VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1946/2021
OC1881/2021
OC1889/2021

CATCHWORDS

Owners Corporations Act 2006 (Vic) s 165(1)(ca); s 167(1)(a) – (e); 'owners corporation dispute; 'reasonable costs incurred by the owners corporation in recovering an unpaid amount from the lot owner (other than costs in the proceeding)'; *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* s 100; 'on the papers hearings'; 'Summary of Proofs'.

IN OC1946/2021

APPLICANT	Owners Corporation 1 Plan No. PS735439F
RESPONDENT	Singh

IN OC1881/2021

APPLICANT	Owners Corporation 1 Plan No. PS606040L
RESPONDENT	Jones

OC1889/2021

APPLICANTS	Owners Corporation 1 Plan No. PS501859N, Owners Corporation 3 Plan No. PS501859N, Owners Corporation 4 Plan No. PS501859N, Owners Corporation 5 Plan No. PS501859N
RESPONDENT	JDR Property Developers Pty Ltd ACN:168 443 525
WHERE HELD	Melbourne
BEFORE	Deputy President R. Wilson Acting Deputy President L. Warren Senior Member C. Price
HEARING TYPE	Hearing
DATE OF HEARING	4 and 7 February 2022
DATE OF ORDER	8 April 2022
DATE OF REASONS	8 April 2022
CITATION	Owners Corporation 1 Plan No. PS735439F v Singh (Owners Corporations) [2022] VCAT 389

R. Wilson	L. Warren	C. Price
Deputy President	**Acting Deputy President**	**Senior Member**

APPEARANCES:

For Applicants	Mr P Leaman, solicitor (in OC1946/2021)
	Mr M Lipshutz, solicitor (in OC1889/2021 and OC 1881/2021)
For Respondents	No appearance
Amici Curiae	Ms O'Sullivan SC and Mr Lum of counsel

REASONS

'Owners Corporation Test Case 2022'.

Contents

A. INTRODUCTION

1. These proceedings raise important legal issues regarding the interpretation of the expression 'reasonable costs incurred' in connection with the application of s 165(1)(ca) of the *Owners Corporations Act 2006 (Vic)* (**OC Act**). This new statutory power, conferred on the Tribunal to make orders in 'owners corporations disputes', was introduced into law by amendments[1] commencing operation on 1 December 2021.

2. Subsections 165(1)(ca) and (4) of the OC Act now provide (emphasis added):

> **165 What orders can VCAT make?**
> (1) In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following –
> …
> *(ca) an order requiring a lot owner to pay to the owners corporation reasonable costs incurred by the owners corporation in recovering an unpaid amount from the lot owner (other than costs in the proceeding).*
> …
> *(4) This section does not affect VCAT's power to award costs under section 109 of the* ***Victorian Civil and Administrative Tribunal Act 1998****.*

[1] Act No. 4/2021 s 70(1)(b) the title of which is *Owners Corporation and Other Acts Amendment Act 2021* (Vic).

3. In making an order under s 165 the Tribunal must take into account the considerations set out in s 167.[2]

4. The legal issues in these proceedings are of wider public interest and community importance for owners corporations and lot owners in owners corporation buildings in the State of Victoria. The case is in the nature of a 'test case' for the owners corporation industry to help provide clarity for owners corporations and lot owners in owners corporations regarding the Tribunal's interpretation of the provision and the considerations that the Tribunal may take into account in the exercise of the new statutory power conferred on the Tribunal under the new s 165(1)(ca).

Test case

5. The Tribunal chose the three proceedings in the test case as 'examples' of the *types* of claims for *costs incurred* in recovering unpaid owners corporation fees from lot owners. They are not comprehensive examples. Nor are they necessarily typical examples. They do, however, provide a selection of claims in which a cross section of issues could be considered and determined together by a panel of the Tribunal.

6. No respondent disputed the claims against them nor appeared to oppose them. To address that difficulty arising in adversarial hearings when there is no 'contradictor' to a claim or argument, the Tribunal received assistance from Counsel from the Victorian Bar, Ms O'Sullivan SC and Mr Lum, who accepted a request from the President of the Tribunal to appear *pro bono publico* ('for the good of the public interest') to assist the Tribunal as *amicus curiae* (as a 'friend of the Tribunal'). In that role Counsel did not act for any party – whether applicant or respondent – but appeared at the hearing to present arguments primarily in opposition to those raised on behalf of the applicant owners corporations in each proceeding. The applicants were represented by their solicitors, Mr P Leaman[3] and Mr M Lipshutz.[4] Their law

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[2] That section (also amended in 2021) now states in full:

> **167 What must VCAT consider?**
> (1) 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;
> (d) 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.
> S. 167(2) inserted by No. 4/2021 s. 72.
> (2) For the purposes of an order under section 162(d), in determining a dispute or matter relating to whether a term of a contract of appointment of the manager of an owners corporation is fair, VCAT must consider Part 2-3 of the Australian Consumer Law (Victoria) as if a reference in that Part to a consumer contract were a reference to the contract of appointment of the manager.

[3] For the applicant in OC1946/2021.

