

**SUBDIVISION ACT 1988 AND OWNERS CORPORATIONS  
ACT 2006 - DEVELOPMENTS**

**PRESENTED ON 8 FEBRUARY 2019 FOR ICU SEMINARS**

**BY: NICHOLAS JONES, BARRISTER**

**AMENDING PLANS OF SUBDIVISION**

1. S. 32 of the *Subdivision Act 2006* provides that if there is a unanimous resolution of the members, an owners corporation may proceed to do one or more of the following:
  - (a) dispose of the fee simple in any part of the common property;
  - (b) purchase or otherwise obtain land for inclusion in common property;
  - (c) alter the boundaries of the land affected by the owners corporation;
  - (d) increase or reduce the number of lots affected by the owners corporation;
  - (e) create new lots or new common property;
  - (f) create a new owners corporation;
  - (g) dissolve itself;
  - (h) merge with another owners corporation;
  - (i) create, vary or remove any easement;
  - (j) consolidate into a single lot land affected by the owners corporation;
  - (k) create, alter or extinguish lot entitlement or lot liability in any way necessary because of the exercise of its other powers under this section; and
  - (l) amend or cancel a scheme of development under the Cluster Titles Act 1974.
  
2. If the owners corporation cannot obtain a unanimous resolution to do any of the things set out in s. 32 of the *Subdivision Act 2006* it cannot do any of those things unless an order is made by VCAT allowing it to do so.
  
3. S. 34D of the *Subdivision Act 2006* provides two different means by which an order may be made by VCAT requiring an owners corporation to do any of the things set out in s. 32 of the *Subdivision Act 2006*.
  
4. S. 34D(1) of the *Subdivision Act 2006* provides as follows:

'A member of the owners corporation, an owners corporation, an administrator of an owners corporation or a person with an interest in the land affected by the owners corporation may apply to the Victorian Civil and Administrative Tribunal for:

- (a) an order requiring the owners corporation to do any of the things set out in section 32 or 33; or
- (b) an order consenting on behalf of a member or group of members of an owners corporation to the doing by the owners corporation of any of the things set out in section 32 or 33.

5. S. 34D(1)(a) of the *Subdivision Act 2006* does not contain any express conditions which need to be satisfied.

6. However, for VCAT to make an order under s. 34D(1)(b) of the *Subdivision Act 2006* several express conditions need to be satisfied. S. 34D(3) of the *Subdivision Act 2006* provides that VCAT must not make an order on an application under subsection (1)(b) unless it is satisfied that:

- (a) the member or group of members cannot vote because the member is or the members are dead, out of Victoria or cannot be found; or
- (b) for any other reason it is impracticable to obtain the vote of the member or members; or
- (c) the member has or members have refused consent to the proposed action and:
  - (i) more than half of the membership of the owners corporation having total lot entitlements or more than half of the total lot entitlement of the members of the owners corporation consent to the proposed action; and
  - (ii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the members who did not consent to the action.

7. The *Subdivision Act 2006* does not contain any guidance as to the circumstances in which it is appropriate to apply to amend the plan of subdivision under either subsection (1)(a) or subsection (1)(b).

8. In *Conroy v Owners Corporation Strata Plan 30438 [2014] VCAT 550* Justice Garde stated as follows:

'the application may nonetheless favourably attract the exercise by the Tribunal of the power in (a) provided of course that the Tribunal

after considering all of the relevant considerations is minded to grant the application and exercise the power contained in (a).'

9. Justice Garde also stated:

'There is no conflict between s. 34D(1)(a) and (b), or between these provisions and (c) and (d). The provisions have different work to do. While an application that does not meet the limitations imposed on the exercise of the power in (b) cannot attract the exercise by the Tribunal of that power, the application may nonetheless favourably attract the exercise by the Tribunal of the power in (a) provided of course that the Tribunal after considering all of the relevant considerations is minded to grant the application and exercise the power contained in (b).'

10. In *Butten v Khung & Ors [2010] VCAT 252* orders were made under s. 34D(1)(b) of the *Subdivision Act 2006* consenting on behalf of a number of lot owners to a resolution which had the effect of the owners corporation selling part of the common property, which was used as a car park for a shopping centre, to be used for the construction of a supermarket.

11. The Tribunal weighed the economic benefit of the common property being sold being a substantial payment by the supermarket chain to the owners corporation and an increase in patronage to an underused shopping centre against a possible reduction in car parking. By carrying out a balancing act based on the evidence VCAT found that the application satisfied the requirements of the provision.

