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Amendments to the Owners Corporations Act 2006 (Vic)
Legal Update

| By Phillip Leaman

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Welcome

TISHER LINER FC LAW



WHAT WE DO:
Our very experienced team can provide assistance to owners corporations, committees, lot owners and managers in a range of owners corporations legal matters including:


- General advice and governance;
- Interpretation of plans of subdivision, common and private lot boundaries;
- Levy recovery;
- Building defect claims and water act claims;
- Adverse possession, easement and amendments to plans of subdivisions;
- Creation and enforcement of owners corporations rules;
- Preparing leases and licences over common property;
- Advise on repairs and maintenance and the application of the benefit principle; and
- Prosecuting and defending claims made at VCAT by Owners Corporations and Lot owners.

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OVERVIEW

The Owners Corporations and Other Acts Amendment Act 2021 has now passed Victoria Parliament and will take effect from 1 December 2021. Today we will provide a key summary of the proposed changes.

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PURPOSE OF AMENDING THE ACT

According to section 1 the purpose of the amending Act is to amend the Owners Corporations Act 2006 No. 69 (Vic) is to:

- provide for five tiers of owners corporations (OCs) that allow for the degree of regulation of OCs to be based on the number of occupiable lots;
- remove the requirement for OCs to have a common seal;
- allow OCs to levy fees to cover the premiums for reinstatement and replacement insurance or for any excess amount on an insurance claim;
- allow OCs to dispose of goods abandoned on the common property;
- provide for what may be disclosed at the first meeting of an OC;
- amend the duties of members of committees and sub-committees of OCs;
- further restrict the circumstances in which a person with a criminal record may be registered as the manager of an OC;
- insert new duties of managers of OCs relating to contracts for goods or services, money held on behalf of OCs on trust and the obligation to disclose beneficial relationships with suppliers of goods or services; and
- make other and related amendments.

The amending Act also:

- amends the Retirement Villages Act 1986 No. 126 (Vic) to enable the residents of a retirement village to elect a resident committee; and
- amends the Subdivision Act 1988 No. 53 (Vic), including to specify how lot liability and lot entitlement must be allocated.

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What are the new tiers?

Tier	Tier 1	Tier 2	Tier 3	Tier 4	Tier 5
Number of Lots	More than 100	51 to 100	10 to 50	3 to 9	2 lot subdivision or services only owners corporation (regardless of number of lots)

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Do lots include accessory lots such as car parks or storage cages separately titled?

If an owners corporation consists of less than 10 occupiable lots and more than 50 non-occupiable lots, the tier into which the owners corporation falls is to be determined as if a reference in those subsections to an occupiable lot were a reference to a non-occupiable lot.

If an owners corporation consists solely of non-occupiable lots, the tier into which the owners corporation falls is to be determined as if a reference in those subsections to an occupiable lot were a reference to a non-occupiable lot.

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How will this improve life for Lot owners?

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GENERAL OVERVIEW

Legal Proceedings

Current position
Currently, an Owners Corporation may issue legal proceedings by ordinary resolution for:

- Levy recovery matters (i.e. lot owners not paying their levies when due);
- Breaches of Owners Corporations rules

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GENERAL OVERVIEW

Legal Proceedings

Position after amendments
However, any other type of action must be authorised by a special resolution. From 1 December 2021, the Owners Corporation shall continue to be able to issue proceedings for the issues above, but will also be entitled to issue legal proceedings:

- for claims up to \$100,000 (or otherwise in the Magistrates' Court of Victoria jurisdiction) by ordinary resolution instead. Such action can be taken to the Magistrates' Court of Victoria or the Victorian Civil and Administrative Tribunal or other court with appropriate jurisdiction depending on the nature of the matter; and
- for other claims by the Owners Corporation on application by a lot owner to the Victorian Civil and Administrative Tribunal.

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GENERAL OVERVIEW

Legal Proceedings

In any application:

- a lot owner has the burden of proving why VCAT should make an order if –
 - the owners corporation has not voted on a special resolution relating to the matter that is the subject of the lot owner's application; or
 - the owners corporation has unsuccessfully voted on a special resolution relating to the matter that is the subject of the lot owner's application and an ordinary resolution would not have been passed; and
- any other party to the application has the burden of proving why VCAT should not make an order if the owners corporation has unsuccessfully voted on a special resolution relating to the matter that is the subject of the lot owner's application and an ordinary resolution would have been passed.