[4] For the applicants in OC1889/2021 and OC1881/2021.

firms, like Counsel appearing as *amicus*, acted in the test case on the basis that they would not charge a fee for doing so, and again for the good of the public interest in the due administration of justice. The Tribunal records its gratitude to the members of the legal profession for doing so.

7. In the conduct of the hearing, in addition to the Tribunal receiving joint written submissions from the solicitors for the applicants and written submissions from Counsel appearing as *amicus*, Counsel were invited by the Tribunal to ask questions of two witness called by the applicants who gave evidence as 'industry witnesses'. The Tribunal was greatly assisted to receive that evidence from the two witnesses, Mr Gregor Evans and Mr Richard Eastwood.

'On the papers hearings'

8. In a usual claim made by an owners corporation seeking reasonable costs incurred by it in recovering an unpaid amount from the lot owner, that claim would normally be heard and determined at the same time as its 'substantive' claim for recovery of that unpaid amount.

9. In a usual proceeding involving fee recovery, this would typically occur in what is known as an 'on the papers' fee recovery hearing,[5] unless a party opts out of the process.

10. Under this quick and cost minimising simple debt recovery process, a member of the Tribunal hears and determines the case at final hearing 'on the papers', which is to say based solely on the statutory declaration and documentary evidence presented by the applicant owners corporation, and without an 'in person hearing' being held. That documentary evidence is received by the Tribunal under s 98 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (**VCAT Act**) in the form of a 'Summary of Proofs' which, as its name suggests, is an evidentiary summary[6] comprising a short form statutory declaration attesting to facts on which the Tribunal must be satisfied to make a final order in determination of the claim. It typically attaches other documents as evidence in support of that fee recovery claim.

11. However, if the respondent lot owner raises a dispute about the claim made by the owners corporation the Tribunal does not hear the case in this way and instead makes 'case management directions', usually for the filing of points of defence and further evidence to be filed in regard to any disputed issues, and then lists the case for a hearing 'in person' at which argument and evidence from both parties can be received by the Tribunal before a determination is made about the claim by the member hearing the case.

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[5] Conducted pursuant to s 100 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (**VCAT Act**).

[6] Discussed further below.

12. Therefore, it is important in the understanding of these reasons for decision that the Tribunal is dealing with uncontested cases, which is to say where no respondent has either disputed the case or any evidence against them nor raised any positive defence to any aspect of any part of the claims made against them by their owners corporation. What this means is that the applicant owners corporation is not having to meet a positive defence or any challenge to its claim or evidence: rather it is simply being put to its proof on the balance of probabilities, which is the standard situation in 'on the papers' hearings.

'Costs in the proceeding' – VCAT Act, s 109

13. In a usual proceeding (whether conducted on the papers or in person at a contested hearing), in addition to making orders on the 'substantive claim' for fee recovery under s 165 of the OC Act[7] the Tribunal may make an order for 'costs in the proceeding' at that time. This is a discretionary order the Tribunal is empowered to make under s 109(2) of the VCAT Act if satisfied about certain matters set out in that section.[8] Usually in proceedings before the Tribunal 'costs in the proceeding' are limited to legal costs, which is to say professional fees that a lawyer charges to its client and disbursements incurred in connection with the proceeding brought in the Tribunal. In addition, the Tribunal has power under s 115B of the VCAT Act to make orders for the reimbursement of payment of fees paid in Tribunal proceedings.

14. However, in 'owners corporation disputes'[9] of these types, *relating to the recovery of fees and charges imposed by an owners corporation*, 'costs in the proceeding' are broader in scope than other cases heard by the Tribunal in its original civil jurisdiction because of the operation of Sch 1, Part 15AB to the VCAT Act[10] which provides in s 51ADA[11] as follows: (emphasis added)

> **51ADA Tribunal may make orders for costs incurred by owners corporations**
>
> (1) The Tribunal may make an order for costs under section 109 *incurred by a lot owner or an owners corporation, either directly or indirectly (including the costs of professional and volunteer managers)*, in an application to the Tribunal *relating to the recovery of fees and charges imposed by an owners corporation under Division 1 of Part 3* of the Owners Corporations Act 2006 .

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[7] Principally orders of the type described in OC Act, s 165(1)(c) but potentially other orders depending on the issues raised in the dispute between the parties.

[8] See VCAT Act, s 109(3).

[9] An owners corporation dispute is defined in s 162, which is set out in fn 23 below.

[10] Schedule 1 to the VCAT Act varies Part 3 and 4 of the VCAT Act in 'certain proceedings under certain enabling enactments': Sch 1, s 1 Purpose of Schedule.

[11] Sch. 1 cl. 51ADA inserted by No. 63/2010 s. 80.

(2) Costs awarded under subclause (1) are not limited to costs incurred by a professional advocate under section 62.

15. This power in Sch 1 of the VCAT Act is a statutory exception to the generally applicable rule that a litigant may not obtain any recompense for the value of their time spent in litigation and that the only costs that may generally be awarded are legal costs or disbursements incurred by the litigant in connection with the legal proceeding in a court or tribunal.[12]

Nature of the statutory power under s 165(1)(ca)

16. The statutory power under s 165(1)(ca) of the OC Act is a new and distinct statutory power enabling the Tribunal to order payment of other types of 'costs' that the Tribunal 'considers fair' that, in the terms of the section:

> … requir[e] a lot owner to pay to the owners corporation *reasonable costs incurred by the owners corporation in recovering an unpaid amount from the lot owner* (other than costs in the proceeding).

