Managing Owners Corporation Disputes with Negotiation Decision Support and Alternative Resolution Procedures

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Abstract

The paper describes a holistic approach to managing Owners corporation disputes in the state of Victoria, Australia, via provision of an alternative grievance mechanism and development of an online decision support guide to relevant case law decisions in this domain. The rate of growth of condominiums, which are commonly referred to as ‘owners corporations’ or ‘strata titles’, have increased exponentially since 1981. Because of this growth, and the need to manage a rapidly expanding population, the governance and management of these entities has become an important concern for government.

Conflict and its management within them is an essential element of this concern. It is widely reported in the literature that existing legal remedies are an inadequate way of responding to many of these disputes. Thus, we aim to provide what we believe are improved internal guidelines and resolution procedures coupled with negotiation decision support for condominium disputants to help guide them through the grievance process.

1 Introduction

The paper presents a holistic approach to managing Owners Corporation (OC) disputes in the state of Victoria, Australia. The aim of the research is to improve the negotiation process by offering disputant a more deliberative negotiation environment via; a) the development of an online decision support guide to relevant case law decisions for property owner (owners corporation) disputes; and b) what we believe is an improved grievance process.

The rate of growth of condominiums in Australia, according to Australian Bureau of Statistics\(^1\) figures, is about twice that of detached housing since 1981. There they are usually referred to as “Owners Corporations” or “strata titles.” In the big population centres of Sydney and Melbourne they now comprise approximately a third of all dwellings. There were 8,426,559 private dwellings counted in Australia in the 2006 census, an increase of 8.2% since the 2001 census.

The largest proportional change was for flats, units and apartments showing an increase of 0.9% (153,176 dwellings) to 14.2% of all housing. Semi-detached houses had risen to

9.2% from the previous 2001 census where it was 8.9%. Separate housing declined to 74.8% from 75.3% recorded in the previous census. Because of this growth and the need to manage a rapidly expanding population the governance and management of these entities has become an important concern for government. Conflict and its management within them is an essential element of this concern. Current legal remedies, however, are widely seen as inadequate because of their expense, delay, and inflexibility when needing to be tailored to a particular dispute.

The paper commences with a discussion of the broad issues concerning neighbourhood disputing in Victoria, including current legislative processes and their limitations. We then analyse parts of the Owners Corporation act (2006) that relate specifically to the Victorian Civil and Administrative Tribunal (VCAT), which has legislative jurisdiction to make rulings in certain types of Owners corporation disputes. Discrete areas of decision making by VACT are identified and some analysis is undertaken to demonstrate how VACT makes rulings in consideration of specific parts of the act. Other factors considered in judgements, that do not relate specifically to parts of the act are also identified.

The next section describes development of an online decision support guide for property owner disputes. We show how a Bayesian Belief network has been expertly modelled using the above mentioned factors to help guide disputants when negotiating throughout the grievance process. The final part of the paper presents an alternate set of dispute resolution procedures aimed at improving upon limitations identified in the current guidelines. Thus, we present a holistic approach to better management of Owners corporation disputes.

2 Current Legislative Process
This section describes the current legislative guidelines and grievance process for resolving OC disputes.

2.1 Neighbourhood Disputing and OC
Condominium disputes are a form of “neighbourhood disputing” that can be divisive and damaging to the individuals and communities concerned. Early research into this area of research in Australia has found it to be one of the most pervasive forms of disputing in the general population and can rapidly escalate into serious and even criminal events (see (Fitzgerald 1985), (Bondjavov et al. 2007)). This research has also indicated that such disputes are not always well managed by third party interveners such as police or local government.

These disputes also involve the investment of enormous resources including not only the neighbours themselves but legal, local government, police, health and welfare services. Most condominium conflict falls into two categories: either quality of life or financial disputes (Mollen, 1999). 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 condominiums therefore 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.

Grosberg (2003) posits that there is an increasing correlation between the number of condominium lot owners and the incidence 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 may become 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), (Mollen, 1999). Mollen also makes the point that because decisions in condominiums are often made by committees constituted by persons lacking in real estate experience they are less likely to accept and respect them (Mollen, 1999, 81).

In Victoria, the second most populous Australian state, these disputes, when unable to be resolved between the residents and owners themselves, are governed by the procedures of the Owners Corporations Act 2006 (the Act). Under previous legislation, The Subdivision Act 1998, persons with a body corporate dispute could apply to the Magistrates’ Court for a declaration or order determining the issue.

