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Owners Corporation – Complaints And Procedural Fairness

Part 10 of the Owners Corporation Act (OCA) sets out procedures for dealing with complaints. Section 152 states that a lot owner, occupier or a manager may make a complaint to the Owners Corporation about an alleged breach of an obligation imposed by the provisions of the OCA or the rules of the Owners Corporation.

The Consumer Affairs website (www.consumer.vic.gov.au) under its "complaint handling" section, provides a number of pro-forma documents to assist with the process. This short article does not revisit the procedures required under the Act by sections 152-161.

What the OCA and its regulations do not spell out is exactly how a complaint should be dealt with procedurally, after the complaint is lodged with the Owners Corporation. The Act does not tell an Owners Corporation what things the Owners Corporation should do in investigating the complaint and what it should not do. Owners Corporation's have been left to their own devices.

This is an oversight. The provisions of the Act provide that the Victorian Civil and Administrative Tribunal (VCAT) can investigate the appropriateness of any decision made by an Owners Corporation's dispute committee or grievance committee. If a committee makes a mistake, then the assumption is that VCAT will fix it.

There are very few cases that have been reported on when VCAT will intervene in a dispute committees determination.¹

The general principal is that VCAT will normally not intervene in a decision of an Owners Corporation. except in rare circumstances.²

¹ See *Fancett v Seniple* [2009] VCAT 887

² See *Baulch v Owners Corporation PS 305551M* [2009] VCAT 2588 (and *Boswell v Forbes* [208] VCAT 1997 esp para 20-26 supra)

In the case of *Boswell v Forbes* [2008] VCAT 1997 Senior Member Vassie, said:

"An Owners Corporation in carrying out its function and power –

- (a) must act honestly and in good faith; and
- (b) must exercise due care and diligence.

Part 4 Division 7 of the Owners Corporation Act deals with decisions of an owner and how they are made. The principle demonstrates there is that, except in circumstances in which an unanimous resolution or special resolution is required, decisions are made by ordinary resolutions, that is to say, by a simple majority of members voting at a meeting or by ballot, with one vote for each lot.

Ordinarily, therefore, a lot owner is obliged to accept, and is bound by, a majority decision properly made, and cannot expect VCAT to determine an Owners Corporation dispute in a way that would overturn such a majority decision.

Some of the provisions of the Owners Corporation Act mentioned above give pointers to circumstances in which VCAT might determine an Owners Corporation dispute in a way contrary to a majority decision of the members.

First, the inclusion in the definition of "an Owners Corporation dispute" (in section 162) of an alleged breach of an obligation imposed by the Owners Corporation Act, or the regulations or rules, reflects that an Owners Corporation and its members are required to conduct themselves according to law. If during the hearing of an Owners Corporation dispute it is established that an Owners Corporation or one of its members has acted in breach of the law, VCAT might well make an order designed to remedy the breach or to prevent a further breach, even if the conduct constituting the breach had been approved by a majority of members.

Secondly, there is the requirement for an Owners Corporation to act honestly and in good faith (section 5). If it should be established that an Owners Corporation, even though acting in accordance with a decision of a majority of members, was not acting honestly or in good faith because (for example, the purpose was to benefit persons who had no legitimate interest in the affairs of the Owners Corporation) then VCAT might well make an order designed to remedy any loss caused by the conduct or to prevent such conduct in the future.³

Thirdly, the requirement in section 167(d) for VCAT to consider whether a resolution is "oppressive to, unfairly prejudicial to or unfairly discriminates against" a lot owner or lot owners indicates that it might well be appropriate for VCAT to make a determination that was contrary to a majority decision of the members if that decision was oppressive, unfairly prejudicial or discriminatory.

Subject to considerations such as those mentioned in the last three paragraphs, majority decisions ought to be allowed to prevail, and it will usually be futile for an applicant to VCAT to argue that a majority decision was wrong and that VCAT should interfere with it."

VCAT has power to intervene in any Owners Corporation dispute so where a dispute committee fails for example to act bona fide, it can intervene and impose any order it sees fit (section 165 OCA).

The question therefore arises as to what must an Owners Corporation, when dealing with a complaint, do to avoid the situation where VCAT will intervene with an Owners Corporation dispute committee's decision?

Little guidance can be obtained from other States legislation, as Victoria's legislation is unique in insisting that Owners Corporation's deal with their own disputes and generally only go to VCAT where the dispute cannot be satisfactorily resolved.

³ See Section 117 and 118 OCA

Procedural Fairness

There is however, a body of law which has been created by the Courts which seems pertinent. Because there have been in the past, disputes over government department decisions and decisions of semi autonomous bodies, the Courts have created a body of law by which a number of requirements must be satisfied by the entity concerned, for its decision to be upheld.