12. However, in *O'Gorman v Owners Corporation RP 018831 [2017] VCAT 579* an application to amend the plan of subdivision to allow common property airspace to be sold to the lot below was refused under s. 34D(1) of the *Subdivision Act 2006*.

13. The Tribunal stated as follows:

'I do not consider that the Tribunal's power to order an owners corporation to do any of the things under s. 32 *Subdivision Act 2006* (including altering a plan of subdivision), is at large. In considering an application under s. 34D(1)(a), the Tribunal should approach the application with caution. The Tribunal should not make an order for altering a plan of subdivision lightly.

The lot owners have a vested interest in the existing plan of subdivision. To change the plan of subdivision may change their rights and obligations. Each plan of subdivision and each application to amend a plan of subdivision will have its own unique set of circumstances. Different considerations will apply in each case. An application to amend an obvious error in a plan of subdivision will involve different considerations to an application where a lot owner seeks to acquire common property.'

14. In *ASA Nominees Pty Ltd v Owners Corporation PS 513436B & Adamopoulos [2016] VSC 562* the Supreme Court heard an appeal from VCAT in relation to an application to amend a plan of subdivision. In that case the plan of subdivision did not accord with the occupation boundaries between two lots with the effect that part of a lot occupied by a bank was within the title of the adjoining lot. There was an error by the surveyor who drew the plan of subdivision which incorrectly included part of the land occupied by the bank into the adjoining lot so that the occupation boundaries did not accord with the plan.
15. The court stated as follows:

'... it was clear that there had been a mistake by the surveyor in the preparation of the plan of subdivision, that the correction of that mistake was within the jurisdiction of the Tribunal to correct under the combined operation of ss. 32 and 34D of the Act and it was, for the reasons given by the Tribunal, much more beneficial for the parties to correct that error and bring the boundaries of the two lots into conformity with the physical boundaries between the lots as to leave the situation as it was.'
16. In *Australian Executor Trustees (SA) Limited v Owners Corporation RP016813 [2016] VCAT 710* an application was made under s. 34D(1)(a) of the *Subdivision Act 2006* seeking an amendment of the plan of subdivision by removing a lot from the plan of subdivision. The applicant was a mortgagee in possession and wanted to sell the mortgaged lot. It could not do so as the owners corporation was not functioning and it failed to provide an owners corporation certificate. The applicant sought the removal of the mortgaged lot from the plan of subdivision so that it could be sold without an owners corporation certificate being required.
17. The mortgaged lot was vacant land and was unconnected to the rest of the land in the plan of subdivision. An order was made removing the lot from the plan of subdivision.

18. An application may also be made under s. 34D(1) of the *Subdivision Act 2006* to cause the owners corporation to alter lot entitlement and lot liability of any of the lots in the plan of subdivision pursuant to s. 33 of the *Subdivision Act 2006*. A lot owner may wish to seek an alteration to lot liability where the lot liability is too high and does not properly reflect the criteria in s. 33 of the *Subdivision Act 2006*.
19. S. 33(2) of the *Subdivision Act 2006* provides that in making any change to the lot entitlement the owners corporation must have regard to the value of the lot and the proportion that value bears to the total value of the lots affected by the owners corporation.
20. S. 33(3) of the *Subdivision Act 2006* provides that in making any change to the lot liability the owners corporation must consider the amount that it would be just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation.
21. In *Conroy & Anor. v Owners Corporation Strata Plan 30438 & Anor. [2014] VCAT 1413* the applicants made an application for the alteration of lot liability and lot entitlement. The Tribunal stated as follows in relation to lot liability:
 

‘On their face the current liabilities are plainly unjust and inequitable. Lots 11 and 12 are much larger than the other lots, yet have smaller liabilities. ...

The Tribunal’s task is twofold. First, to decide if the division of liability is just and equitable and then, if it is not, to decide what would be just and equitable.’
22. An order was made altering both lot liability and lot entitlement. The respondents appealed against the decision but were unsuccessful – *The Concept Developer Pty Ltd v Conroy & Ors [2015] VSC 464*.

### **OWNERS CORPORATION RULES**

23. The *Owners Corporation Act 2006* regulates the rules that may be made by an owners corporation.
24. In particular, s. 138 of the *Owners Corporation Act 2006* provides as follows:
  - (1) By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1.