17. As is readily apparent from the distinction between 'reasonable costs incurred by the owners corporation in recovering an unpaid amount from the lot owner' under s165(1)(ca) of the OC Act and 'costs in the proceeding' under s 109 of the VCAT Act and/or s 51 ADA of Sch 1, there are a number of differences. There are also some similarities in the nature of each power.

18. One obvious difference is that under s 165(1)(ca) the Tribunal's power to order costs only works in one direction – only the owners corporation is entitled to make the claim for the reasonable costs *it* incurs in recovering an unpaid amount from a lot owner. The lot owner has no ability under the section to claim costs incurred in disputing or defending a claim against them; a lot owner is confined to claiming costs that might be awarded under s 109 of the VCAT Act or s 51ADA of Sch 1.

19. A second potential difference is one of timing. Section 109 of the VCAT Act relates solely to costs *in* the proceeding.[13] Section 165(1)(ca) of the OC Act relates to other costs incurred outside of a proceeding, which in many cases will be costs incurred before a proceeding is commenced. But it may not necessarily be the case that the costs that are sought to be recovered under s 165(1)(ca), and which might be ordered to be paid, are limited only to those costs incurred before proceedings are commenced.

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[12] *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 is a recent case in which the High Court held that the anomalous common law *exception* to the generally applicable rule that a self-represented litigant may not obtain any recompense for the value of their time spent in litigation, commonly referred to as '*Chorley* exception', did not apply in Australia. The judgments in that case examine the statutory power of a court to award costs.

[13] As we will discuss, there may be a potential for overlap, such as where costs might have been incurred before proceedings were issued (such as title search or body corporate search or legal letter of demand) but which may potentially be allowed as necessarily incidental costs in the proceeding.

The issue did not arise for consideration in any claim in any of the proceedings in the test case and so it is unnecessary to form a view other than to note that, in the ordinary interpretation of the words of the provision, nothing in s 165(1)(ca) dictates that the 'reasonable costs' sought to be recovered might not be incurred both before and during a legal proceeding as being costs incurred by an owners corporation which are costs that are distinct from 'costs in the proceeding' under s 109.[14] It is to be noted that s 165(1)(ca) is not confined in its application to fee recovery proceedings but embraces a cost incurred by an owners corporation 'in recovering *an unpaid amount* from the lot owner'.

20. The third point to note is that there is a similarity in the legal 'character' of the separate statutory powers conferred on the Tribunal under the two enactments, namely s 109(2) of the VCAT Act and s 165(1)(ca) of the OC Act.

    a. Both provisions confer a statutory power on the Tribunal to make an order *in proceedings before the Tribunal*. The ability to make a claim for 'costs' at all only arises in a VCAT proceeding. Neither provision creates any 'substantive' legal right or obligation outside of a proceeding.[15]

    b. It follows from this that the exercise of neither statutory power is predicated upon the pre-existence of any underlying legal obligation between the parties to pay the costs of one to the another. And so, in an examination of the Tribunal's new statutory power to award 'reasonable costs incurred' under s 165(1)(ca), it is not an element of the claim that there is any underlying legal obligation on the lot owner to pay the costs or any underlying legal entitlement of the owners corporation to receive them. The claim made under s 165(1)(ca) is not

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[14] The section uses the expression costs incurred 'in recovering an unpaid amount' from the lot owner. It is neither restricted to unpaid 'fees' or 'levies' per se, nor to pre-litigation costs incurred in the recovery of an unpaid amount. On its ordinary meaning it potentially could embrace the costs incurred by the owners corporation in having its manager assist it in contested litigation before the Tribunal to recover any amount, such as the cost of preparing account statements, providing instructions to lawyers or attending a contested hearing to give evidence. We do not need to decide this point because there was no claim for it. But we do observe that where levy recoveries are contested and go to an 'in person' hearing, the OC manager, for example, may need to do further work in recovering an unpaid amount from the lot owner, for which the owners corporation may incur additional costs. The issue that remains for another case is whether such costs may be claimed and are properly recoverable under s 109 or sch 1 s 51ADA of the VCAT Act or s 165(1)(ca) of the OC Act.

[15] Lawyers are familiar with their professional and ethical obligation not to make a demand for payment of legal costs on behalf of a client when there is no such underlying legal obligation to pay them existing between the parties. See generally: *Legal Services Commissioner v Sampson (Correction) (Legal Practice)* [2013] VCAT 1439; Victorian Legal Services Board Fact Sheet, November 2015, *Letters of demand: Traps for lawyers*, noting that:

> 'if a contractual right does not exist between the creditor and debtor, the letter must not include a demand or request for payment of legal costs in addition to the outstanding debt. An improper demand of this kind may amount to a breach of Rule 34 of the Conduct Rules.'

for payment of a debt due but simply for an 'order' from the Tribunal under the section.