These principles are called rules of 'procedural fairness'. These rules should not be confused with the phrase 'natural justice'. The concept of natural justice applies only to bodies which exercise 'judicial power' which is in itself a complex concept. A body exercises judicial power where an Act of Parliament gives to the body concerned power similar to a Court eg taking evidence on oath, the capability to punish for contempt etc.

Rules of procedural fairness are of a similar type of rules as 'natural justice' but lack the legislative origin.

When VCAT reviews decisions of Owners Corporation's including dispute committee decisions, it has to decide if rules of procedural fairness have been followed. If there has been a breach, then VCAT can intervene, if it thinks it should.

All dispute committees must follow the rules of procedural fairness or ignore them at their own risk.

What are Rules of Procedural Fairness?

Procedural fairness is concerned with the procedures used by a decision maker in making a decision, rather than an actual outcome reached.

It requires a fair and proper procedure be used when making a decision.

It is the lack of such rules in the Owners Corporation Act which makes it difficult for dispute committees to set procedures for dealing with complaints as they arise.

The rules of procedural fairness require:

- a hearing appropriate to the circumstances;
- a lack of bias by the committee authorised to hear the dispute;
- evidence to support a decision
- an inquiry into matters in dispute

What is the hearing rule?

Fairness demands that the person who is alleged to have breached a rule or caused a problem be told of the case against him/her and be given a chance to reply before the decision is made.

The person who is being accused has a right to:

- reply in an appropriate manner;
- have his/her reply considered before a decision is made;
- be supplied with all relevant information before preparing or submitting his/her reply;
- have a reasonable chance to consider his/her position and prepare a response. However what is reasonable can vary accordingly to the complexity of the issue, whether an urgent decision is essential or any other relevant matter.

What is the bias rule?

The bias rule is a principle of procedural fairness which requires decision makers to :

- not have an interest in the matter being decided (eg financial);
- not appear to bring a biased or prejudiced mind to making a decision; and

- not have a conflict of interest in the matter being decided.

Evidence in support

Naturally anyone making allegations must produce to the dispute committee cogent evidence in support of the complaint. In response the person who is being complained about must be given an opportunity to:

- deny the allegations
- provide evidence which she/she believes disproves the allegations
- present any explanation
- provide details of any special circumstances which might be relevant.

Naturally the dispute committee should make all enquires with an open mind before reaching its decision.

Open Mind

A decision maker such as the dispute committee must be careful to ensure that a fair minded observer would not conclude that the committee might not bring an impartial mind to the resolution of the dispute.

Further Observations

1. It may be appropriate for notes to be taken about what transpires at a dispute committee meetings. Notes in the form of a summary relevant allegations, the parties who attended, matters raised in reply, queries outstanding and decisions made would be minimal information. Certainly minutes of the meeting should be taken. (section 114 of OCA)
2. A neutral venue may be appropriate, so a party cannot allege they were intimidated by the venue eg a complainants home.
3. Adjournment of such meetings should be freely granted, if the requests are reasonable, but a resumption date should be agreed upon before the meeting finishes.
4. it should be made clear to all parties that once the process begins, it must be completed and if any party allows the dispute to drag on without reasonable cause then the committee may resolve to dismiss or uphold the alleged complaint.
5. Likewise if a party leaves the meeting and refuses to continue the process without reasonable cause, in such a case the person leaving the meeting should be warned that without that persons assistance in investigating the complaint, the committee may decide to proceed in their absence, and dismiss the complaint.
6. Where a manger receives a complaint which includes irrelevant defamatory comments, he/she should refuse to accept such a complaint until it is presented in a non inflammatory form. This avoids the risk of a committee being seen to be circulating defamatory documents, thus exposing them to litigation.
7. After a complaint has been investigated and a decision made, the committee may then have to decide, what material it will keep for its records. It may be necessary for a manager to make arrangements for dispute committee records and documents to be held in custody and levy a charge to the Owners Corporation as appropriate.
8. Where a party needs the assistance of the Owners Corporation Manager in preparing the complaint to be provided to the Owners Corporation dispute committee it is important for the manager to have the party concerned identified clearly in the complaint document and sign the document, after having approved its content. The manager should never sign unless he/she is bringing the complaint. The manager should normally be seen to be impartial.

9. At the conclusion of any dispute to advise all parties to the dispute of their rights to have the matter considered by VCAT under Part 10 of the OCA if they are not happy with the decision.
10. It may be of benefit to formulate some procedural rules and seek to incorporate such rules into the Owners Corporation Rules. This has the benefit of ensuring enforceability and educating all member of the appropriate procedures which apply in a dispute. The model rules covering dispute procedure under the Owners Corporation Rules is very superficial, but could possibly be expanded (Rule 6) to cover the matters raised above.

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