Appropriate dispute resolution for Owners Corporation internal disputes – a case study from Victoria, Australia.

Dr Rebecca Leshinsky
Barrister, Victorian Bar
Law Lecturer
Swinburne University of Technology, Australia
rleshinsky@swin.edu.au

Dr Aron Perenyi
Lecturer
Swinburne University of Technology, Australia
aperenyi@swin.edu.au

Peter Condliffe
Barrister, Victorian Bar
Victoria University
pc@vicbar.com.au

Paper Presented in Track 1 (Governance, Politics and Conflict) at the 3rd World Planning Schools Congress, Perth (WA), 4-8 July 2011
Appropriate dispute resolution for Owners Corporation internal disputes – a case study from Victoria, Australia.

Authors note: This paper was written many months after the conference abstract was submitted. Project management and funding constraints only allow for a presentation of the preliminary stages of the project. In this paper, there is an introduction to the literature survey; discussion about the methodology used to prepare the on-line anonymous survey with owners corporation managers; and, a presentation of preliminary findings from the survey. In following papers, the authors intend to provide a more comprehensive analysis of the quantitative data from the survey.

Abstract
This paper introduces the literature review, methodology development and preliminary findings of a research project dealing with conflicts arising out of the ownership of shared assets in high rise and master planned estates in the state of Victoria, Australia. Research for this paper explored the nature of conflict in a legal entity known in Victoria as an ‘owners corporation’. Owners corporations managers were surveyed to gain insight into how pre-litigation disputes are being resolved, and what role mediation and third party facilitation of conflict play in the resolution of internal owners corporation disputes.

Keywords: Owners corporations. Conflict. Appropriate dispute resolution.
Introduction

This paper is a first in a series which explores the lived experiences of persons who live or work with Owners Corporations (OC). Over the past decade, there has been an increase in owners corporation (formerly known as bodies corporate) in the state of Victoria, Australia, largely through increased building of apartments and townhouses, mixed use blocks, and master planned estates (MPEs) (Douglas, Leshinsky & Goodman, 2009). Where there is common property, there needs to be an owners corporationii. Owners corporations, or strata titles as they used to be called, is a way of dividing and individually owning lots or units in a building or property located on a single piece of land. They generally have five characteristics: (a) separate ownership of individual lots of the property; (b) indivisible co-ownership of the common property; (c) restrictions on partition of the common property; (d) a schema of rules and covenants to govern the corporation and (e) day to day management of the corporation is usually given to a professional management company or manager while the overall management of the property and its upkeep is the responsibility of the corporation (Natelson, 1997; Condliffe, 2009). These characteristics present many advantages to builders and owners. These advantages include greater and more certain return on equity/investment to the builder/investor, mortgageability, a more controlled living environment and potentially less maintenance cost to owners, than a detached house (McScotts, 2004). Buying a lot in an owners corporation represents a type of intermediate purchase between the traditional fee simple and rental property. This choice may be for a variety of reasons including the cost of freehold detached housing, availability and suitable location proximate to services and employment in large urban conglomerations (Grassmick, 2002). Such a decision may not be informed by due consideration of the various restrictions placed upon them as owners, but the more immediate considerations of price, location, finance, size and general condition (Condliffe, 2009). In this way the impact of these restrictions may be overlooked and many lot owners may have little previous experience of such living arrangements. The decision to buy an owners corporation lot with the accompanying restrictions upon its use may not be entirely one of free choice but a matter of pure necessity (Wulff, 2004). Government planning is increasingly predicated upon a desire to have a larger proportion of residential growth based upon higher density housing (Randolph, 2006).
In Part A of the paper, we outline the relevant statutory provisions regarding internal dispute resolution under the new Victorian Owners Corporations legislation. We then move to introduce a research project, funded by the Victorian Legal Services Board, which strives to explore how internal disputes are being dealt with in owners corporations. In this paper, we report on preliminary findings from the first part of the project, which explores the lived experience of a sample of Victorian OC managers and how they deal with internal OC disputes.