This point is significant in two other respects.

i. If an underlying legal obligation did otherwise exist between the parties to pay the costs incurred, the order that the Tribunal would make would be one under s 165(1)(c) of the OC Act, namely 'an order for the payment of a sum of money – (i) *found to be owing by one party to another party*'.

However, the legal entity known in Victoria as an owners corporation is an entirely statutory body. Its powers and functions are statutory powers and functions. There is no statutory authorisation for the creation of a legal obligation (statutory, contractual or otherwise), between a lot owner and owners corporation or its manager to pay the costs that the owners corporation incurs in the performance of its statutory functions through the services of its manager or otherwise.

ii. In cases such as this, for the recovery of unpaid owners corporation fees, it is not possible for an underlying legal obligation (to pay reasonable costs incurred in recovering an unpaid amount) to be created as it is beyond the statutory power of an owners corporation itself to levy fees against lot owners other than by setting such fees in the manner permitted by the OC Act, for example 'based on lot liability' pursuant to s 23(3) of the OC Act.[16] Section 28 dealing with 'Liability of lot owners', expressly provides in s 28(2) as now amended: (emphasis added)

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[16] This was a point made in the Consumer Property Acts Review, discussed below. See for example *Salter v Owners Corporation* PS501391P [2016] VCAT 1395. An owners corporation can only levy fees against lot owners under **Part 3 Financial Management**.

Under Part 3, by an amendment to s 23, *annual fees* levied to cover general administration, maintenance and repairs, insurance and other recurrent obligations of the owners corporation must be set based on ***lot liability*** under s 23(3) but subject to a new s 23(3A) which empowers an owners corporation to levy an 'additional annual fee *on a lot owner*' in situations where 'the owners corporation has incurred additional costs *arising from the particular use* of the lot by the lot owner'. Such additional annual fees must be levied on the basis that the lot owner of the lot that benefits more from the use of the lot pays more: s 23(3B).

Section 23A(1) confers a new power on owners corporations to levy *additional* fees 'to cover the costs of the premium for reinstatement and replacement insurance' under Division 6, which must be based on **lot entitlement**: s 23A(2).

Section 23A(3) confers another new power on owners corporations to levy 'a lot owner' a fee to cover the following:

(a) insurance excesses or increased premiums attributable to insurance claims caused by culpable or wilful acts or gross negligence by a lot owner, their tenant or a guest;

(b) damage to common property caused by a lot owner or its tenant which is not covered by insurance or where the cost of the damage is less than the insurance excess; and

> (2) Subject to sections 24, 49 and 53, *a lot owner is* ***not liable to pay*** **or** ***contribute*** *to the funds of the owners corporation a proportion of any amount required to discharge a liability of the owners corporation exceeding the lot owners' lot liability*.[17]

iii. We return to this issue when we come to consider the question of evidence required to establish a claim for an order from the Tribunal for payment of reasonable costs incurred under s 165(1)(ca) but the point we make in advance is that because it is not lawfully possible under the OC Act for an owners corporation to charge a lot owner directly for these costs of fee recovery, an invoice or fee notice or final fee notice from the owners corporation or its OC manager *to the lot owner* cannot be evidence

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(c) an excess amount on an insurance claim that solely relates to the lot owner's lot.

Section 24(1) empowers an owners corporation to levy *special fees and charges* to cover 'extraordinary items of expenditure' which, subject to s 24(2A) must be based on **lot liability**: s 24(2).

Section 24(2A) *requires* fees and charges for extraordinary expenditure items relating to repairs, maintenance and other works carried out wholly or substantially for the benefit of some or one lot but not all lots to be levied on the basis that 'the lot owner of the lot that benefits pays more'.

A new s 24(2B) empowers an owners corporation to levy *special fees and charges* on a lot owner relating to repairs, maintenance and other works arising from the *particular use of the lot* by the lot owner.

Under **Part 3, Division 5 – Asset management**, s 53 contains another power to levy fees on lot owners for 'upgrading of common property'. Subject to s 53(1B) such fees must be based on **lot liability**: s 53(1A). Section 53(1B) requires fees for upgrading works carried out wholly or substantially for the benefit of some or one lot but not all lots to be levied on the basis that 'the lot owner of the lot that benefits pays more'.

Under none of the amendments to **Part 3, Division 1 – Financial powers** or **Division 5 – Asset management** are owners corporations empowered or authorised to levy or impose an any fee or charge *on a lot owner* for the 'cost incurred by the owners corporation in recovering an unpaid amount'.

Indeed, the only statutory power now given to owners corporations regarding the topic of late fee payment is a new power in Schedule 1 – Powers to make rules of owners corporations under s 138(1) relating to '3 Management and administration', which provides:

3.5 Payment of fees by instalments by lot owners in financial difficulty.

An owners corporation cannot make rules that are inconsistent with law: s 140. A rule is 'of no effect' if it is 'oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or an occupier of a lot' (s 140(a)) or is 'inconsistent with or limits a right or avoids an obligation' under the OC Act or any other Act or regulation (s 140(b)).

