceedings in Magistrates Court

Impact on s.165(1)(ba) authorizing orders will be intriguing





New benefit principle

The owners corporation may levy an additional annual fee on a lot owner if—

- a. the owners corporation has incurred additional costs arising from the particular use of the lot by the lot owner; and
- b. an annual fee set on the basis of the lot liability of the lot owner would not adequately take account of those additional costs.

Extends to the costs of:

- a. an excess amount or an increased premium resulting from or attributable to an insurance claim, if the claim is caused by a culpable or wilful act or the gross negligence of an owner, lessee or guest
- b. damage to the common property that is caused by owner, lessee or guest

OC may levy special fees and charges on a lot owner relating to repairs, maintenance and other works arising from the particular use of a lot by the lot owner



Financial statements: s.34 substituted

- 1) An owners corporation that is a tier one owners corporation, a tier two owners corporation or a tier three owners corporation must prepare annual financial statements for presentation at the general meeting of the owners corporation in accordance with the Australian Accounting Standards.
- 2) A tier four owners corporation must prepare annual financial statements for any financial year in which it levies annual fees.
- 3) In this section, *Australian Accounting Standards* has the same meaning as in the Associations Incorporation Reform Act 2012.

Note

Annual financial statements prepared under this section may be either General Purpose Financial Reports or Special Purpose Financial Reports as defined by the Australian Accounting Standards Board."

"Australian Accounting Standards" means the standards issued by the Australian Accounting Standards Board

However....

- OCs are not reporting entities in my opinion
- a *reporting entity* is an entity where it is reasonable to expect that there are users dependent on a general purpose financial report (GPFR) to gain an understanding of the financial position and performance of the entity, and to make decisions based on this financial information and other information contained in the financial report. These users could be shareholders, members, employees, creditors, lenders or potential investors.
- a *non-reporting entity* is where those charged with governance have determined that there are no users dependent on a GPFR. In this situation, a non-reporting entity is permitted to prepare a special purpose financial report and not a GPFR.
- Effects of s.34:
 - a. increased costs to OCs
 - b. will not add any increased security, or to the OC funds managed
 - c. will not be relied upon to inform purchasers of a lot and only confuse owners as to the financial state of the OC



Auditing requirements

- A tier one owners corporation must, after the end of each financial year, cause its financial statements to be audited by a registered auditor or an accountant who is authorised to conduct audits.
- A tier two owners corporation must, after the end of each financial year, cause its financial statements to be reviewed by an independent person who is an accountant (unless it is resolved at the AGM to comply with the audit requirements of Tier One Ocs).
- A tier three, tier four, or tier five owners corporation, at its annual general meeting, may resolve that its financial statements are to be audited in accordance with the audit requirements of tier One or tier Two OCs).
- A person who audits the financial statements of an owners corporation must provide the owners corporation with a written report of the audit.
- A person who conducts a review of the financial statements of an owners corporation must provide the owners corporation with a written report of the review.
- A person must not be engaged to audit or review the financial statements of an owners corporation under this section if the person has a direct or indirect personal or financial interest in the owners corporation.





Maintenance plans

- A tier one owners corporation or a tier two owners corporation must prepare and approve a maintenance plan for the property for which it is responsible.
- A tier three owners corporation, a tier four owners corporation or a tier five owners corporation may prepare and approve a maintenance plan.
- Be mindful of r.7 of the *Owners Corporations Regulations* 2018:
 - common property structures, including the roof, stairways, balustrades, and window frames;
 - common property services, such as shared water, gas and sewerage pipes, pumps, drains, electrical and telephony infrastructure;
 - common property assets, such as fences, pools, and water tanks





