



REIV THE STANDARD  
FOR SUCCESS

# SUBMISSION

CONSUMER PROPERTY ACT REVIEW  
ISSUES PAPER NO. 2  
OWNERS CORPORATIONS

April 2016



# ABOUT REIV

The Real Estate Institute of Victoria has been the peak professional association for the Victorian real estate industry since 1936.

Over 2,000 real estate agencies in Victoria are Members of the REIV. These Members are located in city, rural and regional areas.

The businesses employ more than 10,000 people in Victoria in a market which handles over \$100 billion of transactions totalling 30 per cent of GSP.

Members specialise in all facets of real estate, including: residential sales, commercial and industrial sales, auctions, business broking, buyers agency, property management, owners' corporations management and valuations.

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## Introduction

The REIV is the peak industry association for the real estate industry in Victoria, representing the majority of the state's licensed sales agents, auctioneers and owners corporation managers.

This issues paper - focusing on the Owners Corporations Act 1996 and its associated legislation- is of significant importance to our members who at present manage a considerable number of the 166,000 owners corporations across the state.

These 166,000 owners corporations collectively handle property valued at \$300 million and affect the lives of more than 1.5 million Victorians.

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## REIV Response

The following outcomes were gained from the Member consultation process.

### **1. Are the current constraints on owners corporations' power to commence legal proceedings appropriate?**

The REIV does not deem the current constraints on owners' corporations to commence legal proceedings to be appropriate. Feedback from REIV members indicates there is a legitimate need for the decision to commence legal proceedings to be changed to a simple, majority decision. This will allow for motions to be passed, especially in instances where there are apathetic lot owners and absentee owners.

While owners corporations are currently able to make applications to the Victorian Civil and Administrative Tribunal (VCAT) without a special resolution, VCAT decisions are difficult to enforce and are limited in compensation matters.

REIV members considers it important that owners corporations be able to take more serious cases to the Magistrates Court.

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

The REIV believes the decision on whether to commence proceedings should be at the owners corporation's discretion at all times.

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

Feedback from REIV members indicates an owners corporation should be able to deal with water rights where the water is collected on common property (eg apartment blocks), but not otherwise (eg a unit).

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

The REIV is presently not aware of any issues in relation to this.

### **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 REIV believes owners corporations should be granted powers to deal with goods on common property, in particular abandoned goods. The REIV suggests procedures could be modelled on those that currently exist in the Australian Consumer Law and Fair Trading Act 2012.

### **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?**

REIV members believe the requirements for a common seal are no longer relevant in the current marketplace. The REIV recommends this requirement be replaced with the signing procedure in section 127 of the Corporations Act 2001, together with sub-section 128(5) of the same Act.

### **7. What are your views about the operation of the benefit principle? What is the experience of your owners' corporation in applying the benefit principle?**

Feedback from REIV members indicates the benefit principle has rarely been used, to date. The REIV is not currently aware of systemic problems, so far as this is concerned.

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

The REIV believes owners corporations should be able to recover debt collection costs from defaulting lot owners whether or not the matter proceeds to litigation in a court or tribunal.

**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 at least one case, VCAT allowed only a nominal payment for legal costs and allowed filing and hearing fees. The VCAT Act requires amendment to allow recovery of legal costs and out-of-pocket expenses on the basis of appropriate scales. Costs and out-of-pocket expenses must be able to be recovered in all matters, not just in relation to debts.

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

The REIV does not support discounts for timely payment of fees, as all lot owners have a statutory obligation to pay fees and charges on time.

Applying discounts to lot owners who comply with their statutory obligation is problematic in practice as current management systems do not cater for this.

**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 REIV is firmly of the view that owners corporations should not require the internal dispute resolution process to be completed before proceeding to VCAT or court. It will simply enable a debtor to delay meeting their financial obligations.

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

The REIV is not currently aware of any other issues.

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

Feedback from REIV members indicates any administrative expenses incurred by an owners corporation must be able to be recouped from a lot owner.

**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?**

If there is a requirement for a committee (i.e. 13 lots or greater), there is a need for a prescribed owners' corporation.

**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?**

The REIV believes the Act should require not only a maintenance fund for all owners' corporations including all properties with 13 lots or greater, but also provide for its implementation.