The Court could make a number of different orders, including orders requiring the body corporate to perform or refrain from an act.
Applications could also be made to the Victorian Civil and Administrative Tribunal (VCAT) on a limited range of issues. For example, an application could be made for the VCAT to review a decision of a Council to refuse the certification of a plan. This schema was perceived by many to be too limited, expensive and inaccessible, see for example Everton-Moore et al. (2006).

A review of OC law and legislation in a range of overseas jurisdiction has revealed a significant number of similarities with the Australian statutory schemes and some significant differences. Chief among these differences is a “model law” scheme in the United States to guide State legislature (Slaughter, 2005).

In general terms, Australian policy makers and legislators have been at the forefront of legislative innovation in this area. The New South Wales Conveyancing (Strata Title) Act of 1961 was a model for a number of other Australian and overseas jurisdictions when it was introduced including Canada, South Africa and Singapore. It was the first Commonwealth legislation dealing with subdivided buildings.

In 1973 this pioneering legislation was repealed and replaced by the Strata Title Act (New South Wales) 1973. Whilst there appears to be general agreement across the different systems that litigation through the traditional legal system is an inadequate way of responding to many condominium disputes, and this is recognized in the Victorian legislation, there is little or no analysis of the other options: see for example: Butler (1998), CAV (2003), Christudason (1996) and Cousins (2004).

Not only is there expense and delay but the remedies available are limited and cannot necessarily be tailored to the particular dispute. This indicates the global, as well as local, applicability of this research. This field, unlike organizational and labour disputing, has not been subject to in depth analysis of conflict and dispute interventions.

The Victorian legislation is designed to promote self-governance by providing a legislative framework for owners and residents to work together and to resolve disputes through dialogue, consultation and negotiation. Specifically the Act, in Section 1(b), states as one of its two purposes, “…to provide for appropriate mechanisms for the resolution of disputes.” It provides for a three layered or tiered schema for managing conflict that arises.

2.2 The Three Tiers of Dispute Resolution

The Act commenced operation on 31 December 2007. On that date, the bodies formerly called bodies corporate (created when certain plans of subdivision were registered) became styled as “owners corporation”. The Review that examined the old legislation (The Subdivision Act 1998) which preceded the introduction of the Act outlined a multi tiered dispute resolution process and this is reflected in the Act (Victoria 2006). This was substantially adopted in the new legislation.

The first tier is dispute prevention. This includes providing information and advice on internal communication and grievance procedures, as well as internal dispute resolution for owners corporations, with a default process set out in the model rules to the Act. The second tier provides for access to a low cost dispute resolution process. A government department, Consumer Affairs Victoria (CAV) provides conciliation for disputes and, as necessary, referral to the VCAT.

Under section 161 of the Act the Director of Consumer Affairs can direct dispute to conciliation or conciliation from:

- a current or former lot owner;
- mortgagee of a lot;
- insurer;
- occupier of a lot;
- purchaser of a lot; and
- manager of an owners corporation.

The third tier is VCAT. It was proposed by the Review that VCAT consider cases involving more complex technical and legal issues relating to the operations of owner corporations (Victoria 2006). Whether this will be the result in practice remains to be seen. An owners corporation cannot apply to VCAT for an order in relation to an alleged breach unless the dispute resolution process required by the internal owner corporation rules has been followed and the owners corporation is satisfied that the matter has not been resolved through that process: see section 153(3).

This restriction does not seem to have been applied to owners or residents who may be able to apply to VCAT directly without proceeding through the internal process. Also section 18 provides that an OC cannot take legal action, except upon the issue of repayment of overdue fees or to enforce the rules of the owners corporation, without a special resolution of the committee of management. The crucial sections of the powers of VCAT are however outlined here.
2.3 The Role of VCAT

Part II Division 1 of the Act (sections 162 to 169, inclusive) deals with disputes. Section 162 confers the relevant jurisdiction upon VCAT. It provides:

**162. VCAT may hear and determine disputes**

VCAT may hear and determine a dispute or other matter arising under this Act or the regulations or the rules of an owners corporation that affects an owners corporation (an owners corporation dispute) including a dispute or matter relating to:

(a) the operation of an owners corporation; or
(b) an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation; or
(c) the exercise of a function by a manager in respect of the owners corporation.

The regulations referred to in section 162 are the Owners Corporation Regulations 2007. Regulation 8 provides that the rules set out in Schedule 2 of the regulations are prescribed as model rules for an OC. Section 139(2) of the Act provides, in effect, that unless an OC has made other rules (by special resolution pursuant to a power conferred by section 138) the model rules are the rules of the owners corporation.