Lot owners must not repair and maintain common property or services

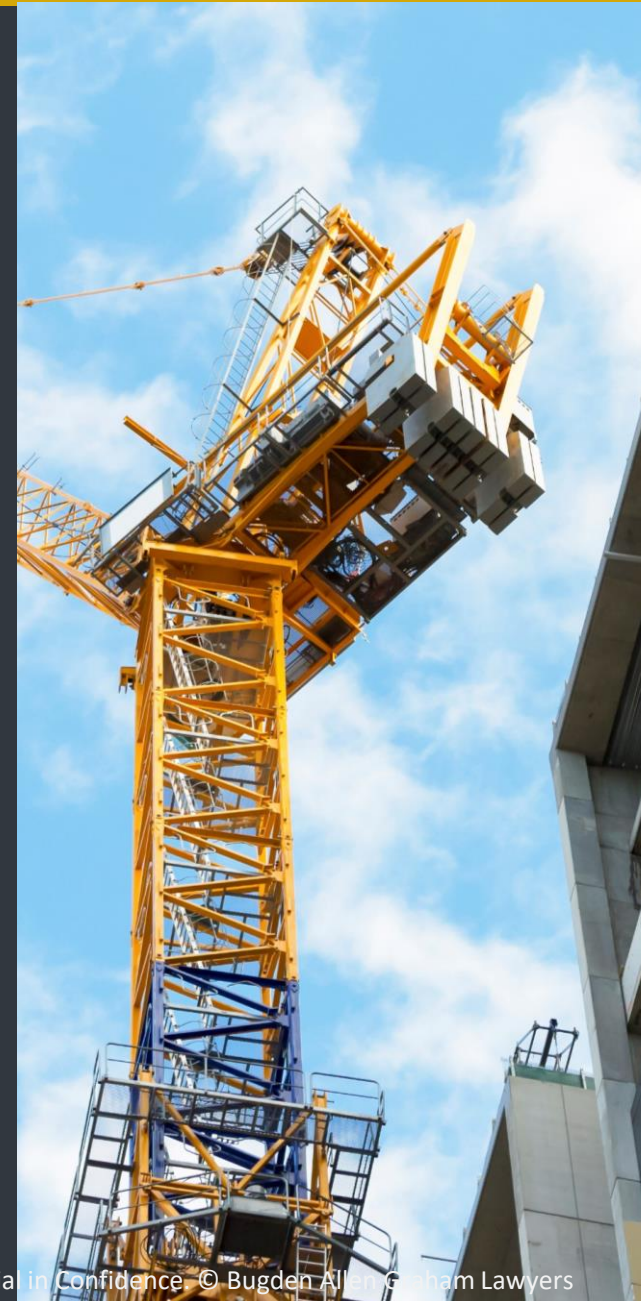
- (1) This section is subject to section 56 of the *Equal Opportunity Act 2010*.

No mention of ss.44 and 45. However, see *Black v Owners Corporation OC1-POS539033E* (Human Rights) [2018] VCAT 185. Perhaps the parliamentary draftsman agrees Black is wrong.

- (2) A lot owner must not repair, alter or maintain—
- (a) the common property of the owners corporation; or
 - (b) a service in or relating to a lot that is for the benefit of more than one lot or the common property.

[Unnecessary. Is a breach of Model Rule 4.1(1).]

See also *Sevensco Pty Ltd v Victoria Body Corporate* (2012) VCAT 374]





Disposal of goods on common property

An owners corporation may dispose of the goods abandoned on the common property

Notice of the OC's intention to dispose of abandoned goods must be in writing

[Good, but requires identification of the person who abandoned goods]

Before disposing of the goods, an owners corporation may move the goods to a safe place, if—

- a. the goods block reasonable access to a lot or the common property; and
- b. the owners corporation has made a reasonable attempt to locate or communicate with the person who abandoned the goods in order to give the person a notice of intention to dispose of abandoned goods.

[What is a safe place?]

