

# Legal Update | Property

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## Body corporate regulation under the new *Owners Corporations Regulations 2007 (Vic)*

The proposed changes under the *Owners Corporations Regulations 2007 (Vic)* (Regulations) will mean prescriptive regulation of certain classes of professionally managed bodies corporate.

The *Owners Corporations Act 2006 (Vic)* (Act) will come into effect on 31 December 2007. The Regulations will also commence operation on this date and is designed to support the Act and replace the *Sub-division (Body Corporate) Regulations 2001 (Vic)*.

The Regulations therefore form part of the new legislative framework for the management of common property and the operation of bodies corporate, which will be known as “owners corporations”.

One of the most significant changes under the new structure is that the level of regulation is not uniform. The new scheme draws a distinction between those requirements to be imposed on small, self-managed owners corporations and larger, professionally managed owners corporations. Professionally managed owners corporations will be known as “prescribed owners corporations” and will be subjected to a more extensive and prescriptive regime.

Consumer Affairs Victoria (CAV) has prepared a draft of the Regulations. The primary aim of the Regulations is to ensure that the interests of lot owners are protected. They therefore seek to promote lot owner participation and improve financial management, building management and governance of owners corporations.

Broadly, the Regulations prescribe:

- classes of prescribed owners corporations
- insurance requirements for owners corporations
- when an existing corporation must establish an owners corporation register
- information to be included on an owners corporation certificate
- fees, costs and charges
- model rules for owners corporations.

### Prescribed owners corporations

Proposed Regulation 5 defines “prescribed owners corporations” as an owners corporation that levies annual fees in excess of \$200,000.00 in a financial year or an owners corporation that consists of more than 100 lots.

Prescribed owners corporations will have higher obligations imposed on them in relation to maintenance planning and funding, the auditing of their accounts and insurance requirements.

### Appointed managers

Where an owners corporation appoints a person to be the manager of the owners corporation pursuant to section 119 of the Act, the manager is required to have professional indemnity insurance for the sum prescribed by proposed Regulation 7 of \$1.5 million.

Managers of prescribed owners corporations must be registered with the Business Licensing Authority (BLA).

The BLA will administer registration and create a public record of the manager’s contact details and their professional insurance.

### Owners corporation register

Pursuant to section 147(2) of the Act, all existing owners corporations must establish an owners corporation register. Proposed Regulation 9 requires that the owners corporation register be established within a period of nine months from the commencement of the Act. All existing owners corporations must therefore establish an owners corporation register by September 2008.

### Owners corporation certificate

Proposed Regulation 11 sets out the information that is required to be included in an owners corporation certificate. It is anticipated that the new measures will ensure greater information disclosure and transparency for lot owners and prospective buyers.

### Model rules

The model rules will apply as default rules in the event that no rules or insufficient rules are made by an owners corporation. Owners corporations therefore retain the right to make their own rules about the proposed rules and any other matters set out in Schedule 1 of the Act.

The proposed model rules are not overly restrictive. Under the existing regulatory framework, standard rules relating to the maintenance and use of common property exist. The standard rules were often found to be deficient in addressing many of the substantial issues which arose between lot owners and between lots owners and the body corporate. According to the CAV the proposed model rules are a more complete version of the standard rules as they relate not only to common property but also to health and safety, metering of services and behaviour of persons.

Part 6 of the model rules establishes an internal dispute resolution framework which is to act as a default position in the event that a dispute resolution process has not already been established by the owners corporation rules. Pursuant to section 153(3)(a) of the Act, all owners corporations are required to have an internal dispute resolution mechanism in place.

### What it means in practice

- Owners corporations will need to determine whether they meet the definition of a “prescribed owners corporation” and are required to meet the higher standards imposed under the Act.
- Owners corporations should undertake a review of their rules to ensure that they are consistent with the model rules and that they have an adequate internal dispute resolution process in place.

- Existing owners corporations must also establish an owners corporations register by September 2008.

It is important that owners corporations are aware that compliance with the new Regulations will be monitored by both CAV and the BLA and that penalties for non-compliance will be imposed.

For information on an overview of the Act and the legislative framework, please refer to the May 2006 edition of our Property Legal Update, which can be found at Middletons’ website at [www.middletons.com](http://www.middletons.com).

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## Are poker machine entitlements tradeable during the currency of the lease?

The right to deal with poker machine entitlements may be affected by rights granted under a lease. In *Boreland v Docker and Ors [2007] NSW CA94* (Boreland Case), the landlord claimed ownership of the poker machine entitlements associated with the leased premises and wanted to prevent the Tenant from transferring its entitlements during the term of the lease. The Court held that the Tenant was entitled to sell the poker machine entitlements during the term of the lease where there were no specific lease provisions restraining the Tenant from doing so.