- (2) By special resolution, an owners corporation may amend or revoke any rules made under sub-section (1).
- (3) A rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or a lot.
25. Schedule 1 of the *Owners Corporation Act 2006* sets out the matters in respect of which an owners corporation may make rules.
26. Further, s. 139(2) of the *Owners Corporation Act 2006* provides as follows:
- If the owners corporation does not make any rules or revokes all of its rules, then the model rules apply to it.
27. Further, by reason of s. 139(3) of the *Owners Corporation Act 2006* 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 matter are deemed to be included in the rules of the owners corporation.
28. A further restriction on the rule making power of an owners corporation is contained in s. 140 of the *Owners Corporation Act 2006* which provides
- that a rule of an owners corporation is of no effect if it:
- (a) unfairly discriminates against a lot owner or an occupier of a lot;  
or
- (b) is inconsistent with or limits a right or avoids an obligation under the *Owners Corporation Act 2006*, the *Subdivision Act 1988* or the regulations made under those acts or any other Act or regulation.

***OWNERS CORPORATION PS 501391P v BALCOMBE [2016] VSC 384***

29. In *Owners Corporation PS 501391P v Balcombe [2016] VSC 384* (“the Balcombe decision”) the court gave consideration to the rule making powers of an owners corporation.
30. The Balcombe case was concerned with rules made under the *Subdivision (Body Corporate Regulations) 2001 (Vic)*. However, in the Balcombe case the court also considered the rule making power under the *Owners Corporation Act 2006*.
31. In Balcombe, the owners corporation was incorporated in 2004. An additional rule prohibiting the use of lots for short term letting was made at

the inaugural general meeting. The additional rule was therefore made under the power to make such rules conferred by the *Subdivision (Body Corporate Regulations) 2001 (Vic)*.

32. The additional rule that was made was as follows:

‘The proprietor or occupier of a residential lot must not use a lot or the common property for any trade, profession or business (other than letting the lot for residential accommodation to the same party for periods in excess of one month) nor permit any other person to do so unless:

(a) the person conducting the trade, profession or business is a full time resident of the lot and only operates a home office with a maximum of one (1) employee; and

(b) the relevant planning scheme does not prohibit the relevant trade, profession or business to be carried on in a lot; and

(c) the lot owner has obtained all necessary permits from the

relevant authorities to enable the relevant trade, profession or business to be carried on in a lot.

Except for commercial/retail lots the proprietor or occupier of a residential lot must not use that lot or any part of the common property for any trade or business nor permit others to do so.’

33. The court ruled that this rule was invalid as it exceeded the rule making power of the owners corporation and accordingly was *ultra vires*.

34. In the Balcombe case it was stated as follows:

“(a) A review of the development of strata title legislation indicates the principal role of the body corporate or owners corporation was to manage and administer the common property of a strata subdivision.

(b) The relevant legislation does not disclose any intention for owners corporations to have power to substantially interfere with lot owners’ proprietary rights; or for owners corporations to effectively have an unappellable right to overrule uses permitted under planning legislation.

(c) A parliamentary intention to provide to owners corporations powers that could substantially inhibit the conduct of lot

owners on their own lots would need to be expressed in clear and unambiguous language.”

35. At paragraph 108 of the Balcombe case Riordan J. set out a three step process to ascertain whether a rule was within the scope of what the Parliament had intended when the relevant act and its regulations were enacted. This test was:

(a) what was the relevant statutory purpose of the *Subdivision Act 1988* and its regulations.

(b) What is the character of Rule 34.

(c) Is there a sufficiently direct and substantial connection between the statutory purpose and the likely outcome of Rule 34.

36. In paragraphs 110 to 112 of Balcombe Riordan J. stated as follows:

“110. These provisions (i.e. the relevant provisions under the *Subdivision (Body Corporate Regulations) 2001 (Vic)*) and the review of the development of the strata titles legislation demonstrate that at the time Rule 34 was made, the principal function of the appellant (the body corporate) was to own and manage the common property of the strata development. It is notable, in my opinion, that there is no reference in:

(d) the Explanatory Memorandum to the Subdivision Bill;

(e) the Second Reading of the Subdivision Bill; (c) the Subdivision Act 1988 (Vic) or its regulations

to bodies corporate having a function to regulate the conduct of lot owners to ensure that they had reasonable regard for the interests of other persons (except when using the common property).