[17] We have mentioned s 24 and s 53 above. Section 49 relates to costs of repairs, maintenance or other works that are 'carried out wholly or substantially for the benefit of one or some, but not all' of the lots affected. It empowers the owners corporation to recover those costs 'as a debt' from the relevant lot owners (s 49(1)) 'calculated on the basis that the lot owner of the lot that benefits more pays more' (s 49(2)). That section does not empower an owners corporation to charge or claim as a debt the 'cost incurred by the owners corporation in recovering an unpaid amount'.

For completeness we also mention s 48 which relates to the situation where lots are not properly maintained and the owners corporation serves a notice under the section on the lot owner to carry out repairs, maintenance or other works. If there is not compliance with such a notice and the owners corporation carries out the works then section entitles the owners corporation to recover 'as a debt' from (rather than levy a fee against) the lot owner, the cost or repairs, maintenance or other works carried out: s 48(4). That section does not empower or authorise an owners corporation to charge or claim as a debt the 'cost incurred by the owners corporation in recovering an unpaid amount'.

of the incurrence of the costs by the owners corporation (or their amount) despite the fact that some owners corporations do purport to invoice lot owners for these debt recovery costs.

Accordingly, although the legislative purpose of the enactment of s 165(1)(ca) was to enable an owners corporation to recover those reasonable costs incurred by it that the Tribunal considers it fair to order, the Parliament did not relevantly amend the sections of the OC Act that constrain the statutory power of owners corporations to levy fees.[18] The evidentiary consequence of this is that in the same way that when costs are claimed under s 109 of the VCAT Act the Tribunal requires discrete evidence (albeit in short form) that legal costs of an amount have been incurred in the proceeding, under s 165(1)(ca) of the OC Act the Tribunal will likewise require discrete evidence in some form *other than in an invoice to a lot owner for the costs* (which the OC Act does not permit) that the costs have been incurred by the owners corporation in recovering the amount from the lot owner. A mere reference to the costs in an invoice or statement such as a final fee notice sent by an OC manager to a lot owner will not only be insufficient evidence to satisfy the provision, it is not evidence on that fact on which the Tribunal can rely.

21. The fourth point of similarity is that each statutory power is a *discretionary*[19] power to make an 'order': under s 109(3) of the VCAT Act the order is one that the Tribunal may make 'only if satisfied that it is fair to do so'; under s 165(1) of the OC Act the order is one that that the Tribunal 'considers fair' in determining an owners corporation dispute in the Tribunal.

Discretion

22. A central legal question in this case is one of statutory interpretation. In construing any legislative provision it is to be *read as a whole* and given its ordinary meaning, in light of its context and purpose.[20]

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[18] Despite this having been put forward as an option for legislative amendment in the government's public review of owners corporation legislation, which we discuss later in these reasons.

[19] The discretion of a court to order legal 'costs' is often described as being at large, although one exercised by reference to well established principles. The discretion of the Tribunal to order 'costs' under s 109(2) of the VCAT Act is not at large and is constrained by the considerations set out at para 35a below. No specific argument was put to us concerning discretionary factors that might inform the exercise of the Tribunal's new power to order 'reasonable costs incurred' to be paid by a lot owner under s 165(1)(ca) of the OC Act other than the general criteria of 'fairness' (described by the *amici* as the 'chapeau' in s 165(1)) and the statutory matters that the Tribunal must consider under s 167 before making any order under s 165(1) in an owners corporation dispute. We discuss below the factors we consider relevant to the determination of each claim in the test case.

[20] See generally *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4], 46-47 [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519

23. The important observation to make here, before we turn to examine the claims in the test case, is that the Tribunal's statutory power to make 'orders' conferred by s 165(1) of the OC Act is expressed in the following general terms:

> *In determining an owners corporation dispute, VCAT may make any orders it considers fair* including one or more of the following –

24. These words must be read with the rest of the section which sets out various categories of 'orders' that are included with this broad conferral of remedial power to make orders 'in determining an owners corporation dispute', and with s 167 of the OC Act which directs VCAT to consider an inexhaustive list of considerations 'in making an order'. [21]

25. Section 165(3) of the OC Act then confers a secondary grant of broad remedial power to make both 'ancillary orders' and 'interim orders', stating that:

> (3) VCAT may make any interim orders and ancillary orders *it thinks fit in relation to an owners corporation dispute*.

Again this additional power to make orders under the OC Act is controlled by s 167[22] which applies to any order made by VCAT under the OC Act.

26. By s 165(1) of the OC Act, the statutory powers to make remedial orders in the determination of an 'owners corporation dispute', *include,* in addition to the new power under s 165(1)(ca) to make an order requiring a lot owner to pay the reasonable costs incurred by the owners corporation in recovering an unpaid amount, the power to make orders:

(a) requiring a party to do or refrain from doing something – such as a mandatory or other injunction;

(b) requiring a party to comply with the OC Act or its regulations or with the rules of the owners corporation – again in the nature of an injunctive order or direction;

(c) for the payment of money whether:

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[39]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14]. In *Westpac Securities Admin Ltd v ASIC* [2021] 270 CLR 118 at 143 Gordon J recently repeated this observation in construing the section in an Act before her and continued:

> 'It is not to be dissected into separate words or phrases, the meanings of which are then amalgamated into some composite meaning': citing *Project Blue Sky* (1998) 194 CLR 355 at 381 [69], 382 [71]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 391 [29].