**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?**

The REIV considers maintenance plans should be mandatory only for prescribed owners corporations. 'Prescribed' being at least 13 lots.

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

The REIV believes prescribed owners corporations' maintenance plans should be prepared by appropriately qualified and regulated professionals and the OC Act should be amended to require implementation.

**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?**

Feedback from REIV members indicates there should be capacity for money to be paid out of maintenance funds on the basis of a general resolution.

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

No, the REIV believes an owners corporation should be free to administer its 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 REIV deems contingency funds to be necessary, especially for owners corporations without maintenance plans. Contingency funds should only be used by general resolution of an owners corporation.

**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?**

In the above scenario, a lot owner is already entitled to issue proceedings at VCAT.

**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?**

The REIV believes lot owners who cause damage to common property should be required to pay for it. Alteration to common property should proceed via the normal channels.

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

The REIV does not presently have anything to add.

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

The REIV considers the current arrangements to be satisfactory.

**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 REIV strongly opposes lot owners being able to 'opt out' of insurance policies taken out by the owners corporation.

Allowing lot owners to take out their own insurance would suggest they are not contributing to cover for common property, resulting in higher insurance fees for other lot owners.

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In addition, should a lot owner opt out of the common cover and then allow their cover to lapse, the result of an otherwise insurable event could pose a risk to all lot owners in the owners corporation should the lot owner not be in a position to meet the cost themselves.

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

Feedback from REIV members indicates risk-weighting insurance premiums is desirable. The REIV believes lot owners who benefit from the insurance claim - and are ultimately responsible for the damage - should bear the excess and be responsible for any increased premium which may arise out of multiple claims. The responsible lot owner should also bear the difference between the ordinary premium and the higher premium.

**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?

In relation to contracts, the REIV believes full disclosure needs to be made to lot owners including the provision of contract copies at the inaugural meeting of the owners corporation.

In addition, a developer must be required to disclose in writing any relationship with the OC manager, including details of any immediate or future financial transaction that will arise out of the contract between the two parties.

In particular, this disclosure should include any financial benefit to the developer as a result of the awarding of a contract to an OC manager.

It is suggested 'relationship' disclosure be based on that which applies under the Corporations Act 2001. The REIV would support prohibiting payments to developers, as it

implies future management fees will be too high.

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

The REIV believes developers' obligations should be based on the need for contractual arrangements to be made for the future benefit of lot owners, not the developer and OC manager.

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

In regards to voting and proxies, the REIV strongly believes only financial lot owners should be permitted to vote and give or exercise proxies.

The REIV would support the implementation of penalties for any OC manager who specifically gathers or uses proxies to vote to continue management of an owners corporation, unless the proxy specifically states that the manager may use the vote for that purpose.

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

The appointment of proxies should only be available to financial lot owners. If a proxy is awarded to a lot owner, the lot owner receiving the proxy must also be financial.

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

Feedback from REIV members suggests it is necessary for the chairperson to have a casting vote but this should be limited to the chairperson of the Committee of Management of the owners corporation, not the person simply chairing the meeting.

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

The REIV does not believe a contract of sale should be able to limit the voting rights of lot owners. Voting rights

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should only be limited in accordance with the Owners Corporations Act.

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

Feedback from REIV members indicates current voting practices appear to work satisfactorily.

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

The REIV believes existing voting thresholds are adequate as special conditions are already catered for.

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

The REIV presently considers the provisions work satisfactorily.

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

The REIV has opted not to comment as this question is better suited to responses of individuals.

However, feedback from REIV members indicates thought should be given to enabling an owners corporation to deal with vexatious members who exploit meetings for the purpose of their own interests.

**37. How can the views of tenants be most effectively shared with owners corporations?**

Tenants' views can be expressed to the owners corporation through the owner of their lot. Tenants tend to focus on short-term benefits, while owners have a long-term view towards maintenance and the general upkeep of the property.

**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 REIV considers the current arrangements regarding size and minutes of committees to be appropriate.

With relation to ballots, the Act does not prescribe who has the power to arrange a ballot of the committee. The REIV recommends this be the same class of person as listed in Section 108. In addition, the REIV strongly opposes committee members who are not able to attend a committee meeting being able to grant a proxy to a non-member of the committee to represent them at the committee meeting.