111. However, the fact that Parliament did intend the bodies corporate would have at least some role to play in the regulation of the conduct of lot owners is demonstrated by the following:

(a) strata title legislation was enacted to provide for the growing trend of persons to live in close proximity in new developments and, in the precursor to the Subdivision Act 1988 (Vic), the then Minister for Labour

and Industry referred to the fact that it was necessary to provide some means of ensuring that people who ate living close to each other have reasonable regard for the interests of other people.

- (b) Pursuant to reg 202(1)(h) of the *Subdivision (Body Corporate Regulations) 2001 (Vic)* bodies corporate have the powers conferred on it by their rules and the regulations. Accordingly, by reg 219 the Standard Rules applied to all bodies corporate. The Standard Rules principal relate to the common property, but they also impose obligations on lot owners not to allow their lot to be used for any purpose which may be illegal or injurious to the reputation of the development or may cause a nuisance or hazard to

any other member or occupier of any lot; or to permit undue noise in or about any lot. It specifically proscribes the making of noise from music or machinery which may be heard outside the owner's lot between midnight and 8.00 am.

112. In my opinion the following matters indicate that it was Parliament's intention that a body corporate powers with respect to the regulation of conduct on lots would be limited to its powers to enforce the Standard Rules:

- (a) as noted above, there is a complete absence of any reference in the Subdivision Act 1988 (Vic), including its regulations, to any function to regulate conduct between lot owners.
- (b) the Standard Rules, which do not include conduct rules, applied to all bodies corporate and cannot be altered.
- (c) the only expressed power to regulate conduct arises from the functions and powers to enforce the rules of the body corporate."

37. In relation to the rule making power under the *Owners Corporation Act 2006* the following was stated at paragraph 175 in *Balcombe*:

“To determine the statutory purpose of the *Owners Corporation Act 2006* I have again had regard to the following:

- (a) The main purposes of the Act include ‘to provide for the management of powers and functions of owners corporations’. As noted above in paragraph 67, the Explanatory Memorandum stated that: ‘The Bill provides greater duties functions, powers and responsibilities for owners corporations to manage common property than are provided by the current *Subdivision (Body Corporate Regulations) 2001 (Vic)*.
- (b) Section 4 of the Act sets out the functions of owners corporations which are, for practical purposes relevantly the same as those set out under reg 201 of the *Subdivision (Body Corporate Regulations) 2001 (Vic)*. As summarized in paragraph 109(b). Section 6 provides for the powers of an owners corporation which, although less specific powers are set out, in substance provide that an owners corporation with the powers which are necessary to enable it to perform its functions, just as reg 202 of the *Subdivision (Body Corporate Regulations) 2001 (Vic)* did in respect of bodies corporate.
- (c) The balance of Part 2 of the Act provides some powers to owners corporations with respect to the provision of services, the bringing of legal proceedings and the common property. Part 3 deals with financial and asset management together with insurance. Parts 4, 5 and 6 deal with governance and management of an owners corporation including the rules of an owners corporation.
- (d) Section 138(1) gives an owners corporation the power to make rules for and with respect to the matters set out in Schedule 1. As set out in paragraph 72 above, Schedule 1 includes powers that relate to governance, organisation, management, administration, the use of common property and conduct matter.”

38. The following was stated at paragraph 175 in *Balcombe*:

‘In my opinion, the prohibition of businesses generally and specifically businesses related to short term letting exceeded the scope of what was intended by the Parliament in enacting the *Owners Corporation Act 2006* principally for similar reasons to those set out with respect to the *Subdivision (Body Corporate Regulations) 2001 (Vic)* ...’

39. It is interesting to note that notwithstanding the power of the owners corporation under the *Owners Corporation Act 2006* to make rules for or with respect to any matter set out in Schedule 1, the court considered that such powers were not sufficient to allow the owners corporation to make rules with respect to short term letting.

### **OWNERS CORPORATIONS REGULATIONS 2018**

40. The *Owners Corporations Regulations 2018* have been introduced since this decision. R. 11 of these regulations has introduced new model rules for an owners corporation. Model Rule 6.1 now provides that an owner or occupier of a lot must take all reasonable steps to ensure that guests of the owner or occupier do not behave in a manner likely to unreasonably interfere with the peaceful enjoyment of any other person entitled to use the common property.

