



Debt Recovery Best Practice Guideline

This practice guideline has been developed to guide you through the process of debt recovery in accordance with the legislative obligations and powers of an owners corporation.

BACKGROUND

CONTACT WITH AN INDEBTED LOT OWNER

PRIVACY OBLIGATIONS TO THE INDEBTED LOT OWNER

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Debt Recovery

SCA (Vic) recommends these processes be followed to manage the recovery of money owed to an owners corporation. These processes recognise the responsibilities of the owners corporation that are imposed by the Owners Corporations Act 2006 (“the Act”).

An obligation is placed on lot owners to pay any outstanding fees, charges, contributions or amounts owing to an owners corporation that have been levied in accordance with the provisions of the Act. If the fees are not paid by the lot owner, the owners corporation can recover the fees from the lot owner as a debt owed.

Due to its strict obligations under the Act, the owners corporation has no authority to discount or waive fees. Accordingly, it is imperative that the owners corporation follow this Practice Guideline to understand its powers and functions to ensure effective debt management.

Steps 1-6 as summarised below, are discussed in greater detail as part of the Procedure.

1. **Issue a fee notice**
2. **Issue a final fee notice**
3. **Telephone/Email Contact & Issuing a letter of demand**
4. **Making an application to the Victorian Civil and Administrative Tribunal (“VCAT”)**
5. **VCAT Hearing**
6. **Registration of the VCAT Order**
7. **Filing a complaint in the Magistrates’ Court**
8. **Enforcement**
9. **Payment Plans**

Background

An owners corporation relies on being able to levy fees in order to fulfil its maintenance and administrative responsibilities. The maintenance and administrative funding requirements must be resolved upon by the owners corporation and:

- » apportioned to each lot owner according to the lot liability of the particular lot; and/or
- » apportioned to lot owner(s) according to the principle that the lot that benefits more pays more (where provided for under the Act).

In resolving upon the owners corporation’s funding requirements the resolutions should also address;

- » the frequency with which those fees are levied; and
- » the payment by a lot owner of penalty interest upon any sum of fees outstanding.

The funding resolutions must be recorded in the minutes of the meeting because the proof of the funding resolutions being properly made underpins the validity of the debt recovery process.

Without the resolutions to levy fees and charges being properly passed and duly recorded the owners corporation risks having VCAT or the Magistrates’ Court dismiss any debt recovery proceeding based on those resolutions and the owners corporation will then be unable to pursue any further recovery until it has regularised those resolutions.

Insofar as the process of debt recovery itself is concerned, it is recommended that two matters are formally resolved upon if fees remain outstanding after the owners corporation complies with its obligations to issue the fee notice and final fee notice.

These resolutions may be undertaken either by the owners corporation in general meeting by ordinary resolution (or by a ballot of all the lot owners); or alternatively by the owners corporation committee in committee meeting (or by a ballot of the committee members), and are:

- » whether debt recovery action proceedings are to be undertaken by the owners corporation in VCAT or in the Magistrates’ Court; and
- » the threshold of unpaid fee instalments that warrants debt recovery action.

This threshold may be described either in terms of the number of the fee payments missed or in terms of a specified cash figure. Such a resolution by the owners corporation or its committee provides a guideline to the

owners corporation manager and serves to avoid allegations of unfair treatment of defaulting lot owners.

In setting the threshold the owners corporation or its committee should be mindful of the costs involved in pursuing debt recovery action, not least because either VCAT or the Magistrates' Court may not be minded to award costs against an indebted lot owner if those costs are only marginally less than the debt being pursued.

It is important to note that the registered proprietor of the lot at any given time is liable for outstanding fees and charges (and so is any person entitled to receive the rents and profits from that lot, such as a bank or other mortgagee that has taken possession).

The impact of this is that a debt arising out of outstanding fees, charges, contributions or amounts owing to the owners corporation in respect of that lot, stays with the lot and does not follow the indebted lot owner. Thus a new registered proprietor who has bought the lot from the indebted lot owner may now be liable to pay the outstanding amount to the owners corporation.

Requests by indebted lot owners for information or further copies of Fee Notices and Final Fee Notices should not be ignored because failure to provide information may constitute, in certain circumstances, either misleading and deceptive conduct or unconscionable conduct.

Contact with an indebted lot owner

Sometimes contact with indebted lot owners can be problematic and in April 2021 the Australian Competition & Consumer Commission (ACCC) issued its "Debt collection guideline: for collectors and creditors" to assist with making such contact and to which this Best Practice Guideline refers.

The tension that may arise when engaging with an indebted lot owner can obscure some simple propositions:

- » It is vital, when making direct contact with an indebted lot owner, that the manager first establishes that the person being dealt with is in fact the indebted lot owner, that is to say the registered proprietor of the lot (or a director or trustee of the registered proprietor). This should be done to maintain the indebted lot owner's privacy and to ensure that confidential information is not disclosed; and
- » The ACCC has stated that unnecessary or unduly frequent contact with an indebted lot owner may amount to undue harassment. The ACCC recommends that an indebted lot owner is not contacted more than three times per week, or ten times per month at most.

When and how contact should be made?

- » Within this context telephone contact should only be made during reasonable hours and these can be considered to be on Monday to Friday between 7:30 am to 9 pm and on weekends between 9 am to 9 pm.
- » Contact should be avoided on national public holidays such as New Year's Day, Australia Day, Good Friday, Easter Sunday, Easter Monday, Anzac Day, Christmas Day and Boxing Day); on state holidays (such as Labour Day, Queen's Birthday and Melbourne Cup Day); and on culture- or faith-based holidays that traditionally feature significant restrictions on undertaking work (such as Birth of Bahá'u'lláh, Chinese New Year, Diwali, Eid al-Adha, Eid al-Fitr, Pascha, Pesach, Rosh Hashanah, Shavuot, Shemini Atzeret, Simchat Torah, Sukkot, and Yom Kippur).
- » However, not all contact occurring during these times will automatically be considered 'reasonable', particularly if an indebted lot owner requests that contact only be made on specific days or during specific times - and has a good reason for doing so, which might include shift-work or caring for a child or aged relative. Nevertheless, if these requested contact times repeatedly result (over a reasonable period of time) in being unable to reach the indebted lot owner, they may be revised without further reference to the indebted lot owner in order to make contact again.
- » In considering how contact should be made with an indebted lot owner, contact should primarily be made by letter to the address as advised under section 148(b) of the Owners Corporations Act 2006. Furthermore, some statutory notices must be sent to a particular address and using this particular address for copies of correspondence is recommended.
- » Alternatively, in the case of an indebted lot owner who does not occupy the lot or who has been absent from the lot for more than 3 months, the mailing address provided under section 135(1) of the Owners Corporations Act 2006 will be appropriate.
- » Email or telephone is also an appropriate mode of contact. However the consent of the indebted lot owner is ordinarily required for these modes of contact. Such consent may be inferred from past practice by which an indebted lot owner has provided the owner corporation, its committee (or a member thereof) or its manager with their contact telephone number or their contact email address.
- » If an indebted lot owner provides a contact