PART A – DISPUTE RESOLUTION IN OWNERS CORPORATION

Case study – Victoria, Australia

The state of Victoria was chosen as the case study for this paper. Legislative changes in 2006 offer a novel and exciting opportunity to commence a longitudinal study on the lived experience of owners/occupiers and those who work with owners corporations. It is anticipated that data from our study will be used as a complementary and comparative tool for other jurisdictions. Literature on the lived experiences of owners corporations is limited and emerging (Blandy, 2010; Lujanen, 2010; Grosberg, 2003). We anticipate that our exploratory work will contribute to the body of knowledge in this area.

The Victorian Owners Corporation Act 2006 (‘OC Act’) provides for a structured approach to owners corporation dispute resolution and it is set out in a three-tier system. This approach allows for an internal dispute process that must occur before litigation. The rules which govern each owners corporation will determine the internal dispute processes to be followed. By default, the Model Rules apply unless or until new rules are passed by the owners corporation.

Conflict in Owners Corporations

Owner/occupier and neighbour disputes can be some of the most bitter and protracted types of disputes in our communities. As a sub-set of what is generally known as “neighbourhood disputes” these are pervasive across all sections of society. They involve the investment of tremendous resources including not only the neighbours themselves but legal, local government, police, health and welfare services. There is important Australian research which considered the extent of neighbourhood conflict. The study, the Australian Household Dispute Study (Fitzgerald, 1985), was very
progressive and it sought to provide an analysis of the legal and non-legal processes used to resolve disputes in Victoria. Interviews by telephone with 1,019 householders were undertaken. The survey found that the extent of neighbour related problems (such as disputes involving animals, noise, trees, smoke, and so on) went far beyond any other category of grievance. Thirty-nine per cent of households interviewed had experienced one or more neighbourhood grievances within the preceding three-year period. Thirty-five per cent of these reached a dispute level. That is, one or both neighbours approached each other or a third party about the matter.

There was a high likelihood that those conflicts that reached the dispute level would lead to a damaged or destroyed relationship. Lower-income groups were found to have a higher level of unresolved grievances which they did not act upon and ethnic groups tended not to take their grievances to a third party. Results from the survey revealed that local government (39%), police (29%) and lawyers (10%) were approached in almost eighty per cent of cases. Satisfaction with the role of all third parties was found to be low amongst those surveyed. Over half the respondents claimed that their dispute had received no outcome or only a partial one. In fact, twenty-nine per cent of the third parties contacted suggested the use of force or threat to resolve the dispute! Only seven per cent of the third parties were perceived as acting to facilitate an agreement between the parties in a conciliatory way (Condliffe, 2009).

The escalation of such disputes can lead not only to an escalation of tensions but turn potential civil cases into criminal offences. A more recent survey, also in Victoria, found that 5% of disputes reported were between neighbours just behind the disputes about the supply of essential services (gas and water at 8%) and with family (6%) (Peacock, 2007). Most of these disputes (65%) were resolved without assistance; however, help from a third party was sought in around fifteen per cent of cases (Peacock, Bondjakov & Okerstrom, 2007). External help from a third party was more likely to be sought in disputes that related to business and government rather than disputes involving family, neighbours or associates (Peacock, Bondjakov & Okerstrom 2007). Nearly one-quarter (24%) of all disputes were not resolved at the time of the survey perhaps indicating, as in the earlier study, the high level of unresolved matters.
Most owners corporation conflicts fall into two categories: either quality of life or financial disputes. The former can include pets, noise, sub-letting, parking, alterations, use of common property, exterior painting and so on. The latter can include failure to pay maintenance fees, special assessments, fines, access to accounts and related matters. Residents in owners corporations not only have to manage the day to day demands of living side by side in close proximity but also the demands of jointly managing and maintaining the property (Condliffe, 2009).

