

PROPERTY

LEGAL UPDATE

MAY 2006

Owners' Corporations to replace Bodies Corporate in Victoria

The Victorian Government recently conducted a detailed review of body corporate laws in Victoria. The review considered the effectiveness and efficiency of the current laws and culminated in the Body Corporate Review Final Report being published in December 2005. A draft of the Owners Corporation Bill ('the Bill') has since been published and will be introduced into Parliament in 2006. The Bill incorporates relevant sections of the current legislation, building on and enhancing these provisions to integrate the recommendations of the report.

Key message

A recent review of Victorian Body Corporate laws has resulted in a draft new bill – Owners Corporation Bill – that aims to move the current regime into a legislative framework that is more representative of the modern industry. The changes are evolutionary and align Victoria more with the other States.

Under the new regime, the name *body corporate* will be replaced with *owners' corporation* in order to emphasise the fact that the body is representative of lot owners and to provide them with a vehicle to manage their common property. This is also the term used in other States.

Current legislative framework

The report found the current regime, which is governed by the *Subdivision Act 1988* and the *Subdivision (Body Corporate) Regulations 2001*, was introduced at a time when most subdivisions consisted of fewer than five residential lots and most bodies corporate were self-managed. As such, the existing legislative framework reflects a policy of limited government involvement in body corporate operations, with a reliance on self-governance by the body corporate community. It is ill-equipped to deal with the significant number of large developments, particularly the recent increase in multi-storey high-rise apartment buildings.

The role of the body corporate has become more technical and complex, further compounding the inherent need for re-evaluation of the current legislation in order to better reflect the changing nature of bodies corporate and to allow for the adoption of a more contemporary approach to their management. The new legislation

will provide increased certainty and a more structured and sufficiently flexible framework for tenants and bodies corporate alike.

Recommendations of the report

In response to the more than 200 submissions received, the report proposed that the following changes to the current regulatory scheme for bodies corporate be implemented.

Enhanced regulation

It is proposed the new legislation should provide for increased certainty of the role and responsibilities of the body corporate and a more contemporary regulation of its operations and management. The report specifically identified a need for the following initiatives:

- » development of more specific rules covering a body corporate's ability to initiate legal proceedings on behalf of its members
- » increased disclosure requirements of records that are required to be kept and made available by the body corporate as well as improving the current system of disclosure of information for prospective purchasers of units in bodies corporate

- » the introduction of a 'body corporate register' of essential matters, allowing increased availability and inspection by body corporate members
- » expanded powers of the body corporate to handle asset management, including improvements and upgrades to common property, and preparation of long-term maintenance plans
- » increased regulation to be imposed on certain classes of bodies corporate, for example large bodies corporate. The report also held that two-lot subdivisions should have an exemption from certain requirements
- » expanding the capacity of bodies corporate to make rules, and providing an enforcement mechanism of these rules through VCAT.

Dispute resolution

The review revealed that when seeking access to justice, members of bodies corporate frequently encounter significant barriers including the costs of taking a matter to the Magistrates Court, which is the only option for the resolution of a dispute other than services generally available for the determination of neighbourhood disputes. This lack of alternatives for dispute resolution emphasised the need to develop an integrated approach in providing dispute resolution services. The Bill sets out a multi-tiered dispute resolution process in the following sequence:

- » **First tier** – internal dispute resolution process for bodies corporate with a default process set out in model rules as well as a formal complaint handling process where the informal process fails
- » **Second tier** – access to a low-cost dispute resolution process through Consumer Affairs Victoria, which will provide conciliation or mediation for body

corporate disputes and, as necessary, referral to VCAT

- » **Third tier** – granting VCAT broad powers to resolve disputes and make binding determinations and to consider more complex technical and legal issues relating to the operations of bodies corporate. Previous tiers must first be exhausted before taking a matter to VCAT.

Protection of body corporate funds

It was proposed by the report that in order to better protect common funds that are under the control of the body corporate, legislation should introduce the following initiatives:

- » requirements on the body corporate to record *all* transactions of income and expenditure
- » increased governance of account management, including the need for prescribed bodies corporate to comply with accounting standards and to facilitate audits of accounts
- » the establishment of a separate maintenance fund with internal expenditure procedures and simple fee/debt recovery procedures.