- telephone number (including mobile phone), contact using that number will be appropriate whatever the indebted lot owner's location.
- » It is important to note that, in Victoria, section 45(2) of the Australian Consumer Law and Fair Trading Act 2012 (Vic) details an array of debt collection practices that are prohibited.
 - » Of these prohibited debt collection practices, sub-section 45(2)(l) specifically prohibits "*contacting a person by a method that the person has asked not to be used, unless there is no other method available*" and sub-section 45(2)(m) specifically prohibits "*contacting a person about a debt after the person advises in writing that no further communication should be made about that debt, unless the contact is by way of—(i) an action issued through a court or VCAT; or (ii) the threat of an action that the person to whom the debt is owed is entitled to issue through a court or VCAT and which the person intends to take; or (iii) a communication with the person for the purposes of complying with the National Credit Code*".
 - » Insofar as sub-section 45(2)(l) is concerned, if the indebted lot owner has asked that a particular contact method not be used then it is reasonable to ask the indebted lot owner to nominate an alternative contact method.
 - » Unduly frequent contact with an indebted lot owner risks being considered as intended to wear down or exhaust an indebted lot owner and may be deemed '*undue harassment or coercion*' (i.e. '*a prohibited debt collection practice*' according to the Australian Consumer Law and Fair Trading Act 2012 (Vic)). Likewise, frequent attempts to make contact with an indebted lot owner may also be considered unreasonable and may similarly amount to '*undue harassment*'. Examples might include a person persistently attending at the indebted lot owner's address, persistently dialling a telephone number or repeatedly emailing, or the use of 'robo-calling' and 'auto texting' where contact is attempted repeatedly within a short space of time after each attempted contact.
 - » Making face-to-face contact with the indebted lot owner at their home should be considered the option of last resort to be undertaken only because an indebted lot owner refuses or fails to respond to other means of communication or for the purposes of confirming the identity and location of the indebted lot owner.
 - » Making face-to-face contact with the indebted lot owner at their home ought to be avoided except as a last resort because of the potential for breach of the indebted lot owner's privacy through the unintended involvement of other persons, the possibility of inappropriate behaviour occurring and the difficulty of making an accurate record of the encounter.
 - » Where such face-to-face contact with an indebted lot owner is deemed necessary it ought not to occur without having sought the indebted lot owner's permission to visit the indebted lot owner in their home and having explained the debt recovery purpose of the visit. It should only take place at a mutually convenient time during the weekday reasonable hours of contact given above and, if the indebted lot owner refuses the visit, the proposed visit must be cancelled.
 - » The indebted lot owner should be given the opportunity to propose delaying the face-to-face contact in order to either seek advice, support, or representation from a third party.
 - » A visit to an indebted lot owner's home must not occur if it is known that special circumstances exist which would make face-to-face contact inappropriate (for example, if the indebted lot owner is seriously ill or mentally incapacitated, or there is the possibility that a member of the indebted lot owner's household who is seriously ill or mentally incapacitated is likely to be present).
 - » Anyone attending the indebted lot owner's home who becomes aware of such special circumstances during a face-to-face visit must leave the indebted lot owner's home immediately. In any event anyone attending an indebted lot owner's home must leave immediately if, at any time, they are asked to do so by someone in the home.
 - » Anyone attending an indebted lot owner's home for the purposes of face-to-face contact with an indebted lot owner should arrive promptly and depart promptly so as to avoid conveying the impression that the indebted lot owner or a member of the indebted lot owner's household is under surveillance.
 - » Making face-to-face contact with the indebted lot owner at a place of work should only be considered in the event that the indebted lot owner is a corporation and the place of work in question is the registered office of the indebted lot owner or is its usual place of business and the face-to-face contact contemplated is with the proxy of the indebted lot owner.
 - » Otherwise, visiting an indebted lot owner at a place of work, especially if there was no prior appointment for the visit, may be regarded as an attempt to pressurise the indebted lot owner by causing or

threatening to cause them embarrassment. This is likely to constitute '*undue harassment or coercion*' of the indebted lot owner.

- » It should be noted that this cautionary guidance is not intended to limit otherwise legally permissible face-to-face contact, for example a visit for the serving of legal process (usually accomplished by a process server) or for the enforcement of court orders by officers appropriately authorised by the relevant court.
- » Unless there is a valid reason for making additional contact or attempts at contact (for example, negotiating the details of an agreement for a payment plan) further efforts to contact the indebted lot owner should stop once the recommended contact limits detailed above have reached unless the indebted lot owner is prepared to continue the contact.
- » It is recommended that once contact has been made a reasonable interval is allowed before the next contact is made with the indebted lot owner to follow up on resolving the debt.

Where contact should be made?

