

Cleaning up body corporate laws

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More and more Victorians are choosing to call apartments within high-density complexes home. Testament to this trend is the State Government's move to replace outdated body corporate laws with more comprehensive legislation.

story **Bronwyn Davis**

WHEN VICTORIANS BEGAN replacing the traditional family home on a quarter-acre block with something more compact, small unit and townhouse complexes began dotting the landscape.

Often there were no more than about five to ten dwellings on one title and frequently this was restricted even further to a pair of twin units.

However as our population continues to grow, the city skyline is morphing into a

vision of cloud-touching cranes and imposing modern residential towers.

Melbourne Docklands and the rejuvenation of the Southbank precinct added to what was fast becoming a development frenzy and today, apartment life is taking over as the favoured norm.

Damian Costello, manager of Body Corporate Managers Bayside P/L, declares, "These days in Victoria there are 65,000 units and a quarter of those are probably high-rises of 100 units or more."

Because of our rapid endearment with high-rise living, the State Government has been forced to address the fact that original body corporate regulations have become archaic.

Consumer Affairs Minister Marsha Thomson says, "The new Act will be the most significant change to the laws governing bodies corporate since they were first introduced in 1988.

"Over 1 million Victorians now own, live or work in bodies corporate, compared with around 200,000 when the original body corporate laws were passed. The laws have not kept pace with these changes and we must update them."

Out with the old, in with the new

Enzo Raimondo, director of the Real Estate Institute of Victoria, is one of many in the property industry to embrace the State Government's proposed changes to laws governing bodies corporate across Victoria.

He claims these amendments and new regulations will bring the laws into the 21st century and "should simplify the operation of the committee that runs the body corporate to make it easier for people to be involved and make decisions about their buildings".

The new legislation will change the name 'body corporate' to 'owners corporation' in keeping with various existing Acts across the majority of Australian states.

Angela Schooneman, head of Minter Ellison Lawyers' real estate practice, says, "The *Owners Corporation Bill* will alter the structure, function, rights and obligations of all bodies corporates. If passed in its current form, it will affect property owners, managers, and property developers of large-scale subdivisions.

"OCs (owners corporations) will still be formed under the *Subdivision Act 1988*. The rules of an existing body corporate will remain in force to the extent that they aren't inconsistent with the new Bill."

Although the final touches haven't been made to the Bill, which is still being debated in parliament and probably won't fully come into effect until December 2007, most of the major changes it will introduce have been widely disseminated throughout the real estate industry.

The new legislation stipulates different requirements for various types of OCs, largely

dependent on the size of the subdivision they manage.

Small, two-lot subdivisions will remain exempt from a number of the proposed requirements and continue to operate as per usual.

Average-sized apartment buildings or multi-unit subdivisions with common areas will be required to comply with much of the new legislation.

Larger OCs that have commercial, retail and residential facilities shared within the one complex, for example, will be known as Prescribed OCs. As larger subdivisions, it's expected that they will be forced to meet additional obligations.

Schooneman lists some of their extra responsibilities as "the requirement to prepare a maintenance plan, to have a maintenance fund, to prepare financial statements and have them audited, and to obtain a valuation of the buildings that they're liable to insure at least every five years".

She adds, "None of this should really change the bodies corporate in terms of substance because if they've been operating properly, all of this should have been done. Now it's just being regulated. There may be a few changes required to deal with the compliance issues, but it shouldn't change day-to-day operations too much."

With its sights firmly set on large-scale OCs, the Bill is expected to shade in the grey areas that left people in doubt as to correct management and maintenance of the multi-rise dwellings that are becoming commonplace in Melbourne's CBD and surrounds.

Costello says, "Some people were probably drowning in the larger developments we now have – I'm talking about a block of 200 to 300 units. The subdivisional Act we have at the moment took the general philosophy of one size fits all but it doesn't cater for any administration variations."

He adds, "The (new) legislation gets into more detail and defines these separate entities.

"The legislation sets out boundaries and endeavours to clarify who does what, where it does it and what the limitations are."

Other changes set to be made by the new Bill include the necessity for every OC manager to carry professional indemnity

insurance and be registered with the Business Licensing Authority (much like real estate agents are required to be). On top of this, managers must work to good faith obligations and act in the best interests of all owners within the OCs they govern.