Section 165(1) of the Act provides that in determining an OC dispute VCAT may make any order it considers fair including one or more of various kinds of orders enumerated as paragraphs (a) to (m). Section 167 of the Act provides:

**Section 167 What must VCAT consider?**

VCAT in making an order must consider the following:

a) the conduct of the parties;

b) an act or omission or proposed act or omission by a party;

c) the impact of a resolution or proposed resolution on the lot owners as a whole;

b) whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;

e) any other matter VCAT thinks relevant.

It is also useful to note that by virtue of section 98(1)(c) of the Victorian Civil and Administrative Tribunal Act 1998 the Tribunal may inform itself on any matter as it sees fit.

The OC’s major function as provided by section 4 of the Act is to manage and administer the common property. Section 5 of the Act provides:

**Section 5: Owners corporation must act in good faith**

An owners corporation in carrying out its functions and powers:

(a) must act honestly and in good faith; and

(b) must exercise due care and diligence

Similarly section 122(1)(a) and (b) of the OC Act provides that a manager must act honestly and in good faith, must exercise due care and diligence, and must not improperly use the managers position a personal advantage in the performance of the manager’s functions. The criterion laid down by s 122 is as follows:

(1) A manager:

a) must act honestly and in good faith in the performance of the manager's functions; and

b) must exercise due care and diligence in the performance of the manager's functions; and

c) must not make improper use of the manager's position to gain, directly or indirectly, an advantage personally or for any other person.

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

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2 Section 30(1)(a) of the Act provides that when a plan of subdivision is registered the owners for the time being of the lots specified in the plan are members of the OC. It also provides that the common property identified in a registered plan of subdivision vests in the lot owners for the time being as tenants in common in shares proportional to their lot entitlement. The OC is registered as proprietor of the common property (see section 31(1) of the Act) and so is the legal owner, but the lot owners, as tenants in common in their proportional shares, are the equitable or beneficial owners: Body Corporate No.1/PS 40911511E St James Apartments v Renaissance Assets Pty Ltd (2004-5) 11 V.R. 41.
This short overview of the Act indicates a comprehensive scheme for the administration of OC. There is clearly a two step procedure. First is to determine that there is a “dispute” within the meaning of section 162. If there is such a dispute then section 165 provides that the decision be guided by the principle of “fairness” under which a number of further factors or considerations apply. A hierarchy of factors can thus be discerned which could be defined as a “decision or argument tree” for the guidance of the Tribunal. In this sense the plan of the Act provides a decision tree that could be represented as follows in Table 1.

Table 1: Principle Factor

<table>
<thead>
<tr>
<th>Principle Factor: Presence of a “Dispute” per 162</th>
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<tr>
<td>Sub Factors</td>
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<tr>
<td>• the operation of an owners corporation; or</td>
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<tr>
<td>• an alleged breach by a lot owner or an occupier of a lot of an obligation imposed on that person by this Act or the regulations or the rules of the owners corporation; or</td>
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<tr>
<td>• the exercise of a function by a manager in respect of the owners corporation.</td>
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<tr>
<th>Principle Sub Factor – Fairness s165 Considerations</th>
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<tr>
<td>• the conduct of the parties;</td>
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<tr>
<td>• an act or omission or proposed act or omission by a party;</td>
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<tr>
<td>• the impact of a resolution or proposed resolution on the lot owners as a whole;</td>
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<tr>
<td>• whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners</td>
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<tr>
<th>Specific Considerations – ss 5 and 122</th>
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<tr>
<td>• good Faith</td>
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<tr>
<td>• due Diligence</td>
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<tr>
<th>Specific Considerations for Managers – s122</th>
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<tbody>
<tr>
<td>• not to take personal advantage for self or others</td>
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It is interesting to observe how the reported cases have managed this schema. The cases available through the Australasian Legal Information Institute (AustLII) provide an overview of the most important and frequent matters coming before VCAT and the Supreme Court. An analysis of these cases indicates at least twelve discrete areas of decision making or issues have emerged as follows:

1. Applications for Unpaid Fees
2. Conduct of Litigation
3. Vexatious and Frivolous Claims
4. Legal and Other Representation
5. Substituted Service of Proceedings
6. Costs
7. Joinder of Parties
8. Overturning Majority Decisions of an OC
9. Appointment and Termination of Managers
10. Issues with Common Property
11. Lot Liability
12. Licenses and Easements

For the purposes of this paper two particular issues are examined. Both are of some interest to Committees, property managers and residents of OC. The first is in what circumstances VCAT would overturn a decision of the OC (number 8 in the list above) and the appointment and termination of managers (number 9 in the list above). In particular, we are interested in how the decision outcomes are arrived at so as to guide potential disputants in decision making.