- » The indebted lot owner's address as advised under section 148(b) of the Owners Corporations Act 2006 will usually be the appropriate place to make contact.
- » However, it is possible that an indebted lot owner may be reluctant to be contacted at their home. In such circumstances the indebted lot owner should be permitted to nominate an alternative location for contact provided that it is a reasonable location to use for contact (i.e. within the State, or at least within Australia).
- » Contacting an indebted lot owner at on a work telephone number or a work email should be avoided unless that work telephone number or work email address was volunteered by the indebted lot owner.
- » It should be borne in mind that contact made with an indebted lot owner at their place of work risks compromising the indebted lot owner's privacy and therefore the indebted lot owner should – in the case of a telephone call - be offered the opportunity to return the call or to provide another number on which to receive a call-back at a more convenient time or to nominate a preferred time for contact, or – in the case of an email - to provide another email address.

indebted lot owner

- » There are legal obligations under the Privacy Act 1988 (Cth) (the Privacy Act) intended to protect the privacy of an indebted lot owner's personal information.
- » Personal information must be kept secure against unauthorised access, loss, misuse or interference.
- » Beware that, in informing a third party that debt recovery is the reason for trying to find an indebted lot owner, a disclosure of personal information about the indebted lot owner is being made. Therefore caution should be exercised in communicating with the indebted lot owner to avoid those communications being accessed by third parties.
- » Voicemail messages expressing interest in contacting the indebted lot owner should be carefully phrased so as to avoid any inference of interest in collecting a debt.
- » Only personal information that is reasonably necessary to recover the debt owed by an indebted lot owner should be collected and that information should not be used or disclosed for a purpose other than that for which it was collected i.e. debt recovery. Reasonable steps should be taken to ensure that the personal information being collected is accurate, complete and up-to-date.
- » An indebted lot owner's social media account should not have material 'posted' to it that could risk being used in a manner that would compromise the indebted lot owner's privacy, for example, a post that can be viewed by a third party.
- » The indebted lot owner has a right to access and correct the personal information collected and certain procedures must be followed to facilitate that access or correction.
- » An indebted lot owner has a right to have an authorised representative (such as a financial counsellor, financial advisor, community worker, solicitor, guardian or carer) represent them or advocate on their behalf about a debt. An indebted lot owner should not – except in very particular circumstances – be contacted directly after the creditor knows, or should know, that the indebted lot owner is represented.
- » Records should be maintained of all communications and attempted contacts with the indebted lot owner and the indebted lot owner's representative, including the time, date and nature of telephone calls and emails about the debt.

Privacy obligations to the

Allocation of funds

- » It is common practice amongst owners corporations and their managers to appropriate payments made by an indebted lot owner to the oldest debts on their account and to pursue a claim for whatever arrears remain with each successive Fee Notice.
- » However it sometimes happens that an indebted lot owner is in dispute with the owners corporation about liability to pay a particular fee or charge and is only prepared to pay for certain items that feature on the Fee Notice. In such circumstances VCAT has applied general contract law principles on the appropriation of payments that permit the indebted lot owner to do this – despite any inconvenience to the owners corporation and its manager- as follows:
 - Where several separate debts are due from a lot owner to the owners corporation, the lot owner may, when making a payment, appropriate the money paid to a particular debt or debts.
 - If the owners corporation accepts the payment so appropriated, the owners corporation must apply it in the manner directed by the lot owner.
 - If, however, the lot owner makes no appropriation when making the payment, the owners corporation may make the appropriation.
 - An appropriation by the lot owner must take the form of a communication, express or implied, to the owners corporation of the lot owner's intention to appropriate the payment to a specified debt or debts, so that the owners corporation may know that its rights of appropriation as a creditor cannot arise.¹

¹ Paraphrased from *Chitty on Contracts*, 28th edition (1999) paragraph 22-059 onwards as cited in *Owners Corporation RP003913 v Shafer (Owners Corporation) [2012] VCAT 1559 (12 October 2012) per Senior Member Vassie at paragraph 28.*

Procedure

1. Issue a Fee Notice

S31 Pursuant to section 31 of the Act, the owners corporation must issue a Fee Notice to the lot owner to recover fees and charges.

The Fee Notice must:

- » State that the lot owner has an obligation to pay the fees and charges within 28 days;
- » State that interest at the rate specified in the Fee Notice will be payable in respect

of any overdue fees and charges; and

- » Include details of the dispute resolution process that applies in respect of disputed fees and charges.
- » Feature the correct name of the registered proprietor of the lot as detailed on title. This can be discovered by undertaking a title search on the lot in question.
- S31(1)** » The notice must be in the approved form; section 31(1).

You can view this approved form via the Consumer Affairs Victoria website.

<http://www.consumer.vic.gov.au/resources-and-education/forms-and-publications>

As these are statutory requirements, failure to comply will invalidate the Fee Notice. In addition, owners corporations should ensure they specify the Due Date to prevent any disputes relating to the time period allowed to the lot owner for payment.

It is imperative that the owners corporation addresses the Fee Notice to the actual registered proprietor of the lot. Furthermore, the Fee Notice should be addressed to the lot owner at his or her last known address or at the address on title of the registered proprietor of the lot in question.

Whilst lot owners have obligations to notify the owners corporation about changes in address or ownership, the owners corporation should remain diligent in keeping up-to-date records of all addresses advised by lot owners.

This will minimise the indebted lot owner's ability to challenge the Fee Notice because, as VCAT has observed, "Obviously a notice that is given or sent to a postal address nominated by the lot owner is effectively given or sent. Whether a notice given or sent to a postal address different from the nominated one is validly given or sent will depend on the circumstances."

S135 Regardless, lot owners who do not occupy the lot or who will be absent for more than 3 months must notify the owners corporation of their new mailing address pursuant to section 135 of the Act.

If this is not provided, the owners corporation should continue sending all Notices to the lot owner's last known Australian address.

S158 However if the lot owner has not nominated an address in Australia then the owners corporation may effect service on the lot owner by posting the notice to the last known address of the lot owner in Australia.

If an address nominated by the lot owner is not known or if a notice sent to that address is returned, then the owners corporation may effect service on the lot owner in any other manner VCAT considers appropriate. It is suggested that VCAT would consider appropriate the options identified in Part 10 of the Act at s 158:

- » by post addressed to the person at the address of the lot, if the person is the occupier of a lot; or
- » by leaving it personally with the person; or
- » by leaving it in the form of a letter in the letterbox for the lot; or
- » by leaving it with an occupier of the lot who is apparently over the age of 16 years; or
- » if the person is not the occupier of the lot, by post to any address the person has provided to the owners corporation as the address for the service of notices.