Grosberg (2003) asserts that there is an increasing correlation between the number of owners corporation lot owners and the incidences of conflict. This is because their relative propinquity, compared with residents in detached housing, is so much greater. Because of this closeness various “house rules” become necessary to manage everything from paint colours and pets to bar-b-q use. Living within these constraints requires a considerable degree of tolerance. Compliance with these rules becomes a matter of principle to some residents especially those who are complying but witness examples of people who are not compliant. This can be exacerbated when renters, who may not share the same concerns and interests, mix in the same building or housing arrangement with owners (Grosberg, 2003). Often, decisions in owners corporations are made by committees constituted by persons lacking in real estate experience which makes this decision making in an area of non-expertise, more difficult for committee members (Condliffe, 2009). It is within this context of rapid expansion overlaid with the traditional complexities of neighbourhood conflict and the management of compact communities that a review of the strata title legislation was begun in Victoria in 2003 (CAV, 2003; CAV, 2004).

**Dispute resolution under the Act**

Part 10 of the *Owners Corporations Act 2006* (OC Act) covers dispute resolution. This is a new addition to owners corporation law in Victoria as the previous legislative scheme did not address any facility for dispute resolution. Dispute resolution can be addressed through three different tiers according to the revised legislation.
First Tier
Under ss 152-159 of the OC Act, owners corporations need to have an internal dispute resolution process, with a default process in the model rules (Douglas, Leshinsky & Goodman, 2009).

An owners corporation may use the model rules in relation to dispute resolution or craft their own first tier dispute system (Douglas, Goodman & Leshinsky, 2008). If the dispute is not resolved, the grievance committee or owners corporation must notify each party of their right to take further action under Part 10 of the OC Act. This is the formal complaint handling process where the informal process has failed.

Second Tier
A person dissatisfied with the internal process may contact Consumer Affairs Victoria which can conciliate or mediate between parties in a dispute.

Third tier
The Victorian Civil and Administrative Tribunal (VCAT) has been awarded broad powers to resolve disputes and make binding determinations. An owners corporation may not take a matter to VCAT unless the dispute resolution process outlined in the rules and complaints procedure in the Act have been exhausted.

Our research project aims to explore the lived experience of the first tier in the new dispute resolution continuum.
In Part B of this paper, early findings are presented from a research project funded by the Victorian Legal Services Board which explores owners corporation internal dispute resolution processes. Specifically, the methodology of the data collection is discussed, including the design and distribution of an anonymous on-line survey (facilitated on the Opinio platform), where owners corporation managers were surveyed on how they deal with internal owners corporation disputes. Data is analysed at an intermediate stage of the data collection phase and early findings from the study are discussed.

PART B: OWNERS CORPORATION MANAGERS SURVEY

A survey was developed and owners corporation managers, who are members of OCV (Owners Corporations Victoria), were invited to participate in the survey. A
decision was made to survey managers because there is a dearth of Australian literature on how managers and lawyers deal with disputes in high rise buildings (Sherry 2008). The survey was uploaded onto the web and is available to Victorian owners corporation managers to complete. It is an anonymous survey and this course was chosen to ensure that the confidentiality of managers would be upheld. It is anticipated that with this approach, managers will be more honest in their responses (Porter 2004).

Survey development and implementation

As the research objective is to explore the nature of disputes and the preferences regarding dispute resolution of the managers in owners corporations, open-ended questions were used to allow respondents to provide background, context and justification for their choices of responses. In terms of the data gathered, the open ended questions provided qualitative information, while the closed ended ones were measured on a nominal scale.

The questionnaire was developed through a series of iterations of expert reviews. Both experts from academia and OCV have provided feedback into the process of finalising the survey questions and responses. As part of the quality control process, the survey was piloted with a small group of respondents. This culminated in an online version of the survey to be developed using the Opinio platform, which was then published on the web.

