Owners Corporation Bill Exposure Draft

A submission prepared by the Property Council of Australia (Victoria)

31 March 2006
Introduction
Thank you for the opportunity to respond to Owners Corporation Bill exposure draft. The Property Council membership consists of institutional and private investors, financiers, major developers and a wide range of service industries that form part of the construction industry.

The Property Council welcomes the Bill and appreciates that the Property Council's requests for provision of an exposure draft have been heeded. To include the provisions currently in the Subdivision (Body Corporate) Regulations 2001 in an Act together with the relevant provisions of the Subdivision Act 1988 will overcome many of the difficulties which caused those regulations be so difficult to operate with, particularly issues as to delegation.

Avoiding overregulation
In previous submissions the Property Council has made the point that it believes the current system works well because in most areas it allows for flexibility and that the Property Council would not welcome a change in policy that would result in overregulation.

The expectation is that generally all questions could be answered by looking at the Act. This will be frustrated because in so many places in the Bill there are provisions for the making of Regulations. In most of these instances the requirement should be in the Act rather than having to source the requirement in two places.

The final report does not mention the imposition of draconian provisions giving considerable powers to the Director and inspectors as contained in the Fair Trading Act. This appears to be an example of overregulation and including of provisions which are not at all warranted by the nature of the Owners Corporation Bill.

In line with this “one stop” principle it is suggested that all forms should be in a Schedule to the Act rather than having to look on the Government web page to find them. Not all body corporate members will have access to the internet.

Maintenance Plan and Maintenance Fund
As stated in previous submissions on this topic, the Property Council believes that the management of property should have a long term focus in addition to focusing on the day to day issues of maintenance. It is important however, that the responsibilities and function of maintenance not be confused with making provisions for longer term capital works and that flexibility remains with the management of the long term asset.

A sinking fund set up to provide for future expected capital works appropriately managed with flexibility would provide for works to be undertaken in a timely manner that assist in maintaining the amenity and value of the property, and could ultimately extend the building’s lifespan.

The Property Council does not endorse compulsory sinking funds for all bodies corporate, rather the ability to establish a fund if a body corporate determines that it is necessary for the property. This allows bodies corporate to manage their property in a manner which best suits the property’s needs.
Flexibility, consultation and constant review of the plan are to be encouraged.

The inclusion of Division 3 is welcome although the development of such a plan should be at the discretion of the Body Corporate and not by special resolution. In defining and providing guidance for the plan examples tend to be prescriptive and should be avoided.

The use of a Fund to provide for future capital works is also welcomed but this provision requires flexibility in funding and use. Forcing strict adherence to a plan is too limiting when managing works over a long term. The Property Council would rather see the promoting of regular updates/reviews of the plan and of the funds set aside for the plan. Flexibility in making payments and use of the fund is required to enable effective asset management. References to insurance should not be referenced to the fund as these capital works are part of separate agreements with insurers.

Division 5 should be focused on the management of regular maintenance and compliance with regulations and laws. The funding of these works should be clearly stated as being included in the annual Body Corporate charge and not the sinking fund.

To avoid confusion and to reinforce the long term management of property the Property Council suggest the renaming of Divisions 3,4,5 as follows:

- Division 3 - Building Management Plan in lieu of Maintenance Plan,
- Division 4 – Building Management Fund in lieu of Maintenance Fund; (to reflect the capital and longer term nature of the work being provided for by Plan & Fund), and
- Division 5 – Repairs and Maintenance (to reflect the nature of the works and responsibility described in this division).

**Dispute Resolution**

The final report refers to a multi-tiered dispute resolution process. The first tier is an exceedingly complicated process which severely limits the powers of the body corporate to enforce rules or other requirements. The procedures in 3.26 to 3.29 do not fit in with the complaints procedure. The complaints procedure seems particularly onerous for a small body corporate.

The second tier is a complaint to the Director. It is not clear what happens to the complaint. The Director appears to be given no power to decide the complaint. There is provision in 10.10 for reference to a consumer affairs employee for conciliation or mediation of any dispute which is reasonably likely to be settled. This is a very uncertain test. There seems to be no provision for what happens in respect of a matter which is not reasonably likely to be settled. There is not, as suggested in the final report, provision for referral to VCAT.