Asset management

The report proposed that the powers of the body corporate should be expanded to enable improvements to common property; maintenance and repairs to easements and services in lots; the establishment of a maintenance fund and preparation of maintenance plans on the estimated cost of repair/replacement for significant items.

Insurance

The report found that that some bodies corporate found it difficult to obtain approval for insurance, and that there was often significant ambiguity in relation to which parts of the buildings were common property for the purpose of insurance. As such recommendations were put forward to allow:

- » bodies corporate to more easily obtain approval for insurance over common property
- » greater clarification on which parts of buildings and other infrastructure were common property for the purposes of insurance.

Rules

The current standard rules for all bodies corporate are inadequate in their application. The review recommends:

- » granting increased power to bodies corporate to make rules
- » deeming unenforceable any rules which discriminate against the owner of a lot or are inconsistent, limit a right or avoid any obligation under the Act or other law.

It is also recommended that the rules may be enforced through VCAT.

Prospective purchasers

The report proposed a shift towards increased protection of prospective purchasers under the new regime. This is hoped to be achieved through:

- » increased disclosure to prospective purchasers of units in bodies corporate, including more detailed disclosure of lot entitlements and lot liability on the plan of subdivision

- » body corporate certificates to be disclosed in the vendor statement – these certificates will contain brief details of key matters such as fees paid, special levies struck and paid, insurance, maintenance plans and any liabilities of the body corporate.

Governance

A common theme throughout the report was that the current regulatory framework failed to adequately facilitate or promote proper governance between members and the body corporate. This was highlighted by examples of poor communication and lack of control by members, together with a lack of definitive rules and guidelines that body corporate managers should follow. As such, recommendations were put forward to introduce:

- » general principles of conduct to cover the body corporate, the committee, the body corporate manager and the holder of a proxy. These principles would also be extended to include several duties to be imposed upon the developer
- » an 'interim resolution' mechanism to allow special resolutions to be made by postal or electronic ballot. The interim decision would be passed if 50 percent are in favour and not more than 25 percent are against a decision. An interim decision would then become a decision of the body corporate if no petition is received within 29 days of the meeting
- » a mechanism to invalidate any clause in a contract if that clause is inconsistent with or limits a right or avoids an obligation under the new regulations. This is hoped to prevent the granting of perpetual or irrevocable proxies for bodies corporate
- » express rules governing the constitution, duties, functions, powers and responsibilities of body corporate committees.

Further changes

Further to the above recommendations, the Bill initiates the following changes to the previous legislation:

Clarification of the powers of the committee

The Bill enables the committee to do all the things the body corporate can do by a simple majority vote of lot owners except for those matters that may be resolved only at a general meeting. There are further requirements as to who may call a meeting and the required notice of a meeting.

Information and record keeping

The Bill facilitates access to information for body corporate members and requires the body corporate to keep records of its activities and make them available for inspection, free of charge, to current and incoming lot owners.

Financial accountability

The Bill includes additional requirements that the books of account must "enable true and fair financial statements to be prepared and audited". An annual financial statement must be presented at the Annual General Meeting a 'prescribed owners corporation' (see below) must have its financial statement audited after the end of the financial year.

Prescribed owners' corporations

The current legislation does not distinguish between small and large bodies corporate. The Bill recognises this distinction in relation to the divergent interests of a two-lot building versus a modern 100-lot high-rise.

The threshold for prescribing an owners' corporation will be set out in the regulations that will be drafted after the new legislation is enacted.

Meetings

Under the Bill, the first meeting of the owners' corporation must occur within six months of the registration of the plan of subdivision whereby the developer must provide various items. Any contracts or leases that have been entered into, accounts and records already made and a maintenance plan must also be tabled.

Developers

Under the Bill, during the time the developer exercises the majority vote in the owners' corporation, they must act responsibly and in the interests of the owners' corporation, and pursue contract remedies against the builder for any defects in the common property. Developers are also prohibited from requiring owners to provide proxies or powers of attorney as a condition of purchase.

Managers

The new legislation requires that a paid manager must be registered with the Business License Authority and will be prevented from registering if they are insolvent or do not have professional indemnity insurance. The Bill also allows the committee to remove a manager rather than limiting this capacity to a general meeting or ballot of lot owners.

We will keep you informed of any further developments.

Further information

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