

# Owners corporations & residential tenancies

## Background

The *Owners Corporations Act 2006* (the Act) came into force on 31 December 2007. By virtue of the Act a body corporate is now known as an owners' corporation. If there is common property on a plan of a subdivision an owners' corporation must be created.

The Act contains provisions in relation to the management, powers and functions of owners corporations (formerly known as bodies corporate), as well as complaint and dispute resolution procedures. It also imposes additional obligations on tenants; they are now bound by the Act, Regulations and owners corporations rules and must take care not to cause damage or deterioration (or allow it to be caused) to the common property. (s137)

The Act gives VCAT jurisdiction to determine an owners' corporation dispute. This means that tenants can now apply to VCAT in relation to a dispute with the owners' corporation, a lot owner or an occupier in relation to an alleged breach of the Act, Regulations or rules. This option was previously unavailable. Since the introduction of the Act there have been very few applications by tenants. As a result there is a dearth of information about VCAT's approach to such applications.

## What is the issue?

Before the introduction of the Act tenants living in apartment buildings had few options if they had a complaint about the condition of the building or the behaviour of other occupants or lot owners.

The following is an example of a situation which is aided by the introduction of the Act:

A tenant's goods are damaged by water coming through the ceiling from another floor. The cause of the leak is a plumbing fault that emanates from a location that is identified as common property and therefore the responsibility of the owners' corporation. Prior to the introduction of the Act a tenant could only take action against their landlord for failure to take reasonable steps to maintain the premises in good repair. In that case a landlord would only need to satisfy the Tribunal that he/she had reported the problem to the body corporate, monitored their response and taken care of any temporary repair. While a tenant could have joined the body corporate to the proceeding as an interested party, VCAT did not have jurisdiction under the *Residential Tenancies Act 1997* (RTA) to make an order against them.

Now a tenant can apply directly against the owners' corporation and seek an order that the fault be repaired and compensation awarded.

The Act sets out a complaint/dispute resolution process as well as giving VCAT jurisdiction to hear disputes and make orders.

A tenant must comply with the owners' corporation rules and a landlord is required to give a tenant a copy of the rules at the commencement of occupation (s136). A rule is of no

effect if it unfairly discriminates against a person or is inconsistent with or limits a right or avoids an obligation under the Act, the Subdivision Act 1988, or the Regulations of both of these acts or any other Act or regulation. (s140)

If the owners' corporation does not make rules the model rules contained in Regulations apply. (s139)

## What can a tenant do to resolve an owners' corporation dispute?

There are three possible options available to tenants for the resolution of a dispute that is in relation to an alleged breach of the *Owners Corporations Act*, Regulations or rules. The options are as follows:



1. Lodge a complaint to the owners' corporation.
2. Refer to Consumer Affairs Victoria for conciliation or mediation.
3. Apply to VCAT.

### 1. Complaint to the owners' corporation

Section 152 allows a tenant to make a complaint about a lot owner, manager or occupier. The complaint must be in writing in the approved form, which must be made available by the owners' corporation upon the tenant's request. It is also available from Consumer Affairs Victoria.

If you want to make a complaint about the owners' corporation you need to tick the box next to "manager" on the form.

Once the owners' corporation receives the complaint they can take action under part 10 of the Act, apply to VCAT or decide to take no further action. If the latter applies, notice must be sent to the complainant setting out the reasons for the decision. (s154)

Before taking action under part 10 or applying to VCAT the owners' corporation must follow the dispute resolution process, set out in the rules. They can only take further action if no resolution is reached and they have reasonable grounds to believe that the person has committed the alleged breach.

If the owners' corporation decides to take action under part 10 they must give to the person about whom the complaint is made, a notice to rectify breach. This notice must be in the approved form, specify the alleged breach and allow 28 days for rectification. A copy of a complaint about a tenant/occupier will be given to the landlord/lot owner.

If there is no rectification within 28 days the owners' corporation may decide to either give them more time, issue a final notice allowing 28 days for compliance or not proceed. Notice of the decision must be given to the complainant and the person about whom the complaint is made.

If the period for compliance is extended the owners corporation must give notice advising of the decision and the additional time for compliance. (s156 )

If a final notice is sent and the alleged breach is not rectified within 28 days the owners' corporation have the option to apply to VCAT. (s157)

## 2. Conciliation and Mediation

A tenant can complain to the Director of Consumer Affairs Victoria which, if it is reasonably likely to be settled, can be referred to conciliation. (s161)

## 3. Applications to VCAT

Applications under the Act are heard in VCAT's Owners' Corporation List though an application from a tenant may be heard in VCAT's Residential Tenancies List. There is a strong emphasis on alternative dispute resolution in the Owners' Corporation List so most disputes will be listed for mediation as soon as possible after an application is made.

Section 162 gives VCAT jurisdiction to hear and determine disputes that arise under the Act, Regulations or rules. A tenant can apply whether or not they are still in the property. Disputes that are relevant to tenants are those related to the repair and maintenance of common areas, the behaviour of other residents, whether they are owners, occupiers or visitors, problems with parking or access to garages or driveways.

If a tenant has not followed any of the complaint/dispute resolution procedures VCAT may encourage them to do so but they cannot refuse an application on that basis. However, they can refuse to accept an application from an owners' corporation if they haven't first followed the dispute resolution process and is satisfied that the matter has not be resolved.

To apply to VCAT a tenant needs to complete Owners Corporation Form A. It can be downloaded from the VCAT website.

Under section 165 VCAT can make any order it considers fair and this may include a number of options. Those relevant to tenants are as follows:

- > An order requiring a party to do or refrain from doing something;
- > An order requiring compliance with the Act, Regulations or rules;
- > An order for the payment of a sum of money. This can be in relation to money owed, damages (including exemplary damages) or restitution;
- > An order in relation to damaged or destroyed buildings or improvements;
- > Ancillary and interim orders VCAT thinks fit to make.

A civil penalty of up to \$250 may be imposed where it has been determined that a person has failed to comply with a rule of the owners' corporation. (s166)

There are several things that VCAT must consider in making an order including the conduct of the parties, an act or omission by a party and the impact of a resolution on the lot owners as a whole. (s167)

Due to the uncertainty surrounding the interpretation of the Act we recommend that any tenants with an owners' corporation dispute should be referred to the Tenants Union of Victoria.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case you are require advice about then you should contact us on **(03) 9411 1444**

**Tenants Union Legal Team**