### **OWNERS CORPORATION RP 3454 v BELINDA AINLEY [2017] VSC 384**

41. In this case the owners corporation was incorporated under the *Strata Titles Act 1967*. The subdivision consisted of six attached single storey villa units. The owner of Lot 1 was granted a planning permit to build a second storey extension to her unit. Lot 1 was the front unit.
42. After the planning permit was granted (which was granted by VCAT as the council had refused the permit) the owners corporation passed a special rule which provided as follows:

‘No member shall:

(a) construct a second storey on their unit;

(b) alter the external facade of their unit, including windows and entrance porches for the existing cream brickwork;

(c) erect any structure or appurtenance on the exterior of their unit without the consent of members as required by the Act.’

43. It is noteworthy that the owners corporation had objected to the grant of the planning permit and the special rule was passed after the planning permit was granted. Accordingly, it was not likely that consent would be given to the second storey extension to Lot 1.
44. The owners corporation issued proceedings at VCAT seeking to restrain the owner of Lot 1 from building the second storey extension and alleged that such conduct was in breach of the special rule. VCAT found that the special

- rule was invalid as being ultra vires and dismissed the proceeding. The owners corporation appealed to the Supreme Court.
45. In *Ainley* the court was specifically concerned with the power of the owners corporation under the *Owners Corporation Act 2006* to make rules for or with respect to any matter set out in Schedule 1. The owners corporation contended, amongst other things, that the special rule was permissible by reason of the power contained in Schedule 1 to make rules for or with respect to the 'external appearance of lots'.
46. In *Ainley* the court adopted the reasoning in *Balcombe* that '... the principal functions of an OC is to manage and administer the common property of the subdivision.'
47. In *Ainley* it was stated at paragraph 72 as follows:

'72. In the context of the OC Act as a whole and its principal purpose, and the subject matter described in the clauses of sch 1, the limitation of the rule making power to the purposes of 'control, management, administration, use or enjoyment' does not extend beyond regulation in a general sense. It does not extend to preventing, suppressing or prohibiting the

thing or course of conduct subject to a discretionary power to dispense with that prohibition. The rule making power does not explicitly authorise rules that extends to prohibiting matters within the field of the power, although it is clear enough that as a matter of law, depending on the words of the rule making power and the statutory context, the power to regulate an activity may include the power to prohibit aspects of the activity particularly if subject to discretionary dispensation.

73. Special rule 2 is not, however, of that character. Renovating a unit and adding a storey is not an 'aspect' of the external appearance of a lot. An aspect of the external appearance might be prohibiting advertising boards, for example. Adding a second storey is adding a structure on top of the existing unit on the lot. Special rule 2 prevents a lot owner from carrying out building works within the lot which are otherwise permissible at law.'
48. The court also found that the enforcement of a rule regarding external appearance should properly take place in the planning permit process. In particular, at paragraph 82 it was stated as follows:

'Having regard to the requirement cast upon lot owners to give notice to the OC of any application for a building or planning permit (OC Act

s. 133), the place in which to seek to enforce a properly made rule designed to maintain some uniformity of appearance is in the process and proceedings of the lot owner obtaining the necessary permits. Not after that process is over.'

49. Further, at paragraph 85 onwards it was stated that:

'Additionally, the rule making power given to the OC needs to be considered in the context of not only the OC Act, its purpose and history, but particularly having regard to s. 140 in the context of the legislative regime established in Victoria relating to planning and building.

... It is also a material consideration that special rule 2, properly characterized, amounts to a substantial interference with the proprietary rights of a lot owner by, in effect, prohibiting the construction of a second storey on a lot, and the matters in special rule 2(b) and (c). In this case, the upper limit of lot 1 extends 20 feet from ground level and it is clear that the current gable roof of lot 1 is well below that level. It is, I think, common ground that the second storey to be constructed in accordance with the planning permit will be entirely within the boundaries of lot 1. This then leads to the second of the propositions stated by Riordan J in *Balcombe* that the OIC Act does not disclose any intention for an OC to have power to interfere with lot owners' proprietary rights; or for an OC effectively to have an unappealable right to overrule uses permitted under planning legislation. The conferral of a power of that kind would require clear and unambiguous language in the OC Act. ...

Special rule 2, particularly 2(a), effectively removes the right of the owner of lot 1 to develop the lot, which is their property, as they see fit in accordance with the law. ...

The statutory purpose of the rule making power is confined, in my view, so that it does not substantially interfere with the proprietary rights of the lot owners. Given that restriction, the construction placed upon the ambit of the power by the Tribunal appears to me to be entirely correct. The Tribunal reasoned that the external appearance power in sch 1, cl 5 of the OC Act gives the OC a power to make rules with respect to the aesthetic look of a lot, but not limited to colour and conformity of appearance to other lots and the common property. That seems to me to be a completely acceptable construction of the power. The Tribunal went on to say that the power does not extend to what can be built, or how it must be built, but is confined to regulating the appearance of what is built or to be built.