[21] See para 3 and fn 2 above.

[22] ibid.

a. money found to be owing – such as to pay a debt due under an underlying substantive legal obligation to pay the money, such as under a contract;

b. by way of damages – such as compensation for breach of a substantive legal or equitable duty or obligation, such as a claim in tort or breach of contract or for equitable damages;

c. by way of restitution – namely to restore parties to the position in which they should be pursuant to a substantive legal claim, such a claim for money to be paid back that was paid under an actionable mistake or where under a contract there is a total failure of consideration;

(d) varying the terms of contracts or agreements – such as a claim for rectification or based on some other underlying substantive legal claim to vary the provisions of an agreement, such as under a statutory cause of action under the Australian Consumer Law (Victoria);

(e) declaring a term void (or not) – such as a claim that the term is illegal or void for uncertainty under the law of contract or some other underlying law, such as under statute.

(f) declaring the terms of a delegation or the meaning of a rule of the owners corporation;

(g) appointing a committee of an owners corporation;

(h) appointing or revoking the appointment of a chairperson, secretary or member of a committee or sub-committee of an owners corporation;

(i) appointing or revoking the appointment of a manager or imposing conditions or restrictions on the management by a manager of an owners corporation;

(j) in relation to damaged or destroyed buildings or improvements;

(k) as to the payment of insurance money under a policy taken out by an owners corporation;

(l) requiring an order to be recorded in the owners corporation register or the register of managers or the Register kept under the *Transfer of Land Act* 1958;

(m) requiring the Registrar (of Titles) under the *Transfer of Land Act* 1958 to amend the Register;

(n) requiring an occupier of a lot to grant entry to a lot or building on a lot to persons authorised under s 50 of the OC Act.

27. As is readily apparent, the *types* of orders VCAT 'may' make as listed in paragraphs (a) to (n) of s 165(1) of the OC Act (being the kinds of orders 'included' within the broad conferral of statutory power to make orders under the section in determining an 'owners corporation dispute'[23]) range in their legal character from *substantive* legal remedies, to *procedural*[24] remedies, to remedies that might be said to have more of an *administrative*[25] or *supervisory*[26] character.

28. Readily apparent too from the inclusive list of the types of remedial orders that VCAT may make in the determination of an 'owners corporation dispute' (whatever that dispute might be),[27] the question of discretion does not always arise despite the conferral of statutory remedial power being

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[23] See OC Act s 162 defining what an 'owners corporation dispute' is for the purposes of the Act.

Division 1—Owners corporation disputes

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

S. 162(c) amended by No. 4/2021 s. 68(a).

(c) the exercise of a function by a manager in respect of the owners corporation; or

S. 162(d) inserted by No. 4/2021 s. 68(b).

(d) a term of a contract of appointment of the manager of an owners corporation, including whether a term is fair; or

S. 162(e) inserted by No. 4/2021 s. 68(b).

(e) the disposal by an owners corporation of goods abandoned on the common property.

[24] By 'procedural' we are also referring to the procedures of 'the operation of an owners corporation' or its rules (s 162(a)), for example in general meeting or committee meeting or in calling such meetings.

[25] By 'administrative' we include orders under s 165 that might be made in the determination of *disputes* of the character described in s 162(a) or (c) of the OC Act.

[26] By 'supervisory' we include orders under s 165 that might be made in the determination of *disputes* of the character described in s 162(a), (c) or (e) of the OC Act, 'including a dispute *or matter* relating to … (a) the operation of an owners corporation … (c) the exercise of a function by a manager in respect off the owners corporation … (e) the disposal by an owners corporation of goods abandoned on the common property'. It is not infrequently the case that supervisory power is given to independent decision making bodies. By way of an analogue, one example is the supervisory power over trusts developed by the courts of equity to provide judicial advice to trustees: see generally Chief Justice Susan Kiefel, 'Judicial Advice to Trustees: Its Origin, Purposes and Nature' *(2019) 42(3) Melbourne University Law Review (advance)*, observing at 6:

> The statutory provisions and court procedures relating to advice given by the courts to trustees have as their aim efficiency in the administration of the estate and reduction of costs.

In the exercise of that jurisdiction, the Chief Justice observes that in *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198, 201 the Privy Council' pointed out that in exercising its jurisdiction to give advice to trustees the Court is engaged in determining what is 'in the best interests of the trust estate'. It is not engaged in determining the rights of adversarial parties … proceedings for judicial advice operate 'as 'an exception to the Court's ordinary function of deciding disputes between competing litigants"'.litigants''

[27] See the definition of an 'owners corporation dispute' in s 162.

expressed in terms that 'VCAT *may* make any order it considers *fair*'. Clearly the words 'may make any order it considers fair' are not to be taken literally. Where the underlying law dictates a result, that result is the order the Tribunal must make as the relevantly appropriate order. What is 'fair' in such cases equates simply to the making the relevantly appropriate order under the applicable law being applied by the Tribunal in its determination of the legal matters in dispute. In such a case the Tribunal 'may' (ie it is empowered to make) that order under s 165(1) of the OC Act but there is no room under the law to make any other order. 'May' is to be read in that statutory context as Parliament doing no more than conferring the power on the Tribunal to make that order. In that context the conferral of the power to grant a remedy by order of the Tribunal has no discretionary element and involves no additional consideration of fairness other than what is 'fair according to law'.