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GENERAL OVERVIEW

Exemptions for Tier 5 OCs

Tier 5 OCs will be exempt from compliance from a range of provisions of the Act to ensure that its operation can be more streamlined.

Services only owners corporations will also be exempt from compliance with a range of measures including not having to have a chairperson or secretary or provide OC certificates. Must still hold AGMs and have committees.

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GENERAL OVERVIEW

Making it easier to execute documents

OCs no longer need a common seal if they don't want one. Documents can be signed by two lot owners authorised by the OC. OC's need to resolve by ordinary resolution that a common seal is no longer required and can be destroyed.

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GENERAL
OVERVIEWInsurance Costs

Owners corporations can pass an insurance excess to individual lots owners in certain circumstances. More detail in later section.

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GENERAL
OVERVIEWWater claims

Owners Corporations also have obligations under the Water Act and can be liable for loss and damage caused to lot owners and other neighbours resulting from unreasonable water flow that arises from common property issues. The most common claims involve leaking common property caused by defective waterproofing that then leak into a private lot causing damage. In some cases an Owners Corporation may be liable to fix the issues caused to the private lots as well as consequential loss such as carpet replacement and alternative accommodation costs, by way of example.

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GENERAL
OVERVIEWWater claims

The new amendments confirm that whether or not there is a claim under the Water Act, if water falls on common property, it is deemed to be part of the common property allowing lot owners to take action against an Owners Corporation for flows of water from common property.

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GENERAL
OVERVIEWWater claims

This broadens the obligations of an owners corporation in that it is now not necessary to prove unreasonable flow but rather if water is on common property and is not properly directed to storm water and the result is damage, it may be easier for a lot owner to take action against the Owners Corporation for damage that results.

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GENERAL
OVERVIEWOriginal Building Defects

The amendments provide two protections for Owners Corporations:

Firstly, developers (initial owners) may not vote on any resolution that is a resolution to take action in respect to building defects; and

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GENERAL
OVERVIEWOriginal Building Defects

Secondly, a lot owner may apply to the Victorian Civil and Administrative Tribunal to commence proceedings without a special resolution passing if a special resolution vote is called and it would have passed if it were an ordinary resolution (i.e. 50% of the votes were in favour). It is then up to lot owners who object to the action being taken which need to convince the Victorian civil and Administrative Tribunal that the action should not be taken as requested. This ensures that the majority can take action in the Tribunal in circumstances where it is reasonable for the Owners Corporation to take such action.

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GENERAL
OVERVIEW**The Benefit Principle now**

The benefit principle applies principally to two sections of the Act.

Firstly, Section 24 of the Owners Corporations Act 2006 provides that an owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure. Fees for extraordinary items of expenditure relating to repairs, maintenance or other works that are undertaken wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.

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GENERAL
OVERVIEW**The Benefit Principle now**

Secondly, section 49 of the Owners Corporations Act 2006 provides that an owners corporation may recover as a debt the cost of repairs, maintenance or other works undertaken wholly or substantially for the benefit of one or some, but not all, of the lots affected by the owners corporation from the lot owners.

The amount payable by the lot owners is to be calculated on the basis that the lot owner of the lot that benefits more pays more.

The calculation is based on what is called the "benefit principle". The benefit principle needs to be carefully reviewed and applied by an Owners Corporation. There is case law setting out how the benefit principle is to be applied and in particular, the Grundl Assessment must be applied. In some cases, legal advice is required to ensure the Owners Corporation is correctly applying the assessment.

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GENERAL
OVERVIEW**The changes to the Benefit Principle**

The Grundl Assessment does not change nor does the application under Section 24 and 49. However, prior to 1 December 2021 an Owners Corporation could not apply the benefit principle to annual fees, only those fees attributable under Section 24 and 49.

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GENERAL
OVERVIEW**Benefit Principle can apply to Annual Fees**

Annual fees can be charged to lot owners on the benefit principle 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.

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GENERAL
OVERVIEW**The changes to the Benefit Principle**

This will give greater flexibility for Owners Corporations where some lot owners may use greater services or costs than other lot owners where there are not already separate limited owners corporations to address the problem.

An example of this is where there is just the one owners corporation and you have some retail space using common property toilets but residential lots that don't use the toilets. If you don't have licence agreements in place to deal with the costs, you can levy the retail lot owners the costs of operating the toilets.