Questionnaire development

The measurement tool was designed to address demographic information of the respondents both in terms of the geographical distribution of properties under their management (questions 1 to 5), and some simple demographic details (questions 28 to 30). These allow various methods, such as weave analysis, of testing for non-response bias (Creswell 2009). The survey addressed the issues of conflict resolution in OCVs in three stages.

The initial block of questions – corresponding to the objective of the research – was mapping the experiences of owner managers’ on the extent of involvement in resolving internal disputes (questions 6-11 and 15). These questions were followed by identification of the managers’ familiarity with the legal resources (questions 13-14), and finally the processes, preferences and skills required to address conflict resolution.
were explored (questions 16-22). Further questions explored the usage of institutional framework of conflict resolution in owners corporations' matters (questions 23 and 24), and the matter of diversity and special needs within dispute resolution in owners’ corporations (questions 25-27).

The response format of the questions varied between open and closed ended. The closed ended questions – due to the nominal response format – were tailored to the need of the audience, by addressing everyday and procedural issues in a relatively simple language. This response format allows descriptive and a limited inferential statistical analysis of the data. The open ended questions allow for the respondents to provide information on experiences, beliefs and to rectify their choice of answers with the closed ended questions.

Survey distribution and data collection

As Porter (2004) pointed out, enhancing response can be achieved through demonstrating support by professional organisations. The setup of this research project offered a unique opportunity for the researchers to present the survey indicating the support of both the Victorian Legal Services Board and Owners Corporations Victoria.

Owners corporations managers – 350 members of OCV, representing approximately 80% of the total population of managers in Victoria (OCV 2011) – were invited to respond to the questionnaire through the regular electronic newsletter of OCV. As an additional measure, a selection of these managers were contacted directly and invited to respond to the survey. Porter (2004) also recommends directly contacting the respondent, in order to increase response rates.

The circulation of the survey started on the 1st March 2011. Respondents were offered a reward (a movie ticket voucher) upon completion of the survey. Between the 1st March and 15th April, the online survey was viewed 17 times, and five full responses were submitted. Five out of the 12 incomplete responses were completely empty, six contained some further usable data. Three out of the five respondents completing the survey to the very end have decided to claim their reward. As shown in the data analysis, six responses contained a sufficient amount of data to contribute to the analysis, resulting in an approximate 35% response rate thus far.

At this stage, the response number is not high enough to conduct t-tests or ANOVA for wave analysis of the responses (Hair et al. 2006). It is expected, that at a 10%
response rate (summing up to 35-40 full responses), some analysis of non-response bias will be possible.

**Data analysis**
As the data collection is in its formative stage, much of the possible analysis will need to wait until further responses are submitted. Analysis of early data is discussed in the following section.

**Preliminary data analysis**
Out of 45 views of the on-line survey, 19 responses contained some degree of data. Six respondents indicated that they manage less than twenty, ten respondents 21 to 100, and a further three that they manage 100 to 250 owners corporations.

One of the largest owners corporations’ manager had a portfolio of predominantly regional properties, while the other two indicated that the properties managed by them are mostly metropolitan. One manager with a medium sized portfolio predominantly managed regional properties, and nine respondents indicated that they predominantly manage urban properties. One out of the seven smaller owners corporations’ managers specialised in regional, the rest in metropolitan properties. It generally seems, that only very few of the respondents have a very small (not more than five) and none have a very large (more than 250) portfolio of owners corporations under their management.

Several responses were excluded from the analysis due to insufficient data content. The respondent with a small portfolio indicating the management of predominantly regional properties has not submitted further usable data. This leaves the analysis with 18 usable responses. Eleven of the respondents indicated that they had no properties outside urban Melbourne at all under their management.

Only one of the urban manager from the South-Eastern suburbs with a medium portfolio indicated that they managed properties in one neighbourhood within Melbourne, the managers spread out their activities to multiple areas of Melbourne. Ten respondents indicated that they managed inner city properties, the rest of the suburbs in Melbourne were relatively evenly covered.