### Facts

The facts of Boreland Case were as follows:

1. The Tenant operated a hotel business on the Landlord’s premises as a weekly tenant from 1 August 2003. The hotel had an existing hotelier’s licence which was transferred into the Tenant’s name when the Tenant entered into the lease. Seventeen poker machine entitlements had been allocated to the hotelier’s licence prior to the lease commencing.

2. The lease contained the following clause (Liquor Licence Clause):

“23.1 The Liquor Licence attaches to the Premises or part of them.

23.2 The Lessee acknowledges that the Lessor is the beneficial owner of the Licence and that it is permitted by its nominee to exercise the Liquor Licence while it is Lessee provided that it complies with this Division.”

Clause 23.3 then provided that the Liquor Licence was not to be exercised in any way that jeopardised its operation.

“Liquor Licence” was not defined in the lease.

3. The lease also contained the following more general clause:

“The Lessee will keep current all licences and permits and registrations required for the Permitted Use and where any such licence or permit or registration has been transferred to the Lessee or its nominee by the Lessor or the transfer thereof has been procured by the Lessor, upon the expiration of this Lease or its earlier termination, the Lessee will transfer or cause to be transferred each such licence or permit or registration to the Lessor or its nominee at no cost to the Lessor.” (General Use Clause).

4. Between mid 2005 and early 2006, there was various correspondence between the Landlord and the Tenant (Correspondence) which indicated that the Landlord had agreed to the Tenant remaining in the premises until 31 August 2007 on the same terms as the current weekly lease.
5. In late 2005, the Tenant entered into an agreement to sell all of the Tenant’s interest in the poker machine entitlements and made an application to the Liquor Administration Board for the transfer of those entitlements.
6. The Landlord subsequently gave the Tenant a notice to quit which expired on 24 March 2006.

7. The Landlord filed for declaratory relief and an injunction restraining the Tenant from transferring the poker machine entitlements without the Landlord's approval.
8. The trial judge found in favour of the Landlord. The Tenant then appealed the decision to the Court of Appeal.

## Court's Decision

The Court of Appeal held that:

1. The Correspondence had the effect of changing the weekly lease into a lease with a fixed term until 31 August 2007 despite the Correspondence referring to the lease being on the same terms as the weekly lease.
2. The Liquor Licence Clause did not extend to the poker machine entitlements as it was clearly expressed to refer to the liquor licence (the hotelier's licence) and not the poker machine entitlements which were separate from the liquor licence under the relevant legislation. As such, the clause was ineffective because a liquor licence is not property, and therefore could never be 'held on trust' for the Landlord (only property could be held on trust). In other words, the Court held that the parties had included a clause in the lease that had no meaning or purpose at all.
3. The Tenant could transfer the poker machine entitlements during the term of the lease as the Tenant owned the property in the entitlements and, given that the Liquor Licence Clause was ineffective, there was no specific provision restraining the Tenant's right to transfer the poker machine entitlements during the term of the lease.
4. However, the Court held that whilst the Tenant was free to sell or transfer the poker machine entitlements during the term of the lease, the General Use Clause required the Tenant to return the liquor licence and the poker machine entitlements to the Landlord at the end of the lease. In other words, the specific Liquor Licence Clause did not protect the Landlord but the General Use Clause at least meant that the Landlord was entitled to receive the poker machine entitlements back from the Tenant at the end of the Lease.

## Practical Tips

Usually, poker machine entitlements are critical to a hotel's operation and its turnover. In light of the Boreland Case:

1. Parties should be careful entering into correspondence which might have the effect of varying the terms of the lease without an intention to do so.
2. A landlord should ensure that the terms of the lease are expressed in a manner which clearly restricts the Tenant from transferring or disposing of the entitlements during the term of the lease.
3. Similarly, if a tenant wants to ensure an ongoing right to poker machine entitlements, then such a right should be clearly expressed in the lease.
4. There should always be separate clauses dealing with separate issues in legal documents where possible. Liquor licence and poker machine entitlements are fundamentally different things and should therefore be dealt with separately in leases. While in the Boreland Case the General Use Clause did eventually protect the Landlord's interest in the poker machine entitlements where the Liquor Licence Clause failed, it is not good practice to rely on 'general' or 'catch all' clauses to protect such an important interest.
5. Potential purchasers of poker machine entitlements and tenants entering into leases which involve the transfer of the poker machine entitlements should independently ascertain whether the party proposing the transfer has valid ownership and the right to make the proposed transfer.

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