Again, this seems to me to be a proper construction of the rule making power in the context of the OC Act as it has been construed in Balcombe.’

50. Model Rule 5.2 introduced by the *Owners Corporations Regulations 2018* since this decision was made now provides that an owner or occupier of a lot must obtain the written approval of the owners corporation before making any changes to the external appearance of their lot. An owners corporation cannot unreasonably withhold approval but approval may be given subject to reasonable conditions to protect quiet enjoyment of other lot owners, structural integrity or the value of other lots and common property.

### **ELWICK 9 v FREEMAN [2018] VSC 234**

51. In this case, the rule of the owners corporation provided, amongst other things, that a member or occupier of a lot, must not:

‘make or permit to be made noise from music, machinery or other, including social gatherings, musical instruments, television sets, radios, stereos, CD players or the like which may be heard outside the lot owner’s lot between the hours of 10.00 pm and 8.00 am.’

52. The applicant obtained a planning permit to use the ground floor lot as a gym. The planning permit which was obtained provided that the gym could operate from 6.00 am and that no amplified music may be audible outside the building between the hours of 7 pm and 9 am.
53. VCAT ordered that the lot owner comply with the owners corporation rules and in particular ordered that the gym should not commence operation earlier than 8 am.
54. The court found that the order was incorrect as the owners corporation rules were inconsistent with planning permit and accordingly were affected by the operation of s. 140 of the *Owners Corporation Act 2006*.
55. At paragraph 126 the court stated as follows:

‘The planning permit allows the gym to operate from 6.00 am whereas the orders made by the Tribunal on 9 November 2017 restrict the operation until 8.00 am. The orders clearly limit the right enjoyed by the permit holder to use the land for a gym pursuant to the terms of the permit and are thus inconsistent with that right. It is both inconsistent with and a limitation of the planning permission granted pursuant to the PE Act to restrict the hours of operation to 8.00 am.

Consequently the decision of the Tribunal to make such an order is beyond the power and extent of the rules because to interpret the rules in a manner which overrides or limits the permit is inconsistent with s. 140 of the OC Act.'

### **SULOMAR v OWNERS CORPORATION NO.1 PS511700W [2016] VCAT 1502**

56. This case concerned the rules of an owners corporation at Sanctuary Lakes. This was a staged development of about 3,000 vacant building lots. Additional rules were made under the *Subdivision (Body Corporate Regulations) 2001 (Vic)*. These rules sought to enforce a building code and to require lot owners to maintain the council owned nature strip, to use a particular security system, to keep a dwelling occupied, to obtain approval from the owners corporation for any building plans and to prevent the parking of commercial vehicles on lots.
57. VCAT applied the principles established in *Balcombe* and found that the owners corporation did not have the power to make the disputed rules as the owners corporation had only limited powers to make rules to regulate private lots. However, the rule requiring a lot owner to submit building plans was ruled to be valid insofar as it was enforced to protect common property as it was found that the owners corporation was entitled to ensure that any proposed building did not encroach onto common property.

### **OWNERS CORPORATION SP24474 v WATKINS [2016] VCAT 1312**

58. In this case in 2013 the owners corporation passed two special rules the first of which banned pets from common property and the second of which banned pets from private lots.
59. VCAT found that the rule banning pets from private lots was invalid. The principles in *Balcombe* were relied upon and it was found that the rule did not have any sufficient connection with the rule making power in Schedule 1 of the *Owners Corporation Act 2006* and that it was an unlawful interference in private property rights
60. In relation to the rule banning pets from common property it was considered relevant that the only common property that pets could traverse was the common property driveway. The rule was found to be invalid as unfairly discriminating against lot owners who were pet owners as there was no reasonable justification for a prohibition on pets using common property in the circumstances of the subdivision.
61. The *Owners Corporations Regulations 2018* which have been introduced since this decision have introduced new Model Rule 4.1. This now provides that if the owners corporation has resolved that an animal is a danger or is causing a nuisance to the common property it must give reasonable notice of the resolution to the owner or occupier who is keeping the animal. The owner or occupier who is keeping the animal must remove the animal. This

rule does not apply to an animal that assists a person with an impairment or disability.

**NICHOLAS JONES**  
**Barrister**  
**Owen Dixon Chambers.**