Further, a certificate outlining information about the common property and OC, including details of the manager, all licences, agreements and contracts, any legal proceedings or liabilities and financial statements, must be supplied to current owners on request and attached to the vendor's statement for any incoming purchasers to view.

Although he feels these changes are for the better, Costello predicts the fees for OC-managed complexes are likely to increase when the new regulations finally take effect.

"More procedures could create greater overheads which could lead to more cumbersome committees who don't initially understand their obligations. The legislation could lead to greater budgeting but in the long term should lead to better planning."

Overall though, the feeling among industry

dwellings, the new regulations concerning maintenance plans could mean greater long-term profit potential as well as rental returns on their asset.

Raimondo states, "The changes being made by the government... have the potential to improve the management of the corporations and the maintenance of the asset.

"The requirement for maintenance plans for larger buildings run by corporations will make it easier to ensure that the asset doesn't fall into disrepair. Under the current laws, drawn-out debates about maintenance can lead to a degradation of the asset and subsequent reduction to property values."

Costello agrees that the requirement for a maintenance agenda is a "big benefit to investors because their asset's being protected".

"A block of retired people may not really want to know that there's a major expense because they might not be around in a couple of years, but that's not very good budgeting or safe planning for anybody. So

The other bonus for investors buying into a complex with a long-term maintenance plan is that they'll have a clearer understanding of what their fee contribution is going towards and why.

bodies is that moves by the State Government are all in the right direction.

Rob Pitcher, president of the Institute of Body Corporate Managers Victoria, sums up the positive vibe the OC Act is creating in property circles insisting, "This will ensure that Victoria benefits from a strengthened and practical body corporate management Act and industry."

Protecting your asset

One of the primary issues the new OC legislation raises is maintenance of those properties managed by the bodies corporate. This is particularly applicable to larger apartment complexes where continued vigilance and an awareness of any problems are necessary to ensure the safety of owners and tenants within the building.

For investors in multi-storey apartment

the introduction of this is a huge benefit for owner-occupiers, investors and the future of this infrastructure."

He continues on to explain that OCs will be required to earmark capital items for replacement or repair every 10 years. Things such as water pipes, cabling and unseen infrastructure can cause major problems but are often not attended to until an emergency arises. They'll all be more closely scrutinised and better maintained by the new *Corporations Act*.

The idea of a maintenance plan approved by the OC committee has everyone's tick of approval. Costello says this was an area primarily driven by people's whims in the past.

"A lot of people don't understand that things have a certain useful life and need to be checked and improved before they get

too old. A good example would be concrete cancer, where it's sometimes not obvious that the integrity of a building is failing."

The other bonus for investors buying into a complex with a long-term maintenance plan is that they'll have a clearer understanding of what their fee contribution is going towards and why.

Schooneman says, "The bodies corporate are there to look after the structure of the building and the like, and some may not be using the fees to actually maintain the property.

"When you buy into a development of that nature, 10 years down the track you might be exposed to a hefty body corporate bill in order to fix an issue that hasn't been properly maintained.

"In the past there was no guidance or specific requirements in relation to those kind of things.

"So what this legislation is really trying to do is to focus on better financial and asset management."

Three tiers for dispute resolution

The *OC Bill* will also address issues relating to disputes arising within corporations. Until the new legislation comes into play, the existing *Subdivision Act* calls for any disputes to be handled by the Magistrates Court.

This has proven to be not only time consuming, but extremely costly, particularly for smaller bodies corporate that may not have sufficient funds to pursue necessary legal action in order to recover unpaid fees for instance.

The new Bill incorporates a three-tier dispute resolution process. Schooneman says this entails:

Complaint to the OC – the OC rules must have a dispute resolution process. If they don't, the dispute resolution process of the model rules will apply. An OC must follow the dispute resolution process before making an application to the Victorian Civil Administration Tribunal (VCAT);

Application to the director, Consumer Affairs

Victoria – the director may refer a matter to an employee of Consumer Affairs Victoria for conciliation or mediation; and

VCAT – VCAT has powers to resolve a dispute arising under the Act or regulations or rules with regard to the operation of an OC, breach by a lot owner or occupier of the Act or regulations or rules, and exercise of a function by the manager. VCAT can refer a matter to the County Court.

Costello claims the use of VCAT is an excellent dispute management tool, chiefly with regard to the right of appeal to recover unpaid fees and other monies that can cripple smaller bodies corporate.