These amendments will ensure that lot owners that benefit from a particular cost more pay for the cost.

The Grundl Assessment must still be applied in relation to each separate cost.

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GENERAL
OVERVIEW
CONT..**Committees**

Committees must have no more than 7 members unless there is an ordinary resolution which increases that to 12 members.

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GENERAL
OVERVIEW
CONT..**Removal of Goods**

Owners Corporations now have a process for removing and disposing of goods on common property.

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GENERAL
OVERVIEW
CONT..**Current position**

It has been difficult for Owners Corporations to remove goods which are left or stored on Common Property. Usually, the Owners Corporation must rely upon a breach of the Owners Corporations rules. This involves issuing a breach notice and final breach notice and then taking legal action at the Victorian Civil and Administrative Tribunal.

The problem with this is that the process can be costly and disproportionate to the issue.

A common example, might be when a lot owner keeps an couch or outdoor setting in part of the common property and refuses to move it to their private lot property. Owners Corporations may find it difficult to justify spending the costs associated with issuing proceedings.

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GENERAL
OVERVIEW
CONT..**What's changing**

The amendments provide a comprehensive process and procedure to deal with private lot chattels which are on common property from 1 December 2021. This is great news for Owners Corporations, their committees and managers. So how does it work?

The amendments allow an Owners Corporation to dispose of goods abandoned on the common property provided that that following the procedure already set out in the Australian Consumer Law and Fair Trading Act 2012 as varied by the amendments. Owners Corporations must provide a notice of their intention to dispose of the abandoned goods.

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GENERAL
OVERVIEW
CONT..

That notice must be in writing and include—

- (a) the plan number and address of the owners corporation; and
- (b) a description of the goods; and
- (c) an address at which the goods may be collected; and
- (d) a statement that on or after a specified date the goods will be disposed of by the owners corporation unless the goods are collected; and
- (e) a statement that the owners corporation will retain from the proceeds of sale of the goods an amount not exceeding the cost to dispose of the goods.

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GENERAL
OVERVIEW
CONT..

A notice of intention may be given to the person who abandoned the goods personally or left at, or sent by post to, the person's last known address.

A notice to a person with a publicly registered interest in the abandoned goods is taken to have been given if it has been sent by post to the person's address in the register in which the interest is registered. This means that for serial numbered goods (such as cars, boats etc) or goods for which the Owners Corporation knows is owned by a specific person, the Owners Corporation must obtain a search on the Personal Property Securities Register to see whether or not any party has a secured interest in the goods to be disposed of. If so, the Owners Corporation must notify such parties.

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GENERAL
OVERVIEW
CONT..

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.

An owners corporation must not dispose of the goods if—

- (a) a dispute exists between the person who abandoned the goods and the owners to the goods; and
- (b) an application has been made to VCAT by the owners corporation in relation to the dispute.

An owners corporation that disposes of goods under this Division is not liable in relation to the goods by reason of the disposal.

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GENERAL
OVERVIEW
CONT..

Whilst, there is a defined process, it is important that Owners Corporations receive legal advice prior to disposing of any goods with any value.

Whilst Owners Corporations will not be liable for disposing of goods, this protection from claims only arises where the Owners Corporation has followed the process correctly.

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GENERAL
OVERVIEW
CONT..**Developers and their initial obligations**

Developers who hold on to the majority of lots after the plan of subdivision is registered must now comply with such obligations for 10 years not 5 years. Initial owners (and their associates) must not be appointed as the manager of the Owners Corporation or vote on resolutions in respect to defects. They must not also designate as a private lot what normally would be common property or services or receive any payment from the manager of the owners corporation in relation to the manager's contract of appointment.

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GENERAL
OVERVIEW
CONT..**Maintenance Plans**

Tier one and two owners corporations must prepare and approve a maintenance plan.

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GENERAL
OVERVIEW
CONT..**Developers and appointments of managers and contracts**

Developers will be restricted in engaging managers and entering into contracts at the first annual general meeting. Contracts can only be entered into for a maximum period of 3 years subject to hotel and resort management contracts.

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GENERAL
OVERVIEW
CONT..**Audits**

Tier one owners corporations must audit their financial statements and tier two owners corporations must have their financial statements reviewed by a CPA or Public accountant.