The third tier is VCAT. The Property Council welcomes the inclusion of VCAT as a tribunal for determining body corporate disputes. The Property Council is concerned however that the jurisdiction may be too limited by 11.1. One particular item which is of concern to developers is the refusal of a body corporate or failure to give a consent required under the rules of the body corporate. Another possible jurisdiction is to determine whether rules are effective or not.

It is noted that the introduction of VCAT is not an exclusive jurisdiction. This raises the possibility of forum shopping to access the most advantageous
tribunal or court. The viability of VCAT as a dispute resolution avenue is dependant on adequate resourcing. The Property Council believes that body corporate experts must be appointed to VCAT or developed within VCAT. The expertise will need to be in relation to Owners Corporation Law and also in relation to buildings and their repair and maintenance.

Representation of Members by Owners Corporation/Body Corporate

The final report states in proposal 2 “It is proposed that the new legislation clarify when the body corporate is able to take legal proceedings on behalf of the members and the processes and circumstances for this”. The Bill does not provide appropriately for this and the requirement of a special resolution before issuing proceedings is impractical.

The Property Council in a prior submission stated “The body corporate must be able to claim against the developer for failure to complete buildings and other works on common property and claims against others”. The draft Bill does not seem to contain this provision possibly because of the decision in the St James case. The draft Bill does not correctly deal with this issue. The proposal to impose obligations on developers who retain 50% or more of a development to enforce a domestic building contract is not the correct solution. Focus should be on the body corporate having:

- clear powers to sue; and
- the benefit of any warranties arising out of the domestic building process.

These two solutions will better serve the body corporate in the future than the method proposed. If the government is to pursue this path however, it is reasonable to have provision for members of the body corporate to indemnify the developer in its enforcement of the contract, including costs of doing so.

The body corporate is better able to pursue such a case than the developer which should be required to assist the body corporate in resolving the dispute. 4.3(3) does not contemplate long term holding of at least half of a building by a developer. A time frame would be a better solution.

It is very important that the body corporate be clearly given power not only to claim against the developer and but also to claim against others in relation to common property and common services and to represent all the members of the body corporate in relation to essential services and occupational health and safety and other matters involving services to the building.

Prescribed Corporations

The Property Council has concerns about the proposal to define certain Owners Corporations as prescribed corporations. The Bill does not set out the criteria for a prescribed corporation. The Property Council view is that maintenance plans and maintenance funds or sinking funds should be optional rather than mandatory for all bodies corporate. An arbitrary line, whatever it is set, is not going to give a satisfactory answer. The definition should not be set without industry consultation to ensure that unfair burdens are not imposed on owners corporations simply because they satisfy a threshold, such as a budget threshold. Large buildings may have small budgets. Smaller buildings may have larger budgets if they have more members.
Good faith, honesty and due diligence

The bill imposes broad obligations on various parties to act honestly and in good faith and to exercise due care and diligence. Clearly the Property Council agrees that all parties should conduct themselves honestly and in good faith. However, the Property Council questions whether it is appropriate to legislate for these matters in the manner proposed. To take one example, under the bill, an owners corporation entering into a long term lift maintenance contract will have duties to act honestly and in good faith and to exercise due care and diligence. However, these same duties are not imposed on the lift maintenance contractor. This creates an unequal position. The existing common law and legislation (eg Trade Practices Act, Fair Trading Act) adequately address these areas and should not lightly be replaced or interfered with. The venture down a new path of sweeping obligations to act honestly and in good faith and to exercise due care and diligence is to be avoided.

Proxies, Powers of Attorney and Representation of Companies

The Property Council has in previous submissions raised concerns about the multiple roles of the developer. The provisions limiting the granting of proxies or powers of attorney do not necessarily protect members of bodies corporate.

There are many cases when multiple proxies will be required. Examples are:-

- in developments used as serviced apartments or carpark developments or storage area developments when the investors wish to have their interests represented at meetings of the body corporate by the operator of the scheme.
- where the committee or a member are endeavouring to achieve a special resolution or a unanimous resolution or even an ordinary resolution. To have to find one proxy holder for each member is an extraordinary requirement.

A better solution is required for members of bodies corporate.

It is desirable that in master planned communities, developers should not lose control of the project so as to cause them to lose their ability to deliver the vision they created and disclosed to purchasers. The concept of community titles as used in NSW should be considered.

If you have any questions or require further information do not hesitate to contact Peter Marshall on 9664 4221 or pmarshall@vic.propertyoz.com.au.

Yours Sincerely

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