29. This difficulty with the language used by Parliament in conferring remedial power is not new. In *Christchurch Grammar School v Bosnich* [2010] VSC 476, a case dealing with the jurisdiction of the Tribunal to 'make any order it considers fair' under the s 109 of the now superseded *Fair Trading Act 1999 (Vic),* Justice Sifris held at [40]:

> In my opinion, although the matter is not free from difficulty, the Tribunal is required, when deciding the merits of a case, to apply the law and not merely be guided by it. Any flexibility relates only to the form of the order and of course, to procedural and evidential matters. If this was not the case absurd results could follow. To the extent that the Supreme Court of Victoria has concurrent jurisdiction different results could follow. The Court, not having the benefit of s 109, would have to apply the law while the Tribunal could do what it considered fair even if the law was to the contrary. Further, such a result would encourage idiosyncratic notions of fairness and justice.[28] If the intention was to exclude the operation of the law (as a matter of substance and not merely procedure or form) a specific section to such effect, clear and unambiguous, should have been inserted.

30. Thus, in the current Anstat annotation of the OC Act, the authors of which are Members in various capacities of this Tribunal, in their commentary, in citing Justice Sifris, they state: (emphasis added)

> [165.01] The Tribunal is not confined to making an order that fits into one of the categories listed in the sub-paragraphs … when determining an owners corporation dispute. It may make any order it considers fair.
>
> The Tribunal's power to make any order it considers fair *does not entitle it to ignore the law. The Tribunal's obligation is to hear and determine the dispute according to law*. Once it determines that the applicant is entitled as a matter of law to a remedy, having made out a cause of action (a legally

[28] Stating at fn 23 'To use the phrase in *Muschinski v Dodds* [1985] HCA 78; (1984) 160 CLR 583, 615 (Deane J).'

> maintainable claim) made available under the Act or otherwise known to the law, the Tribunal in exercise of its power under s 165(1) has flexibility in fashioning an appropriate order to achieve the remedy….
>
> The Tribunal's power to make any order it considers fair includes a power not to make any order at all if, if in all the circumstances, it considers it fair not to make any order.[29]

31. What this means is that if the owners corporation dispute involves an issue of the Tribunal making a determination about legal rights or obligations under the underlying general law – which is to say the common law, equity or applicable statutory provisions (including the OC Act itself) – then the section empowers the Tribunal to make orders derived from the underlying general law, which is to say applicable common law, equitable and statutory remedies.

32. But, as can be seen from the statutory description of what is an 'owners corporation dispute' and the types of orders the Tribunal 'may' make in the determination of an owners corporation dispute, some of the remedial 'orders' that the Tribunal may make are quite different in character altogether.

33. Their legal effect will be to create new legal rights and obligations between the parties to the owners corporation dispute. Sometimes, orders made will ultimately affect the on-going 'operation' of the owners corporation and also bind its committee members and OC managers and each of its lot owner members, not all of whom will necessarily have been a party to the proceeding in the Tribunal in which the 'owners corporation dispute' is being determined. Some of the orders may even bind other government institutions to do certain things that create rights and obligations under other legislation (ie under s 165(1)(l) and (m).

34. The legislature's use of the words 'may' in s 165(1) therefore must be understood as sometimes conferring a *discretion* and sometimes simply *empowering* VCAT to make an order in determining an owners corporation dispute. In the instance of s 165(1)(ca) and the new power that it confers on the Tribunal to make the type of order that it describes, the words 'may' and 'fair' confer a statutory *discretion*.

35. The further points to make, which are apparent from a reading of s 109 of the VCAT Act and Part 11 of the OC Act (in which s 165 and s 167 are located), is that:

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[29] Examples given include where a breach of an owners corporation rule had occurred but no order was made; where an application for an order requiring the owners corporation to perform its duty to repair and maintain common property only resulted in one belatedly raised item being upheld by the Tribunal but which the owners corporation agreed to address.

a. In regard to 'costs' orders made under s 109 of the VCAT Act (which is a general power granted to the Tribunal to award costs in any VCAT proceeding) the exercise of that power is subject to the statutory *stipulation* in s 109(1) that 'Subject to this Division, each party is to bear their own costs in the proceeding'. Further while s 109 (2) permits that 'At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party *in the proceeding*', that discretionary power is itself circumscribed by s 109(3) stating that 'The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to' the matters set out in s 109(3)(a) – (e).[30]

b. In contrast, the Tribunal's power to order payment of 'reasonable costs incurred' under s 165(1)(ca) of the OC Act is neither constrained by any statutory stipulation nor circumscribed by the same limiting considerations. Rather the criteria for the exercise of the statutory power under s 165(1)(ca) are the broad conferral of remedial powers in the introductory words of s 165(1), which read: 'In determining an owners corporation dispute, VCAT may make any order *it considers fair* including one or more of the following …', and the things VCAT

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[30] This stipulation (in relation to 'costs') is to be contrasted with s 115B(3) of the VCAT Act (which as we have noted earlier, relates to the 'reimbursement of fees') which states that:

> (3) In making an order under this section, other than in a proceeding to which section 115C or 115CA applies, the Tribunal must have regard to—
> (a) the nature of, and issues involved in, the proceeding; and
> (b) the conduct of the parties (whether occurring before or during the proceeding), including whether a party has caused unreasonable delay in the proceeding or has failed to comply with an order or direction of the Tribunal without reasonable excuse; and
> (c) the result of the proceeding, if it has been reached.