This can have some utility although the obvious limitation is that the facts in any case are different but central to judicial decision making. These two categories of dispute also provide a good background against which to examine how the Tribunal is interpreting and applying the provisions of the Act and in particular the factors outlined in the argument tree in Figure 1.

2.4 Overturning a Decision of an Owners Corporation Committee

In Boswell v Forbes & Ors Senior Member Vassie considered this issue at some length. In this case the OC Committee had not correctly passed a resolution granting a lot owner a right to use a garage. However, the Tribunal was prepared to allow to give it further time to pass the resolution and concluded that subject to certain exceptions “....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

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3 See Muecke, N., A. Stranieri, et al. "Re-Consider: The Integration of Online Dispute Resolution and Decision Support Systems."
4 http://www.austlii.edu.au/ Last Accesses 18 February 2010

5 Available at http://www.austlii.edu.au/ (at this time approximately 85 in number).

should interfere with it”.  This was after finding that the matter did constitute a “dispute” under s 162 upon the basis that “…nobody has suggested otherwise.” The exceptions listed by the Senior Member were:

a) Where members have acted in breach of the law;
b) If the OC has not acted honestly or in good faith; and
c) If a decision of the members of the OC is oppressive to, unfairly prejudicial to or unfairly discriminates against a member who is opposed to the decision.

The first exception is based upon Section 162 of the Act which defines, inter alia, an “owners corporation dispute” as a breach of the Act or the rules and regulations made there under. The second exception is based upon Section 5 of the Act which requires an OC to act honestly and in good faith. The third exception is based upon Section 167(d) which requires VCAT to consider whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners.

The Tribunal did consider and quoted all of the sectors referred to in Figure 1 but it chose only to rely on certain factors which it listed as “exceptions.” It could be queried why, for example, an OC Committee is not also required to take “due diligence” in its decisions and why this would not be a ground for overturning a Committee decision. The list of exceptions provided by the Tribunal in this case would appear to apply a narrow interpretation of the available factors. Also, the interpretation of s 162, which defines the jurisdiction to hear disputes, would appear, in our view, to be a narrow interpretation of that section. Section 162 not only relates to “breaches” but also to disputes about the “operation” of the Act or “functions” of a manager under the Act.

In relation to section 5 the Tribunal appears to ignore the due diligence criteria and we cannot see how it could be subsumed into the reasoning around the good faith criteria.

With regards to section 167 the Tribunal also appears to take a narrow view. Paragraph (a) and (b) of that section relating to conduct and acts or omissions of the parties which could be subsumed into the first two exceptions listed by Senior Member Vassie. However, paragraph (c) does broaden the matter somewhat and requires the Tribunal to consider the wider impact on the proposed resolution “on the lot owners as a whole.” This was not explicitly considered although it may be an implicit consideration.

In other words if one followed this decision an aggrieved party wishing to dispute a majority decision of an OC Committee of Management would have to show that the circumstances fell within one of the three exceptions to the general principle that majority decisions would not be overturned by VCAT. It is interesting to observe that in making his findings about the workings of the Act Senior Member Vassie whilst quoting Section 165(1) of the Act, which provides that in determining an OC dispute VCAT may make any order it considers “fair,” did not in fact overtly apply it as a criterion in his reasoning. Underlying this issue is the need to ensure some certainty and confidence in the decisions of such Committees and to prevent frivolous and vexatious claims. This could perhaps be considered a subsidiary principle factor although it was not an issue in Boswell.

In the event he found that although the Committee had not properly followed the legal procedures as laid down by the Act and passed a special resolution as they should have (i.e. a resolution passed by 75% of the members) he would allow them time to do so. That is that whilst there was a demonstrable reason to overturn the decision, because it was a breach of the law, he would not do so.

He found that there was no specific discrimination against the complainant No explicit finding was made as to whether the Committee acted honestly or in good faith although it is implied in Member Vassie’s report that the Committee were unaware of the need for a special resolution in this situation which may imply that they did not breach this requirement.