S23 The Fee Notice should only include charges raised in accordance with lot liability; s23.

There are however, exceptions to this:

S29 » when elements of penalty interest are included in outstanding fees; s29.

The owners corporation's resolution to charge penalty interest on outstanding fees should be reconfirmed at each Annual General Meeting where the rate at which it was agreed to charge interest should also be resolved and minuted e.g. resolved to charge penalty interest 'at the maximum rate' of interest payable under the Penalty Interest Rates Act 1983. To avoid confusion or passing a resolution that could become invalid when and if the PI rate changes, the actual numerical rate e.g. 10%, 10.5%, 11% etc. should not be stipulated.

PIR Act The Owners Corporations Act 2006 provides that an owners corporation must not exceed the maximum rate of interest payable under the Penalty Interest Rates Act 1983. The current penalty interest rate is available at:

<https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values/>

S47(2) » when fees include the cost for the owners corporation to repair and maintain a service in or relating to a lot at the request of the lot owner; s47(2).

In such instances it may have been impracticable for the lot owner to repair or maintain that service.

S48(4) » When the fees include the cost for the owners corporation to carry out works undertaken to the lot; s48(4).

In such instances the lot owner would have failed to comply with a notice issued by the owners corporation, to carry out repairs, maintenance or other works that adversely affect the outward

appearance or outward state of the lot or use and enjoyment of the lots or common property by other lot owners.

S24
S49 » when fees include the cost of repairs, maintenance or other works undertaken wholly or substantially for the benefit of some only of the lots from the lot owners; s 24 & s49.

In this instance the amount payable by this particular lot owner may have been resolved upon by the owners corporation on the basis that this lot has benefited more and thus the lot owner should pay more.

In these circumstances the resolution by the owners corporation must explicitly state the rationale for the decision that a given lot has benefited more and thus that lot owner should pay more. If the owners corporation is unable to satisfy VCAT that the rationale was arrived at by the owners corporation acting honestly and in good faith then there is the likelihood that VCAT will refuse to make an order for the recovery of the debt.

Fee Notices should avoid featuring 'carried forward' balances. Such balances will inevitably prompt VCAT to question what particular fees and charges have made up the 'carried forward' amount.

If either the basis of the 'carried forward' fees and charges cannot be justified by reference to particular resolutions or if the apportionment of the 'carried forward' fees and charges according to lot liability cannot be demonstrated there is the likelihood that VCAT will refuse to make an order for their recovery.

Evidence to support a claim should consist of ledger/lot owner cards providing a transactional history of the fees/charges and identify the description (including

what type of fee and dates) for each fee/charge levied against that lot owner's account.

It should also include minutes from all meetings at which the fees/levies were approved and minuted, as well as any budgets and levy schedules provided to the OC members confirming the total budget and apportionment of costs.

2. Issue a Final Fee Notice

If the fees and charges have not been paid within 28 days after the date of the Fee Notice, the owners corporation can issue a Final Fee Notice to the lot owner.

Pursuant to section 32 of the Act, the Final Fee Notice must:

- S32**
- » State that the lot owner has an obligation to pay overdue fees and charges and interest immediately
 - » State with respect to interest (if this has been resolved upon by the owners corporation in general meeting):
 - the interest that is payable in respect of overdue fees and charges as at the date of Final Fee Notice; and
 - the amount of interest that will accrue daily until payment
- Part 11**
- » State that the owners corporation intends to take action under Part 11 of the Act to recover amount due if overdue fees and charges and interest owing are not paid within 28 days after the date of the Final Fee Notice.
 - » The notice must be in the approved form; s32(1).

S32(1) You can view this approved form via the Consumer Affairs Victoria website.

<http://www.consumer.vic.gov.au/resources-and-education/forms-and-publications>

The owners corporation must be careful that it specifies the same sum in the Final Fee Notice as is featured in the Fee Notice. If there is any difference, it provides an opportunity for a lot owner to dispute the validity of the Final Fee Notice and frustrate the debt recovery process.

Necessarily the owners corporation will continue to charge penalty interest and, to provide clarity to both the indebted lot owner as well as to VCAT, the penalty interest charges ought to appear on the Fee Notice (and ultimately on the Final Fee Notice) as a separate entry.

Neither Fee Notices nor Final Fee Notices should

feature legal costs, debt recovery agency costs or even the manager's costs incurred in pursuit of a particular debt unless such costs have been awarded by a Tribunal or Court. Another exception may be when that featured cost is the proportion of those legal/debt recovery/manager's costs to be borne by the lot owner after having being apportioned either according to lot liability or the benefit principle.

3. Telephone/Email Contact & Issuing a letter of demand

The manager may seek the guidance of the owners corporation or its committee in establishing a policy in respect of telephone/email contact with indebted lot owners. Such a policy would assist in protecting the manager from any allegation that the manager was repeatedly or unjustifiably contacting an indebted lot owner to press for payment of the debt.

It is best practice to maintain a diary and/or file notes that may also be called upon as evidence and confirm details of any and all calls made/emails sent and/or received. It should record the date, time and length of discussion where applicable, as well as identify the outcomes of the discussion/text that transpired.

Whilst the owners corporation is obliged to keep – as part of its records and its register - the name and address of each lot owner, the manager should be mindful that the owners corporation is not obliged by law to keep telephone/email contact details and may cause an offence to certain lot owners if it uses such details that have come into its possession in order to pursue debt payment. In general however, an owners corporation manager is entitled to use information it holds to carry out and perform its duties.

The manager should also be mindful of the ACCC's guidelines for the protection of the lot owner's personal information, which includes information about the lot owner as well as opinions. Speaking to the lot owner's family members, friends or acquaintances about their outstanding debt may be deemed a breach of the owners corporation's privacy obligations.

If the lot owner fails to comply with the terms of the Final Fee Notice, the owners corporation may decide to issue a letter of demand. Although there is no statutory obligation upon the owners corporation to issue a letter of demand the owners corporation or its committee may resolve that the defaulting lot owner be given a further chance to comply with the Final Fee Notice prior to recovery proceedings being commenced.