Only five managers have regional properties. Three respondents active in the regional areas of Victoria managed properties in North East Victoria, three in South East
Victoria and one in South West Victoria. Only one respondent was involved with the management of properties in two regional areas.

Altogether, 18 respondents provided further information on their experiences and preferences regarding conflict resolution, with an even distribution across size cohorts. Almost half of the respondents indicated that they belonged to the age cohort of over 50, and the majority of the respondents had substantial (over 5 years) experience in managing owners corporations.

After discussing the demographic characteristics of the respondents, the next step is to analyse responses regarding experiences about internal disputes. Three respondents indicated frequent, and a further 14 occasional conflicts between occupiers, but only seven have indicated that they spend over 10% of their time on managing these conflicts. Five of the 18 respondents indicated, that they are not comfortable with the amount of time spend on resolving conflicts, even though most of these mangers do not spend time in resolving conflicts within owners corporation committees.

All respondents indicated, that they follow OVC to keep informed regarding regulations. The second most popular source of information was their legal advisors, and only a minority of them keeps updated through Consumer Affairs Victoria. It also seems that owners corporations managers prefer to diversify their information sources, and rely on more than one. Concern was raised regarding consistency of information provided by Consumer Affairs Victoria.

Lifestyle and fees related conflicts were equally common issues owners corporation managers come across in their work. Thirteen of the eighteen respondents indicated warranty related conflicts with developers. Over half of the respondents use the OC Act model rules in dispute resolution, and half of these respondents indicated general dissatisfaction with the effectiveness of these rules. A general pattern in using own rules is, that managers tend to resolve conflicts either through informal mediation or involving a very broad range of stakeholders.

Almost half of the respondents indicated that they would need more skills or training in conflict resolution. The manager using the model rules pointed out, that the manager becomes a ‘messenger’ in the conflict between different parties. The actual conflict management skill identified was the capacity to deal with ‘difficult’ personalities, clients, and controlling one’s own emotions as well as clients’ behavior. Although several respondents indicated the need for training, and one respondent pointed out that conflict resolution should not be the manager’s role.
Over sixty percent of the respondents indicated, that they outsource conflict resolution, and involve lawyers, and some of them involved professional mediators as well, though one respondent had a strong opinion against mediation, as a mediator did not have the necessary authority.

As per the dispute resolution model of the OC Act, more formal owners corporation dispute resolution is predominantly conducted by involving VCAT. Data to date from the survey indicates that conflicts involving disability, ethnic diversity or language issues are uncommon. Only one respondent indicated, that they ever had to deal with ethnic diversity, and their recommendation was, that one needs to be ‘very careful’ in dealing with issues of this kind to avoid claims of discrimination. Other respondents commented on the need to deal with non English speakers, and predominantly identifier that the other parties are usually asked to draw in the necessary assistance (relatives, friends, etc.)

Further data analysis
The results presented above came from the interim analysis of the data. Data analysis with a sufficient number (35-40) of responses can allow the establishment of significant differences between groups, such as urban versus regional, or small versus large owners corporation managers. Cross-tabulation across dimensions – such as size and outsourcing conflict resolution or skill needs – can shed light into manager preferences of the ways they prefer to resolve such conflicts, and what assistance they would need from which preferred source.

Observations from the preliminary data analysis
Data to date, although limited, is indicative of owners corporation managers facing conflict in places where people live in strata arrangements. Conflict arises further from building and services warranty issues. Diversity, disability or language issues do not seem to be a significant cause of conflict or difficulty in resolving disputes, in the view of the (very limited) respondents. It is anticipated that, further survey responses will provide more data and refine our thinking on this matter.

The data to date, suggests that even thought the model rules, as they currently stand in the OC Act, provide an opportunity as a device to assist in resolving disputes, they are not that useful. This early data presents managers as predominantly preferring to use their own set of rules. As more survey responses are collected and analysed it will be
interesting to ascertain what is the real trend in terms of the model rules. As part of
this early data, we can report that one survey respondent explicitly pointed out that the
model rules make them feel uncomfortable and through their on-going use of the
model rules they feel like a ‘messenger’ who is being ‘shot’.