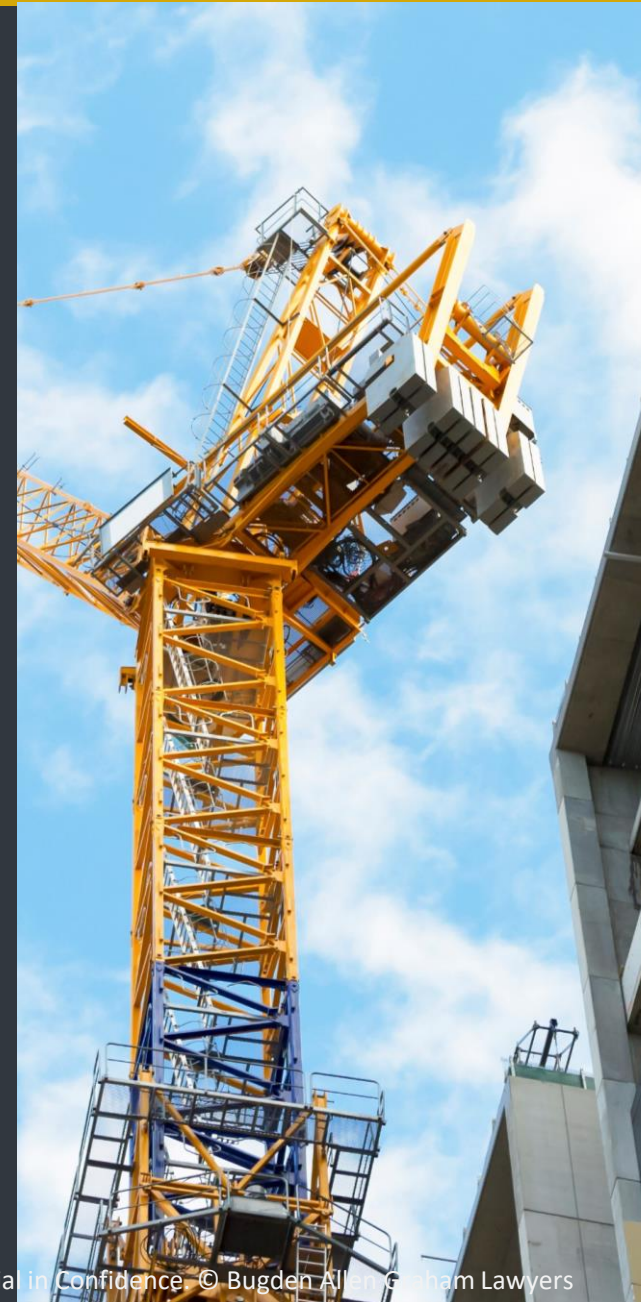
[Who pays the costs of removal and storage?]





Developer contracts

- If the applicant for registration of the plan of subdivision appoints a third party manager prior to the first meeting of the owners corporation, the contract of appointment of the third party manager expires at that first meeting.
- If the applicant for registration of the plan of subdivision enters into any other contract (other than a contract of appointment) that relates to the owners corporation and benefits the applicant for registration, any term of that contract must not exceed 3 years in duration, unless the term is in a contract that is a hotel and resort management contract





Management contracts

The initial owner of land affected by an OC or an associate of an initial owner must not—

- be appointed as the manager of the OC; or
- on any resolution of the owners corporation that relates to a defect in or on a building on the plan of subdivision
- receive any payment from the manager of the owners corporation in relation to the manager's contract of appointment

Associate means:

- an employee or agent of the initial owner; or
 - a spouse, domestic partner, parent, brother, sister or child of the initial owner or the initial owner's representative; or
 - a child of the spouse or domestic partner of the initial owner or the initial owner's representative.
-
- Tier 1 OCs must appointment a manager (unless opts out by special resolution)
 - Person must not be appointed as the manager of an owners corporation for a period that exceeds 3 years
 - Manager must disclose beneficial relationships





Section 122 duties

The following duties are added to s.122:

- (d) must take reasonable steps to ensure that any goods or services procured by the manager on behalf of the owners corporation are procured at competitive prices and on competitive terms; and
- (e) must not exert pressure on any member of the owners corporation in order to influence the outcome of a vote or election held by the owners corporation; and
- (f) before a contract is entered into for the supply of goods or services to an owners corporation under which a manager is entitled to receive a commission, payment or other benefit, must give written notice to the chairperson of the owners corporation disclosing the commission, payment or other benefit in accordance with section 122B





Section 122(d)

- must take reasonable steps

duty not absolute or strict; must be reasonable in all of the circumstances

- procured by the manager on behalf of the OC

“procure” means obtain. A recommendation does not constitute procurement. Should be limited to circumstances where a manager engages directly (eg. arranging minor repairs). Should not apply where manager is directed/doesn’t exercise discretion

- procured at competitive prices and on competitive terms

probably mere detail added to duty of due care & diligence



Section 122(f)

Before a contract is entered into for the supply of goods or services to an owners corporation under which a manager is entitled to receive a commission, payment or other benefit, must give written notice to the chairperson of the owners corporation disclosing the commission, payment or other benefit in accordance with section 122B.

- Managers are fiduciaries (see “*Strata Managers as Fiduciaries*” paper delivered by Gary Budgen OAM to Australian College of Strata Lawyers’ Annual Conference 2020)
- Disclosure has always been required
- Secret commissions are a crime under s.176 of the *Crimes Act* 1958
- Reference to chairperson is problematic





Restrictions on proxies

A person must not vote as a proxy on a resolution at a meeting of the owners corporation—

- a. on behalf of more than one lot owner— if there are 20 or less occupiable lots on the plan of subdivision; or
- b. on behalf of more than 5 percent of the lot owners—if there are more than 20 occupiable lots on the plan of subdivision.

unless the person votes as a proxy in the prescribed circumstances

Same applies to Powers of Attorney

[The s.89 protection is sufficient]

[Quorums are difficult to achieve as it is]



Interim resolutions

- Subject to the following the manager may pass an interim resolution at a general meeting if no lot owner is present (whether in person or by proxy) at the meeting.
- The manager must not pass an interim resolution that
 - affects the contract of appointment of the manager;
 - involves an amount that is greater than 10% of the annual budget of the owners corporation;
 - if the annual budget has not been set for the relevant year, involves an amount that is greater than 10% of the annual budget for the previous year.
- An OC, by ordinary resolution, may exclude or alter the power of the manager to make an interim resolutions





Service of Documents

- A document required to be given to an OC may be given:
 - by leaving it with the chairperson or secretary or as committee member; or
 - by leaving it in the letterbox at the address recorded in the OC register; or
 - by posting it, by prepaid mail, to the address recorded in the register; or
 - by sending it by electronic transmission to an address or location nominated by the chairperson, secretary or a committee member
- Cf s.34(3) of the Subdivision Act:
 - *A notice to an owners corporation may be served by post and is properly addressed if the address in the notice is the one shown in the records of the Registrar.*





Entitlement & liability

A plan providing for the creation of an OC must—

- a. specify details of lot entitlement and lot liability; and
- b. be accompanied by a statement detailing how the lot entitlement and lot liability is allocated

Lot liability in the plan must be allocated equally between the lots unless—

- i. there is a substantial difference in size between the lots; or
- ii. different lots have a bearing on the consumption or use of common utilities or the cost of maintaining the common property; or
- iii. the number of occupiers in each lot has a greater bearing on the consumption or use of the common utilities or the cost of maintaining the common property than the size of the lot; and

Lot entitlement in the plan must be allocated on the basis of the market value of the lot and the proportion that value bears to the total market value of the lots.



Thank you very much for your time.
If you have any questions about this presentation, please contact:

Tim Graham
Partner
Bugden Allen Graham Lawyers
tim@bagl.com.au | 03 8582 8100



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