He says, "At the moment it would cost the body corporate around \$1500 to take a non-paying member to the Magistrates Court. The body corporate may not get costs reimbursed from the court decision and thus be out of pocket \$1500.

"With the new system they'll be able to apply penalty rates and if they still don't pay, their recourse of appealing to VCAT

is so much easier than going to the Magistrates Court. It will save the bodies corporate a lot of money and it's a lot fairer."

Raimondo agrees this is a sound idea in theory, however he makes the point that it may not work to all members of the OC's liking.

"The existence of a better dispute management process could make decision making and subsequently owning easier. However it will not remove the fact that investors in owners corporations are still subject to decision making by committee, with decisions that they may not necessarily agree with affecting the management of their investment."

Transparency and fiscal facts

Investors buying into OC-managed complexes can expect better administration, as well as improved protection of their funds under the new legislation. With the option of imposing penalty interest on non-paying members, it would be expected that members will meet their obligations more readily.

In the past, with the magistrates court as their only recourse, many bodies corporate have been unable to adequately manage and maintain investors' assets, simply lacking the resources to take action against those who make life hard for everyone.

Another improvement is expected to come in the shape of greater transparency for investors buying into OC-managed properties, with further regulation of disclosure of information including maintenance plans for larger complexes.

Costello says, "From the buyer's point of view, if there's more information available they can make better buying decisions. More information will allow for greater budgeting and planning of costs associated with the investment."

If the OC's properly managed, purchasers buying in should be able to see the proposed costs and budget accordingly.

"They'll be able to get a form answering questions such as body corporate units' finances, their insurance and whether any litigation is pending," he says.

"Other information will include any major projects coming up and what the purchaser's financial commitment would be. That's the big grey area that's existed

In summary

The new Owners Corporation Act will;

- Change the term body corporate to owners corporation.
- Improve the dispute resolution process with a three-tier structure that includes internal complaints handling, access to Consumer Affairs Victoria to mediate if required and access to the Victorian Civil Administration Tribunal to make binding determinations.
- Require paid managers to register with the Business Licensing Authority and have professional indemnity insurance and be solvent.
- Clarify the roles and responsibilities of everyone involved including committees of management, developers, managers and lot owners and occupiers.
- Set out procedures for conducting annual general meetings, as well as a timetable for holding the first meeting and the documents that must be available at that meeting.
- Improve disclosure of information including activities, undertakings and membership of the OC. These records must be made available at no charge to current and incoming owners.
- Require the OC certificate to be attached to the S32 vendor's statement to ensure full disclosure of fees and other matters to potential purchasers.
- Require an annual financial statement to be presented at the AGM, with larger OCs to have their financial records audited.
- Larger OCs will be required to develop a maintenance plan and fund and obtain valuations for insurance every five years.
- Place important restrictions on developers who have a majority of power to ensure they represent the best interests of all owners.

Source: Consumer Affairs Victoria

until now and a lot of people can get caught out pretty badly. The supplying of that information should make for more reasonable decisions being made by investors about the known facts."

Schooneman is of much the same opinion and says, "Investors will have a little bit more certainty about what significant costs might be coming up and how the common property has been maintained. It might assist in terms of numbers if you see a body corporate certificate in your vendor's statement indicating that extensive amounts of money have to be paid – you might query what you're getting for that."

Good faith is fair

In the past, developers have had the potential to create a large subdivision, buy up a majority of the apartments within the complex and hold significant power in the body corporate structure.

Things are about to change though, as various "good faith" obligations are imposed by the new *OC Bill* that prevent anyone within the OC, including managers and developers, to act in any manner other than

one which ensures a fair go for all owners and tenants.

Another area where some owners within larger subdivisions were getting a raw deal was in regard to common or shared property that wasn't perhaps so "shared".

Costello explains, "At the moment with the *Subdivisional Act* everyone is jointly and separately liable in terms of common property. However the new legislation looks into owners as being tenants in common where it's proportional on their lot entitlement.

"In the past, a developer might develop a 20-storey block, build the best apartment on the top storey and buy it, then put it at 10 units of liability while everyone else has 15 units of liability.

"The subdivision may be disputed on a basis of a user-pay situation and if this doesn't occur, members could go to VCAT to dispute the title discrepancy."

He adds, "That goes along with the fact that there will be more transparency and developers will be more accountable for their actions within the OC – which is great for consumers." ■