The owners corporation may also determine that, based on the management time involved, the number of outstanding indebted lot owners or the sums in arrears, the fee recovery process should be outsourced at this stage. In such circumstances solicitors or debt recovery agents who may be engaged to recover the outstanding fees should be

required to send a letter of demand to the indebted lot owner making clear that the management of the legal proceedings has been vested in them and providing a further opportunity for payment prior to these proceedings being undertaken.

A manager should seek legal advice regarding the content and formatting of any letters of demand that it sends out on behalf of an owners corporation to an indebted lot owner to avoid falling foul of the ACCC.

Letters of demand must be carefully constructed to avoid featuring phrases that the Federal Court has declared to be misleading or deceptive or likely to mislead or deceive. In particular, a letter of demand should not assert an obligation upon the indebted lot owner to pay all relevant administrative and/or legal costs incurred by the owners corporation because an indebted lot owner is only obliged to pay such costs as have been apportioned to that indebted lot owner according to lot liability. Similarly, phrases like “...*this will result in added legal costs*” should be avoided because they may be taken to imply that all the owners corporation’s legal costs will have to be borne by the indebted lot owner if the debt is not paid irrespective of whether the owners corporation succeeds in obtaining an order for payment of the debt.

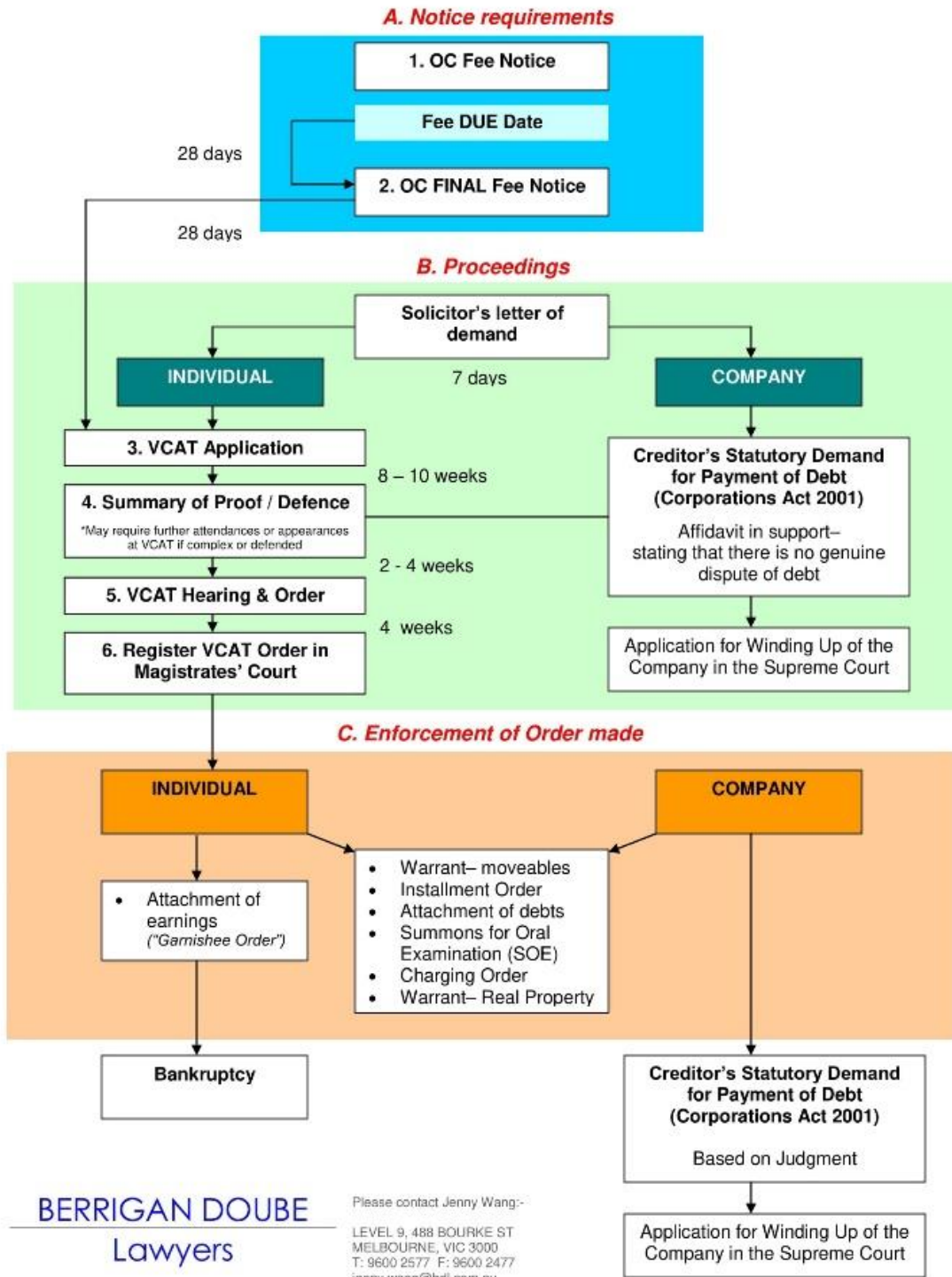
Moreover it is important that a letter of demand does not create the impression, either by the words contained within it or by it being formatted so that it looks like a court document, that the letter of demand itself might somehow be capable of being filed with a court.

In this context it is worth repeating that the manager ought not to place itself in the position where it might be accused of repeatedly contacting an indebted lot owner to press for payment of the debt and the ACCC has expressed the view that, “*Generally, undue harassment can be constituted by unnecessary or excessive contact or communication with an indebted lot owner calculated to intimidate, demoralised [sic] or exhaust them.*”²

² [Open letter from Scott Gregson, Group General Manager Enforcement Operations, Australian Competition & Consumer Commission \(ref 43373\) to the debt collection industry, 8 December 2011.](#)

4. Making an application to VCAT

Debt Recovery procedure:



If the indebted lot owner fails to comply with the Final Fee Notice and/or, if sent, the letter of demand, the owners corporation can apply to VCAT for an order requiring the lot owner to pay the debt.

S32

Application can only be made to VCAT if the amount is not paid within 28 days after the Final Fee Notice is given under section 32 of the Act.