The authors would like to thank their grant body, the Victorian Legal Services Board. They also wish
to thank their industry partner, Owners Corporation Victoria (OCI). Acknowledgements also to our
fellow project colleagues, Kathy Douglas (RMIT) and Associate Professor Dr Robin Goodman (RMIT).

References

and Practice, Farnham: Ashgate Publishing Limited.

Consumer Affairs Victoria (CAV). 2003 Issues Paper, Bodies Corporate – Review of
the effectiveness and efficiency of the Subdivision Act 1988 as it relates to the
creation and operation of bodies corporate, Melbourne: Consumer Affairs Victoria.

Consumer Affairs Victoria (CAV). 2004. Future Directions Paper, Bodies Corporate,
Melbourne: Consumer Affairs Victoria.

Condliffe, P. 2009 Living in the Compact City: A Process for the Management of
Disputes under the Owner’s Corporation Legislation, GDN: An International
Meeting on Group Decision and Negotiation, Toronto, Canada, June 14-17, 2009

Creswell, J.W. 2009 Research design: qualitative, quantitative, and mixed method
approaches, Los Angeles: SAGE.

Grosberg, L. 2003 ‘Using Mediation to Resolve Residential Co-op Disputes: The
Role of New York Law School’, New York Law School Journal of International and

Resolution Design Under the Owners Corporation Act 2006 (Vic), Australasian
Dispute Resolution Journal Vol. 19: 95-104.

Douglas, K. Leshinsky, R. & Goodman, R. 2009 Mediating the Neighbours, Law

Fitzgerald, J. 1985 Comparative Empirical Study of Potential Disputes in Australia
and the United States, 1982-84, Report of the Dispute Resolution Project Committee,
Melbourne: Legal Aid Commission.

Goodman, R. & Douglas, K. 2008 ‘Privatised Communities: The Use of Owners
Corporations in Master Planned Estates in Melbourne’, Australian Geographer, Vol.
39 No. 4:521-536.


Under the Owners Corporation Act 2006 (Vic) (the OC Act) “owners corporation” replaces the term “body corporate”. Section 3 notes that owners corporation means “a body corporate which is incorporated by the registration of a plan of subdivision or a plan or strata or cluster subdivision”.

Section 27A Subdivision Act 1988 (Vic).

The Owners Corporation Act 2006 commenced as Victorian law on 31 December 2007.

Section 139 of the OC Act provides for the Model Rules being:

1. The regulations may prescribe model rules in relation to any matter in respect of which rules can be made.
2. If the owners corporation does not make any rules or revokes all of its rules, then the model rules apply to it.
3. If the model rules provide for a matter and the rules of the owners corporation do not provide for that matter, the model rules relating to that matters are deemed to be included in the rules of the owners corporation.

The Model Rules state as follows:

Rule 6 Dispute resolution

1. The grievance procedure set out in this rule applies to disputes involving a lot owner, manager, or an occupier or the owners corporation.
2. The party making the complaint must prepare a written statement in the approved form.
3. If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant.
4. If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute.
5. The parties to the dispute must meet and discuss the matter in dispute, along with either the grievance committee or the owners corporation, within 14 working day after the dispute comes to the attention of all the parties.
6. A party to the dispute may appoint a person to act or appear on his or her behalf at the meeting.
7. If the dispute is not resolved, the grievance committee or owners corporation must notify each party of his or her right to take further action under Part 10 of the Owners Corporations Act 2006.
8. This process is separate from and does not limit any further action under Part 10 of the Owners Corporations Act 2006.

This Victorian government agency looks after the Owners Corporations Act 2006.

The anonymous on-line survey is located at http://opinio.online.swin.edu.au/s?z=9901