Further, Member Vassie commented that the evidence revealed that the Committee would intend to rectify the matter by shortly passing a special resolution. He also considered that the only person to be materially effected by the decision as it stood would be the complainant himself. However, if the complainant was able to overturn the decision then this may affect the remainder of the lot owners adversely. The Tribunal regarded the “intention” of the

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7 At par 26.
8 Par 7.

9 See Owners Corporation 24176Y v Easden (Civil Claims) [2008] VCAT 2299 (7 November 2008) for an outline of the relevant considerations.
committee to consider a meeting to pass a special resolution to remedy the problem as relevant.10

Also, it considered the impact this would have on all lot owners and the potential for creating a "new set" of problems if the complainants application was granted11. In this way it seems to have come to indirectly at least consider the effect on all parties of the decision as provided for in section 167 although not in the list of exceptions.

Accordingly, Member Vassie decided to give the Committee a certain time to remedy the legal deficiency in its decision. If it did not then the complainant could make another application to VCAT and presumably overturn the decision. In this way the decision of Member Vassie demonstrates willingness to flexibly apply the relevant considerations provided for in the legislation. However, it may also demonstrate that Committees who fail to take due diligence may also be given some considerable latitude by the Tribunal because it was not considered in the list of exceptions.

In Farrugia v Walshe & Whitlock Pty Ltd & Ors (Civil Claims) [2009] VCAT 762 (29 April 2009) Member Grainger extended this approach by agreeing with the decision in Boswell and applying the same considerations to circumstances where a claim is made seeking orders compelling “…..an owners corporation or manager…” to take action without any decision having been made by the members of the owners corporation at a meeting of the owners corporation. The Member stated at Paragraph 18:

“In other words, VCAT should not make an order requiring an owners corporation, or manager to do something unless the owners corporation, one of its members or the manager has acted in breach of the law, the owners corporation or manager has not acted honestly or in good faith or the refusal of an owners corporation or manager to take action is oppressive to, unfairly prejudicial to or unfairly discriminates against a member who wants the action to be taken.”

The Tribunal prefaced its remarks by stating that it could make an order it considered “fair.”12

2.5 Appointment and Termination of Property Manager

One of the decisions that VCAT was called upon to make by a disgruntled lot owner in the aforementioned Farrugia case was the termination of a manager appointed by the OC committee. In the circumstances of that case the Honourable Member, as we have seen, applied the same criteria as applied by Senior Member Vassie in Boswell. Other cases have emerged in relation to this issue.

In Network Pacific Real Estate Pty Ltd v O’Rourke & Ors (Civil Claims) [2009] VCAT 1194 (7 July 2009) the Tribunal dismissed a claim by a manager that it should continue as property manager when the Committee of an OC had passed a resolution that it be replaced by another property manager. The Tribunal accepted, in paragraph 2.4 that it could make an order under s 165 to appoint or revoke the appointment of a manager provided it was “fair”.

In this case the Committee of the OC had presumed to revoke the contract of the manager in possible breach of its terms. The manager then withheld the files of the OC and sought specific performance and damages under the contract.

The Tribunal rather strangely concluded that the Committee needed a special resolution to revoke the appointment of the manager which is something not required by the Act. It is no doubt required to pass a special resolution when it seeks to take legal proceeding in relation to the revocation: see s 119. In any case the Tribunal “flexibly” argued that although the attempt to revoke the appointment was invalid it would terminate the appointment at a certain date, approximately six weeks after the date of the hearing, because “….in fairness to both parties I do not consider that it is beneficial for there to be an ongoing relationship between the parties…..”13

This decision reasonably presumes therefore that the OC make clear its terms to its property manager. In this instance the Tribunal rejected the evidence from the OC representatives that the appointment of the manager they wished to terminate was only on a month to month basis

10 Par 45.
11 Par 46.
12 Par 12.
13 Par 3.7
but rather was more likely to be on a year by year basis given past practice. The attempt by the Committee to revoke the appointment before the year was out could have been construed as a breach of the contract. That it was not was because it was decided by the Tribunal, wrongly in our view that a special resolution was required i.e. carried by 75% of lot owners entitled to vote.