S18(2) Section 18(2) of the Act, the owners corporation does not require a special resolution to make an application to VCAT for recovery of fees and other charges or contributions resolved upon by the owners corporation.

The application should be supported by a clear statement of the fees outstanding, copies of the relevant Fee Notices and Final Fee Notices and copies of the minutes of the owners corporation's meetings for every year that the debt exists (ie you should not limit inclusion to the most recent minutes but should provide minutes that passed resolutions to charge each and every outstanding debt).

Applications should feature the street address of the indebted lot owner. VCAT will not accept applications featuring a post box address.

For lot owners who reside overseas, an application for substituted service must be made to serve the VCAT application on the lot owner at their overseas address or via email. The owners corporation should be prepared to provide evidence as to why they reasonably believe the proposed substituted service address is likely to bring the application to the attention of the lot owner.

VCAT AA-S115C (1)(c) An owners corporation applicant in debt recovery, is likely to be awarded its application fee under section 115C(1)(c) of the Victorian Civil and Administrative Tribunal Act 1998. This raises a presumption as to reimbursement or payment of fees for debt recovery applications. Whilst the owners corporation's legal/administrative costs in such applications will fall to be considered separately by the Tribunal.

- » copies of the relevant Fee Notice and Final Fee Notice; and
- » copies of the minutes of the owners corporation's meetings at which the relevant fees and charges were properly resolved upon; and
- » proof that the indebted lot owner is the registered proprietor of the lot in question (title search); and
- » proof of the lot liability of the indebted lot owner's lot, together with overall lot liability for the plan of subdivision (e.g. this could be the Schedule of entitlement and liability found within the plan of subdivision); and
- » declarations of service of the Fee Notices and Final Fee Notice upon the lot owner.

The due date for the submission of this evidence will be advised by VCAT, as a general rule it is usually one month prior the hearing date.

Either party may object to the matter being heard on the papers. Similarly, VCAT may determine that the matter is not suitable to be heard on the papers. In this circumstance, both parties must attend the hearing of the application which will take place before a Member or Senior Member of VCAT.

The Applicant (owners corporation) may ask VCAT to make Orders that include not only the payment of the outstanding fee debt but also for interest on the debt until the date of the hearing and for the payment of the Applicant's (owners corporation's) costs in making the application.

In making an application for costs consideration should be given to the additional time taken to prepare the VCAT application. Including the time taken to prepare and photocopy the supporting documentation, as well as the time spent away from the office. The calculation of the cost of time and document production should correspond to the rates charged in the contract of appointment of manager and should be supported by contemporaneous fee notes completed by the manager's staff and invoiced to the owners corporation.

5. VCAT Hearing

VCAT will inform the parties of the date and time of the hearing. The parties are the "Applicant", who is the party making the application (the owners corporation), and the "Respondent" who is the party against whom the application has been brought (the indebted lot owner).

In response to COVID-19, the majority of fee recovery hearings are held on the papers, which means that neither party is required to attend in person.

VCAT's decision will be based upon the statutory declarations and supporting evidence provided by both parties. The supporting evidence may include:

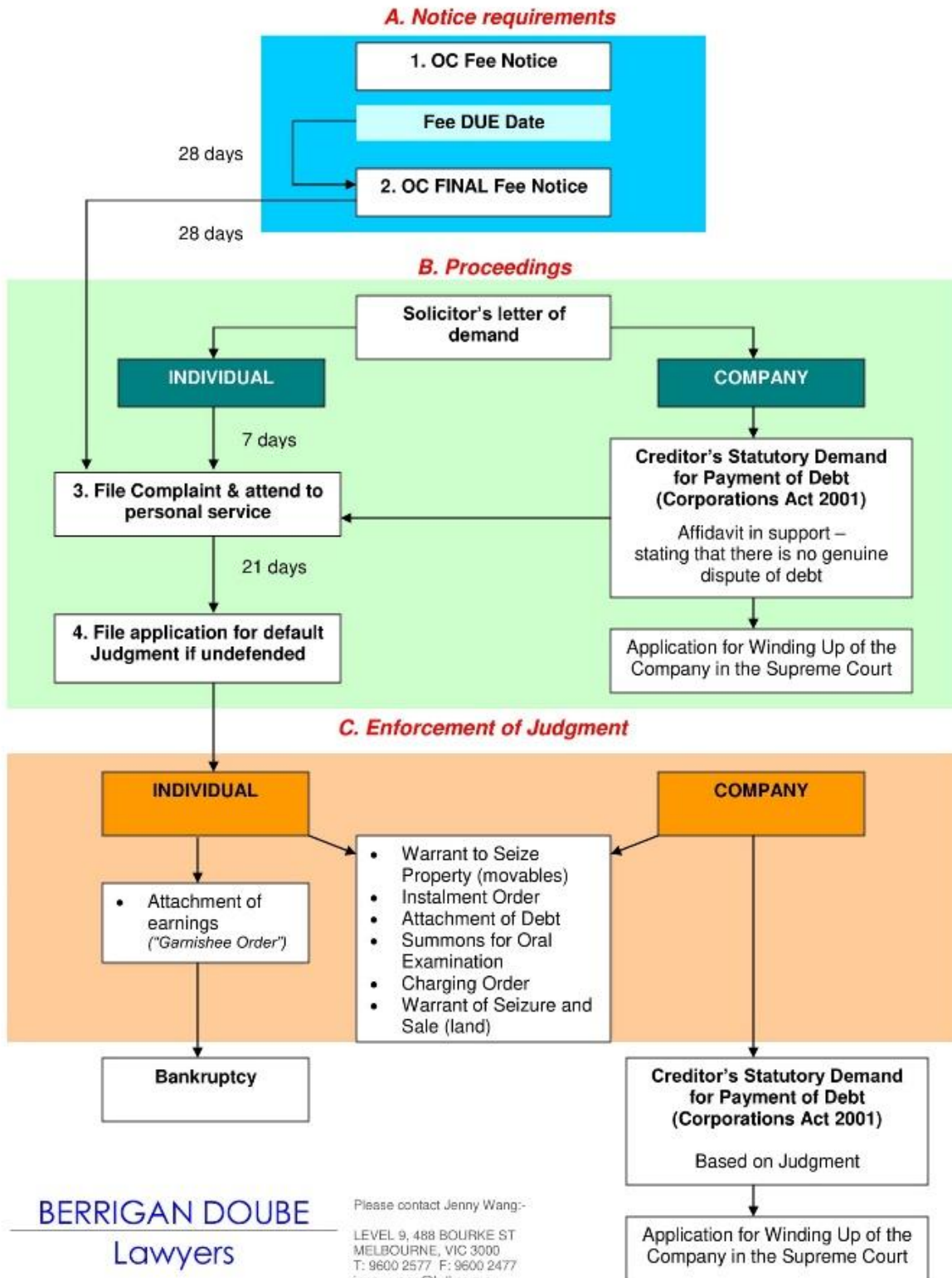
6. Registration of the VCAT Order

Should a lot owner fail to comply with an order of VCAT to pay any outstanding debts, the OC will need to apply to the Magistrates' court for an enforcement order.

Prior to any enforcement action the Applicant (owners corporation) must first register a copy of VCAT's Orders with the Registry of the Magistrates' Court. This registration enables the Applicant (OC) to pursue the enforcement of the debt as if the VCAT Orders were a judgment of the Magistrates' Court.

7. Filing a Complaint in the Magistrates' Court

Owners Corporation Fee Recovery Procedure – Magistrates' Court of Victoria:



An alternative to proceeding in VCAT is to initiate proceedings in the Magistrates' Court.

S32 A Complaint can only be filed in the Magistrates' Court if the amount is not paid within 28 days after the Final Fee Notice is given under section 32 of the Act.

S18(2) Pursuant to section 18(2) of the Act, the owners corporation requires an ordinary resolution to file a Complaint for the recovery of fees and other charges or contributions resolved upon by the owners corporation.

The Complaint should be supported by a Statement of Claim that sets out the fees outstanding and the liability of the indebted lot owner to pay the fees.

Once a Complaint has been filed it must be served personally upon the lot owner and an Affidavit of Service must be filed with the Court. The Complaint will contain a notice to the Respondent of the claim amount as well as the amount of costs being sought.

The Respondent has 21 days from the date of service of the Complaint to file a Notice of Defence with the Court. If the Respondent fails to do so, the owners corporation can apply for Default Judgement to be entered against the Respondent.

Upon a successful outcome, the owners corporation is likely to receive an order for payment of costs in accordance with the current Civil Court Fees Scale.

8. Enforcement

Despite the non-payment of the debt, its enforcement by a Court or by VCAT is not automatic. The owners corporation has to apply for enforcement of the judgment that has now been registered. It should be noted that the owners corporation does not have to formally resolve to enforce an order. All methods of enforcement require the payment of Magistrates Court fees but these can be added to the debt and are recoverable from the indebted lot owner.

The current fees can be viewed in the current Civil Court Fees Scale available at <https://www.mcv.vic.gov.au/news-and-resources/publications/civil-and-general-costs-ready-reckoner>

The most common forms of enforcement include:

- » Attachment of Debt
- » Attachment of Earnings Order
- » Instalment Order

- » Warrant to Seize Property
- » Summons for Oral Examination

Payment Plans

The ACCC encourages creditors to work with indebted lot owners and to adopt a flexible and realistic approach to payment plans, including making reasonable allowances for an indebted lot owner's ongoing living expenses and recognising that indebted lot owners who are experiencing financial difficulties will often have a number of debts owing to different creditors whilst ensuring that payment arrangements incorporated into a payment plan are meaningful and sustainable.

The owners corporation or the indebted lot owner may seek at any time in the debt recovery process to enter into a payment plan.

Importantly, as a creditor, an owners corporation must not mislead the indebted lot owner in the context of payment negotiations for a payment plan. For example, an owners corporation must not advise an indebted lot owner that it does not, or is unable to, enter into a payment plan when this is not the case.

It is also unacceptable for an owners corporation to pressure an indebted lot owner to pay in full or in unreasonably large instalments, or to pay a large upfront amount and state that only afterwards will it consider a payment plan.

Under no circumstances should an owners corporation or its officers or its manager provide indebted lot owners with financial advice.

Once finalised, the indebted lot owner should be given a reasonable opportunity for the payments to be made under the payment plan.

Generally, while a payment plan is in place, the indebted lot owner or their representative should not be contacted unless the indebted lot owner either asks for the owners corporation or its manager to make contact, or if the indebted lot owner fails to abide by the terms of the payment plan.

In addition, the owners corporation should still provide ongoing account statements to the indebted lot owner whilst the payment plan is operational.

Any decision on whether to enter into a payment plan should be agreed upon and endorsed by the committee of the owners corporation and recorded in the committee's minutes. However, care should be taken by the manager to ensure that personal information concerning the indebted lot owner's financial situation is kept as private as possible.

Although it should be noted that the owners corporation is not entitled use a payment plan to 'discount' any fees that are owing to it, the owners corporation may waive penalty interest but must report

any decision on whether to waive or not to waive to the Annual General Meeting, together with the reasons for that decision. It is therefore advisable that the owners corporation resolve in advance on any circumstances which may warrant the waiver of penalty interest.

When negotiating the terms of a payment plan, the owners corporation committee or the owners corporation manager should take care to avoid advising the indebted lot owner on methods to solve their debts, as this may be seen as giving financial advice. For instance, the ACCC considers it unacceptable to pressure an indebted lot owner to borrow money from friends or family, or to enter into further debt to pay off the debt to the owners corporation or to access their superannuation early.

The manager and the owners corporation's committee should consider if the payment plan is financially viable for the owners corporation's budget and cash flow. In order to avoid allegations of preferential treatment between indebted lot owners, the owners corporation should have an agreed-upon assessment process to review all proposals.

All payment plans should be in the form of a legally enforceable contract and be in a common format. The costs of drawing up the payment plan may be met by the indebted lot owner and incorporated into the sums recovered under the agreement.