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GENERAL
OVERVIEW
CONT...**Rules**

An owners corporation may make rules in respect of proposed works to renovate or alter the external appearance of a lot—

- to protect the quiet enjoyment of all other lots and the common property during those works; and
- to protect the structural integrity of any building on the plan of subdivision from those works; and
- to ensure the market value of any other lot does not decrease as a result of those works.

Rules in general cannot be oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or an occupier of a lot.

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GENERAL OVERVIEW CONT...

Rules

Sustainability Items
An owners corporation must not make rules that unreasonably prohibit the installation of sustainability items on the exterior of a lot.

A prohibition on the installation of a sustainability item only on aesthetic grounds is taken to be unreasonable; and a requirement that the location of, or the works involved in installing, the sustainability item must not impede reasonable access to, or the use of, any other lot or the common property is taken to be reasonable.

Under the Act, a sustainability item means any thing that eliminates or reduces a reliance on non-sustainable energy sources and includes—

- (a) a solar hot water system; and
- (b) solar energy panels; and
- (c) a roof with colours having a particular solar absorption value.

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GENERAL OVERVIEW CONT...

Rules

Broadening of determining that a rule is unfair and unenforceable
Section 140 (a) set out above will be deleted and replaced with "Rules cannot be oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or an occupier of a lot. This broadens the scope of ensuring that rules are unenforceable if they go too far.

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GENERAL OVERVIEW CONT...

Rules

Guests Liable for Breach of Rules
Prior to the amendments, Owners Corporations could take action against tenants and lot owners. The amendments mean that tenants/occupiers must ensure that their guests comply with the rules.

If a guest to a lot breaches the rules of the owners corporation, the occupier of the lot and the guest are jointly and severally liable for satisfying any penalty or compensation payable as a consequence of the guest's breach.

However, an occupier of a lot is not liable for a guest's breach if the occupier of the lot provides the guest with a copy of the rules of the owners corporation. The onus to prove that a copy of the Rules were provided to a Guest will be on the occupier.

This provision will not impact on short stay operators and guests which will still have certain obligations under Division 1A of the Owners Corporations Act 2006.

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GENERAL OVERVIEW CONT...

Interim resolutions

If a general meeting of an owners corporation has a quorum and the special resolution is not passed with the requisite number of votes, but there are no votes against the resolution, then the resolution will be taken to be an interim resolution.

This will make it easier for larger owners corporations to make decisions where there are large numbers of lot owners who don't turn up to meetings.

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GENERAL OVERVIEW CONT....

VCAT Orders

VCAT will be able to order a lot owner to pay the Owners Corporation costs incurred in recovering unpaid amounts from the lot owner (other than costs in the proceeding). This is to clarify that the section does not affect the power of the Tribunal to award costs under Section 109 of the Victorian Civil and Administrative Tribunal Act 1998.

Lot owners may bring, defend, discontinue an action on behalf an Owners Corporation where a special resolution or ordinary resolution has not passed and they make application to the Tribunal. It is then up to a lot owner to prove to the Tribunal why the lot owner should not be permitted to take the action.

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How will the changes affect Managers?

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Adding additional obligations for Managers to:

- 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
- 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
- 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;
- holding money in separate bank accounts (unless otherwise agreed) and provide copies of financial statements of bank accounts on request by an owners corporation; and
- disclosing beneficial relationships or commissions, payments or other benefits with or from suppliers.

ADDITIONAL OBLIGATIONS FOR MANAGERS

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Contracts of appointments for managers **must not include** certain prescribed terms such as-

- making an owners corporation convene a general meeting or pass a special resolution to revoke the manager's appointment;
- allowing the manager to renew the contract of appointment at the manager's option;
- automatic renewal of contracts;
- specifying the terms of notice before termination to exceed 3 months for tier one and tier two owners corporations or one month for all other tiers

CONTRACT OF APPOINTMENTS FOR MANAGERS

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Managers may pass interim resolutions

The Act will allow managers to pass interim resolutions on some matters where if no lot owner is present at the meeting ensuring that managers can ensure that owners corporations can function.

A common example of this might be the manager resolving to obtain insurance in circumstances where insurance is about to expire.

MANAGERS MAY PASS INTERIM RESOLUTIONS

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A deeper dive into the changes on...

- ✓ Meetings
- ✓ Voting
- ✓ Insurance

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