Section 119 of the Act does not require such a special resolution to revoke the appointment but section 18 does require it to have such a special resolution if it seeks to bring legal proceedings in relation to the revocation. The Tribunal appears to ignore the criteria set out in the Boswell and Farrugia cases and applies a “fairness test” based upon what may be beneficial to all the parties. However, it failed to consider the other sub-factors, including the principal factor, referred to above except perhaps the impact it would have on all the parties.14

In McCarthy v Dandenong Region Body Corporate Services (Aust) Pty Ltd v D R Strata Management (Civil Claims) [2009] VCAT 1898 (10 September 2009) an action was brought by two disgruntled lot owners against the manager appointed by the OC because, in their view, they were not receiving any benefit from the common property and were being forced to pay fees which they should not have had to. They blamed this upon the manager and sought its dismissal and made a claim for damages due to a failure of the duty of care owed to them by the manager. The OC was not joined in the action. We will only deal with the former issue here.

Section 122(1)(a) and (b) of the OC Act, as noted above, provides that a manager must act honestly and in good faith, and must exercise due care and diligence, in the performance of the manager’s functions. The Tribunal here could see no reason why this statutory duty should be regarded as a duty to the owners corporation alone, and see no reason why it should not be regarded as a duty owed to each lot owner (and, for that matter, to each occupier of a lot) as well.15

Further, it was clear to the Tribunal that under Part 11 of the Act, a lot owner may apply to VCAT to resolve a dispute with a manager relating to the exercise of a function by a manager in respect of the owners corporation, and that this constituted a “an owners corporation dispute” (Sections 162 and 163(1)(b)). Accordingly VCAT has jurisdiction to hear and determine a dispute based upon a lot owner’s allegation that a manager has breached the statutory duty imposed by Section 122. It is worth noting that in determining an owners corporation dispute, VCAT may make an order for the payment of damages (Section 165(1)(c)) or revoking the appointment of a manager (Section 165(1)(i)ii)).

In this case the various actions of the manager in response to the complaints were not regarded as breaching paragraphs (a) and (b) of section 122. Paragraph (c) of that section relating to improperly gaining a personal advantage was not considered. The case was dismissed with costs awarded against the applicants. This case demonstrates that the due diligence criteria is relevant at least in cases against managers.

In Fancett v Semple (Civil Claims) [2009] VCAT 887 (13 May 2009) the issue was about the appointment rather than the dismissal of a manager. One lot owner had claimed that she was being unfairly treated by the Secretary of the OC (another lot owner), who was virtually acting as the manager of the property, including by not agreeing to hold the OC committee meeting in neutral territory and a failure to take action about parked cars on the property. Senior Member Vassie agreed that this represented a case against the continued arrangements and proceeded to order appointment of a professional manager stating:

13. When there is conflict between members of the owners corporation, even though the members may be few, it is sometimes false economy for the owners corporation not to appoint a professional manager, and desirable that such a manager be appointed if the conflict adversely affects the proper administration of the owners corporation’s affairs.

The present case was one in which, in view of the various matters I have mentioned, I concluded that it was appropriate to make the orders sought. The antagonism between the parties was affecting adversely the proper administration of the owners corporation. A professional manager was needed who could properly investigate complaints (whether justified or not), arrange for meetings of members to be held on neutral territory, and be at arms’ length from personality clashes.

14 The Tribunal did, at par 2.4(c), consider s 163 with regard to who could lodge an application in the case of a “dispute” and concluded that the lot owners could.

15 Par 12

16 Par 13
This case demonstrates that rather than issues of “fairness” or the related sub-factors above the most significant consideration was “proper administration.”

Taking these various cases into consideration it can be seen that the Tribunal uses different rationales for its decision depending upon the issues before it. Its approach varies between the broad “fairness test” applied in the Network case to a reliance on the more particularised breakdown in Farrugia.

The McCarthy case highlights the different approach when the application is brought against the manager rather than the Committee. The criterion in section 122 came into consideration. This places a definite duty of care upon managers to all lot owners. There seems to be some potential differences between the treatment of committees and managers. If the decision making process is summarised in light of the “decision tree” provided by the Act then the following schema is indicated in Table 1 below.

<table>
<thead>
<tr>
<th>Cases</th>
<th>Factors</th>
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<tbody>
<tr>
<td>Is a “Dispute”</td>
<td>Fairness</td>
</tr>
<tr>
<td>Boswell</td>
<td>✓ Breach of Law</td>
</tr>
<tr>
<td>Farrugia</td>
<td>✓ Breach of Law</td>
</tr>
<tr>
<td>Network</td>
<td></td>
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<tr>
<td>McCarthy</td>
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<tr>
<td>Fancett</td>
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Table 2: A Summary of Select Cases and Statutory Factors Considered Under the Owners Corporation Act 2006

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All of the cases above assume there is a “dispute” per s162 even if they do not explicitly mention it. Apart from this factor this analysis demonstrates potentially disparate way in which the Tribunal is considering the hierarchy of factors established by the Act. This includes “wider” considerations than contained in the legislative scheme. For example in Boswell the Tribunal also considered the “intentions” of the Committee for remedy the situation as relevant. In Fancett the Tribunal was prepared to consider and give some precedence to the concept of “good administration.” This creates issues for those preparing cases and advising clients about how to proceed. It also indicates that there is some way to go before the jurisprudence in this issue develops and is settled.