**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?**

Feedback from REIV members indicates there is a need for model rules that prevent the outward appearance of a lot from being changed without the approval of the owners corporation. However, approval should not be unreasonably withheld.

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

REIV members suggest any other issues relating to the external appearance of lots should form part of special rules.

**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?**

Access to common property for lot owners and occupiers should be governed by either the Act or model rules. It's important to note that rules will be easier to alter, as may be necessary.

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The REIV is also aware that the Subdivision Act 1998 provides rights of access to easements.

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

The REIV believes all owners, occupiers and their licensees and invitees should comply with owners corporation rules. Ignorance of the rules should not be a consideration.

**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 REIV believes all lot owners, licensees and invitees should be bound by the rules, however, ultimate responsibility should rest with the person permitting a licensee or invitee to be on the property.

**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)?**

The REIV supports the implementation of model rules regarding smoking. The REIV suggests New South Wales' rules regarding smokers be replicated in Victoria. In relation to pets, lot owners are afforded protection under the Domestic (Feral and Nuisance) Animals Act 1994.

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

REIV members have identified multiple issues relating to the coverage of the model rules including visitor parking and appearance of lots. The structural and fire safety issues affecting lots are an additional issue.

**46. What are your views about owners corporation rules that prevent lot owners installing 'sustainability'**

**items in or on their units?**

If the appearance of a lot is affected, the lot owner should have to obtain the owners corporation's consent, however, consent should not be unreasonably withheld.

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

The REIV does not deem the current penalties to be an adequate deterrent. In addition, these penalties are often too difficult to enforce. The Institute would like to see civil penalties introduced.

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

Other than those issues mentioned above, the REIV presently considers existing rules to be generally appropriate.

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

Feedback from REIV members suggests the existing obligations are adequate.

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

The REIV is not presently aware of any further issues.

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

As lot owners are not obliged to inform an OC manager about how they use their lots, many owners corporations may not necessarily be aware if lots are being used for short-term accommodation. As such, the introduction of any disclosure requirements on OC managers would be extremely difficult to comply with.

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

- Feedback from REIV members suggests owner-prepared certificates are often inaccurate.
- Updates of any owners corporation certificate should be provided by the provider of the original certificate, within a stipulated timeframe only, and for a nominal sum.
- Updated financial statements can be provided at the cost of providing a document.

**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 REIV believes an owners corporation should be allowed to pursue dispute resolution at its own initiative.

**54. Are there any other issues relating to dispute resolution?**

Feedback from REIV members indicates the dispute resolution process is too long and cumbersome to be effective in managing problematic behaviour by residents.

In particular, dispute resolution can involve a lengthy process before an owners corporation can seek adjudication from VCAT when often only an order is provided, then having to go through the entire process again if an order is not complied with, and the ultimate penalty being as little as \$250 for the perpetrator whilst the costs borne by the owners' corporation can be much greater. The REIV would like to see this process amended with quicker imposition of penalties for recalcitrant residents.

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

The REIV believes VCAT should consider imposing costs on

problem owners.

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

Current delays in obtaining hearing dates are unacceptable. The REIV strongly supports VCAT introducing service by email as an alternative to service by post.

**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?**

At present, annual meetings of the retirement village and owners corporation are held concurrently. The REIV considers this best practice.

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

The REIV does not have any strong views on this subject.

**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?**

Like tenants, retirement village residents are able to express their views to their lot owner.

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

The REIV considers the current processes are appropriate.

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**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 REIV believes lot liability and entitlement should be set by an independent surveyor, based on legislated criteria incorporating an obligation to act fairly and honestly.

The current process for changing lot liability and entitlement is satisfactory, as is the time limit for registering changes to plans of subdivision.

The REIV would like to see improvements made to the Subdivision Act in regards to ensuring the initial entitlement liability is subject to the same requirements of later ones.

**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 REIV considers the criteria should be unfair or unreasonable allocation of entitlement or liability.

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

The REIV suggests section 34D of the Act should be amended to provide one route for change, rather than the two that presently exist.

## CONTACT US

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