In addition to any payment plan reached with an indebted lot owner being fully and accurately documented, a written copy of the agreed payment plan should be provided to the indebted lot owner on request. If the indebted lot owner does not agree with the way the payment plan has been recorded, they should be allowed to have an opportunity to clarify the arrangement with the owners corporation's committee.

Whilst many indebted lot owners only wish to enter into informal payment plans, it is worth noting that there are problems associated with agreeing to do this. The following are particular problems, which are likely to haunt both the owners corporation and its manager:

- » an informal arrangement on terms which do not have the endorsement of the committee risks exposing the manager to accusations of favouritism towards the indebted lot owner; and
- » in the event that the indebted lot owner defaults on an informal payment plan there is no evidence as to what the terms of the payment plan actually were; and
- » it is unlikely that VCAT or a court will enforce the terms of an informal payment plan if there is a dispute between the owners corporation and the indebted lot owner about what are the terms of the informal payment plan.

Resources:

- » Owners Corporations Act 2006 Sections 12(2), 14, 16, 18(2), 23, 23A, 24, 28, 29, 30, 31, 31(1), 32, 32(1), 47(2), 48(4), 49, 135, Part 11
- » Penalty Interest Rates Act 1983
- » Annexure – Summary of powers, functions and duties imposed
- » Magistrates Court website – Civil Court Fees Scale & Forms of Enforcement
- » Consumer Affairs Victoria website – approved Fee Notice & Final Fee Notice
- » VCAT Amendment Act - S115C(1)(c)
- » Australian Competition & Consumer Commission - Debt collection guideline: for collectors and creditors

SCA (Vic) wishes to acknowledge Berrigan Doube Lawyers for their contribution to this Practice Guideline.

This publication is only a guide. Readers should make and rely on their own expert enquiries. No warranty is given about the accuracy of the material and no liability for negligence or otherwise is assumed by SCA (Vic), its servants or agents in any way connected with this publication.

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Annexure – Summary of powers, functions and duties imposed

The OC Act provides the following powers, functions and duties on an OC to recover debts and fees:

- | | |
|--|---|
| <p>S18 OC must not bring legal proceedings unless authorized by special resolution; but If a matter is within the civil jurisdictional limit of the Magistrates' Court and an owners corporation is authorised to do so by ordinary resolution, the owners corporation may commence any legal proceeding in the Magistrates' Court; or VCAT or any other tribunal; or a court of another State or a Territory that corresponds to the Magistrates' Court.</p> | <p>on a lot owner relating to repairs, maintenance and other works arising from the particular use of a lot by the lot owner</p> |
| <p>S23 OC may set annual fees to cover general administration, maintenance and repairs, insurance and other obligations.

OC may levy an additional annual fee on a lot owner if the owners corporation has incurred additional costs arising from the particular use of the lot by the lot owner; and an annual fee set on the basis of the lot liability of the lot owner would not adequately take account of those additional costs.</p> | <p>S28 Current owners, purchasers in possession and person receiving rent and profits from the lot must pay outstanding fees, charges, contributions or amounts owing to the OC. Amounts owing will be based on lot liability unless it is for repairs, maintenance or other works undertaken wholly or substantially for the benefit of some of the lot owners.</p> |
| <p>S23A In addition to the annual fees levied under section 23, OC may levy fees to cover the costs of the premium for reinstatement and replacement insurance taken out in accordance with Division 6 of Part 3 of the OCA.

The fees levied so levied must be based on lot entitlement. OC may levy a lot owner a fee to cover the cost of any of an excess amount or an increased premium resulting from or attributable to an insurance claim, if the claim is caused by a culpable or wilful act or the gross negligence of a lot owner; or a lot owner's lessee; or a guest of a lot owner or a guest of a lot owner's lessee; or to cover the cost of damage to the common property that is caused by a lot owner or a lot owner's lessee where either the damage is not covered by insurance; or the cost of the damage is less than the excess amount that would have been payable on an insurance claim in relation to the damage; or an excess amount on an insurance claim if the claim solely relates to a lot owner's lot.</p> | <p>S29 OC may charge penalty interest on arrears, if there is a current ordinary resolution at an AGM.</p> <p>S30 OC may recover any money owed to it in an appropriate court, as a debt due to the OC</p> <p>S31 OC must provide lot owners with a Fee Notice complying stating the lot owner's obligation to pay fees and charges within 28 days, the interest applicable (if any) and details of the dispute resolution process</p> <p>S32 OC may provide Final Fee Notice to lot owner if money owed is not paid within 28 days of the Fee Notice. Must state that lot owner has obligation to pay fees, charges and interest (if applicable) immediately, the interest payable in respect of overdue fees and charges and amount of daily interest accruing, and that OC intends to take action if moneys owed are not paid within 28 days of Final Fee Notice</p> |
| <p>S24 OC may levy special fees and charges to cover extraordinary items of expenditure. Requires special resolution if amount exceeds twice the total amount of the current annual fees. However, special resolution is not required when immediate expenditure is or was necessary to ensure safety or to prevent significant loss or damage to persons or property. OC may levy special fees and charges</p> | <p>S135 A lot owner who does not occupy the lot or who will be absent from the lot for more than 3 months must advise the OC of the lot owner's mailing address in Australia for the service of notices and any changes to it as soon as possible.

If the lot owner has not nominated an address in Australia then the OC may effect service on the lot owner by posting the notice to the last known address of the lot owner in Australia or if an address nominated by the lot owner is not known or if a notice sent to that address is returned, then the OC may effect service on the lot owner in any other manner VCAT considers appropriate.

The OC Act provides the following powers, functions and duties that enable an OC to charge fees or earn income.</p> |
| <p>S12(2) OC may require a lot owner or occupier to</p> | |

- whom a service has been provided to pay for the cost of providing the service to the lot owner or occupier.
- S14 OC may lease or license the whole or any part of the common property to a lot owner or other person
- S16 OC may acquire or hold personal property for the use of lot owners or other persons and may obtain a lease or licence of personal property for the use of a lot owner or other person and
- S49 OC can recover as a debt the cost of necessary repairs, maintenance or other works carried out for a lot where the lot owner fails to do so, or works undertaken wholly or substantially for the benefit of some of the lots.
- may also dispose of personal property.

Debt Recovery - VIC

December 2021