3 Negotiation Decision Support for Owners Corporation Disputes.

This section describes the development of the online decision support guide to relevant case law decisions for property owner (owners corporation) disputes. For the purpose of the guide we assume that the principle factor the ‘Presence of a “Dispute”’ has already been confirmed as positive. It is expressly provided that the guide does not constitute legal advice and should not be relied upon for this purpose. It merely provides decision support based on analysis of past OC cases heard by VCAT to better inform disputants during their deliberations and negotiations of possible outcomes should the matter come before VCAT.

3.1 Constructing the Bayesian Networks

We have modelled judicial reasoning for owners corporation cases heard by VCAT using the Samiam tool to create separate Bayesian networks for some of the discrete areas of decision making listed in section 2. Bayesian networks are graphical tools for specifying probability distributions. They rely on the basic insight that independence forms a significant aspect of beliefs that can be elicited relatively easily using the language of directed acyclic graphs (DAGs). Nodes in a DAG represent propositional variables and edges of the nodes represent direct causal influences among these variables (Darwiche, 2009).

Figure 1 is a DAG for cases involving the issue of ‘Overturning Majority Decisions of an OC’. The two nodes at the top of the graph: 1) ‘Overturn OC Resolution’, and 2) ‘Allow OC to remedy’, are defined as ‘query variables’. They represent possible outcomes for cases involving a particular issue and are used to query the probability of each outcome occurring given the particular facts of a case. The nodes below this are called ‘evidence variables’. These variables are used to assert evidence (facts) about a case in order to infer an outcome.

Figure 1: Network Structure

<table>
<thead>
<tr>
<th>Overturn OC Resolution (Pr(a))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
</tbody>
</table>

Table 3: Conditional Probability Table

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17 Samiam freeware version is available at: http://reasoning.cs.ucla.edu/samiam/index.php

Last Access February 18 2010

18 Co-author Peter Condliffe is a Barrister at the Victorian Bar and an Advanced Mediator at the Victorian Bar and a Nationally Accredited Mediator under the Family Law Act.

19 The CPT’s may also be constructed from statistical analysis of past cases.
Example Scenarios

We now demonstrate the use of the Bayesian network to infer outcomes for three hypothetical scenarios. Asserted facts for each case are shown in red and display a 100% input value.

**Scenario 1**

**Assumed Facts**
- No discrimination against complainant
- Overturning decision would impact on lot owners as a whole
- There was a breach of law
- Parties had acted in good faith.

**DAG representation**

**Inferred Outcome**

The facts here are the same as the *Boswell v Forbes* case discussed in sub-section 2.4. The outcome inferred by the DAG graph also replicates the tribunal outcome for that case. Based on the asserted facts, the most likely outcome is that the member allows the OC time to remedy the breach of law. It is important to note that even though there was a breach of the law, the value of the ‘Good Faith’ variable was asserted to be true, thus, the value of the ‘Breach of Law’ variable changed automatically to ‘No’. This does not mean that a breach of law is now considered not to have occurred. This factor was merely nullified by the ‘Good Faith’ variable, when inferring a likely outcome.

**Scenario 2**

**Assumed Facts**
- No discrimination against complainant
- Overturning decision would impact on lot owners as a whole
- There was a breach of law.
In Scenario 2 the facts are similar to scenario 1 except that there was no ruling as to whether or not the OC had acted in good faith and there was no intention shown to rectify the breach of law. Thus, the inferred likely outcome is that the OC resolution would be overturned.

**Scenario 3**

**Assumed Facts**

- There was discrimination against complainant
- Overturning the decision would impact lot owners as a whole
- There was no breach of law.

**DAG representation**

In Scenario 3 it is inferred that the resolution should not be overturned. Even though there was discrimination against the complainant, the fact that overturning the decision would impact on lot owner as whole combined with the fact that there was no breach of law to tip the balance of probabilities in favour of not overturning the resolution.

**Figure 3: Scenario 2 DAG**

**Inferred Outcome**

Section 138 of the Act provides that: (1) By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1. Schedule 1 specifically provides for the making of a broad variety of rules, in addition to dispute resolution, including internal grievance procedures, hearing procedures and communication procedures. We have created a new process consistent with these provisions and designed to manage a range of common conflicts and disputes likely to be encountered in Owners corporations. This process is, like that in the Act itself, a three stage process as follows:

**Stage 1: Self-help:** the parties are encouraged to meet and talk informally using the formulation in the model rules;

**Stage 2: Conciliation:** a process similar to mediation which enables the parties to reach their own solution to the issue/s but allows the conciliator to provide a range of options if the parties agree and if appropriate in the circumstance; and

**Stage 3: Arbitration:** A process of “on the papers” adjudication where the parties agree to be bound by the decision of the arbitrator.

Arbitration has been included in the process because it does have certain advantages. However, the role of arbitration is such a scheme can be controversial because of all the alternative processes it leaves the parties with less autonomy and when it is not managed properly within the framework of a dispute management process can be both unwieldy and costly (Miskin, 2006). However, it is interesting to note that in response to a crisis in the construction of condominiums due to prolific litigation concerning water leakage Washington state legislature introduced legislation based upon a mandatory arbitration and conciliation procedure (O'Donnell, 2005-2006).

These reforms were accompanied by requiring the initiating party to advance the costs of the arbitration or conciliation but allowing for these costs to be awarded to the party that “wins” the case. The Arbitrator decides the case purely on the arguments and evidence presented to him by the parties. The parties must prove their cases on
the balance of probability to the satisfaction of the Arbitrator. The use of arbitration can lead to improved efficiencies and certainty in the process (Condiffe, 2008). The inclusion of it also reflects the use of a similar process (adjudication) in the Queensland and in many overseas schemes.

The Rules of this scheme are intended to allow the parties to present their cases without the need for legal representation. However, in some instances legal representation will be required. The process requires the parties to present their cases and accompanying materials to the conciliator and arbitrator. This is not an inquisitional scheme although both the conciliator and arbitrator can, where appropriate, ask for further information. Some parties will probably require assistance in presentation and guidelines for this purpose can be readily produced.

The advantages of proceeding in the way outlined in the Rules is that the parties and the owners corporation keep or maintain the dispute within a clearly delineated process where they are able to plan or predict a process with some certainty. The model rules and the statutory process under the Act do not easily allow this especially from the vantage of the owners corporation. This is because the statutory scheme allows an owner or resident to proceed to the CAV or VCAT after the initial complaint whereas the owners corporation is limited to the statutory process. This scheme also allows the owners corporation to budget for projected costs and ensure some certainty of outcomes. It would be advisable for the owners corporation to contract with a provider of ADR services to provide the necessary services at an appropriate rate.

5 Conclusion

With the rapid growth of condominiums in Victoria, Australia over the last thirty years, conflict and its management has become an essential element of concern. Current legal remedies, however, are widely seen as inadequate. Our research aims to assist in better management of these conflict by a) providing negotiation decision support that mirrors judicial reasoning practices so that disputants can negotiate more deliberatively before proceeding to litigation; and b) providing OC disputants with what we believe to be improved internal guidelines and procedures.

The guidelines have been made available to strata title Owners under the management of Victoria Body Corporate Services Pty Ltd (VBS).

Plans are now underway to evaluate and test the effectiveness of the new guidelines using simulated disputes involving both control and experimental groups. The use of simulations as a method is a well tested and accepted methodology in this type of research across the various disciplinary and professional divides: See for example Druckman (2007) and Buelens (2008). The key advantage of this approach, as in experimental studies generally, is the reduced ambiguity in specifying the relationship between key variables. Also, it is possible to closely study the details of a process, such as conciliation, which would be generally impossible in a real life situation. Finally, it allows us to impose new strategies in the situation that is safe but very difficult to do in the real situation.

In late 2009 our project team met with VBS to map out functional requirements of ‘The Handbook of Owners Corporation Disputes’ system. This meeting led to the specification of the current Bayesian network which demonstrates proof of concept. The next stage of development will be to create DAG’s for all the discrete areas of OC disputing outlined in subsection 2.3. We will then undertake a comprehensive analysis of all OC cases heard by VCAT and compare these outcomes with inferred outcomes obtained from the system. This will be an iterative process with the analysis expected to lead to a refinement of the network structure and adjustment CPTs.

6 References