By reason of s.115C there is a 'presumption' that applies in connection of the reimbursement of fees in owners corporation disputes. That section relevantly provides: (emphasis added)

> **115C Presumption of order for reimbursement of fees to successful party in certain proceedings**
> (1) This section applies to the following proceedings—
> …
> (c) a proceeding under the **Owners Corporations Act 2006**, other than a proceeding on an application for review under section 191 of that Act;
> …
> (2) *Subject to subsection (3), a party who has substantially succeeded against another party in a proceeding to which this section applies is entitled to an order under section 115B that the other party reimburse the successful party the whole of any fees paid by the successful party in the proceeding*.
> (3) Subsection (2) does not apply if the Tribunal orders otherwise, having regard to—
> (a) the nature of, and issues involved in, the proceeding; and
> (b) the conduct of the parties (whether occurring before or during the proceeding), including whether the successful party has caused unreasonable delay in the proceeding or has failed to comply with an order or direction of the Tribunal without reasonable excuse.
> (4) In this section—
> **successful party**, in relation to a proceeding, means a party who has substantially succeeded against another party in the proceeding.

'must consider' under s 167[31] of the OC Act in making an order under s 165.[32]

36. So in regard to the matters that the Tribunal must take into account in determining what is 'fair' under s 165(1)(ca), the specific considerations that the Tribunal must 'consider' under s 167(1)(a) – (e) of the OC Act are, as may be relevant:

    (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;

    (d) 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.

37. By the terms of s 165(1)(ca), these considerations necessarily might include matters *outside* of the proceeding in VCAT (ie 'other than costs *in* the proceeding': s 165(1)(ca)) but potentially could include a consideration of the 'conduct' of the parties or an 'act or omission' or proposed act or omission by a party occurring in the context of a proceeding. Thus, a failure by a lot owner to respond to an invoice by making prompt payment, or a pattern of non-payment of fees, or not meeting commitments made to an OC manager to pay the outstanding fees or protracting negotiations or obfuscation in the resolution of a dispute, may well be matters that, in a given case, inform the Tribunal's exercise of the discretionary power

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[31] See para 3 and fn 2 above.

[32] Thus not only does s.165(1)(ca) of the OC Act not have the same statutory stipulation present in VCAT Act s 109(1) for 'each party to bear their own *costs in the proceeding*' subject to Division 8 of the VCAT Act, nor does s 165 of the OC Act have the same 'mandatory' considerations, about which VCAT *must* be satisfied under VCAT Act s 109(3) before exercising that statutory discretion to award 'costs in the proceeding' under s.109(2) (or Sch 1 s 51ADA as the case may be). While the power to award litigation costs under VCAT Act s 109(2) is confined by the words 'if satisfied it is fair to do so' (cf OC Act s 165(1): 'VCAT may make any order it considers fair'), the things that VCAT is to have regard to are entirely different things.

- Under VCAT Act s 109 things that VCAT must have regard to are matters *relating to the proceeding* in VCAT. They include the way a party may have 'conducted the proceeding' (s 109(3)(a)) or whether a party may have 'been responsible for … the time taken to complete the proceeding (s 109(3)(b)) or the 'relative strengths of the claims made' in the proceeding (s 109(3)(c)) or the 'nature and complexity of the proceeding' (s 109(3)(d)) or 'any other matter the Tribunal considers relevant (s 109(3)(e)).
- In contrast matters that VCAT must consider under OC Act s 167 before making an order under OC Act s 165(1)(ca) are matters that relate to the conduct of the parties that may occur outside of the *proceeding*.

conferred under s 165(1)(ca). The conduct of the owners corporation itself or through its appointed OC manager may also be relevant.

38. The final point that can be made about s 165(1)(ca) of the OC Act is that in granting the Tribunal the new statutory power, Parliament has implicitly recognised that without it the Tribunal does not otherwise have the statutory power to 'order' such costs be paid by the lot owner. But in granting the new power there is no statutory presumption[33] that such an order should be made or that the making of an order is necessarily 'fair' in every case despite the fact that the costs might have been incurred by the owners corporation and might otherwise have been 'reasonable'.

39. Accordingly, the Tribunal must in every case determine whether to make an order under s 165(1)(ca) based on what the Tribunal considers 'fair' in the circumstances of each case that it is required to determine as an 'owners corporation dispute' for recovery of an unpaid amount from a lot owner.

'Summary of Proofs'

40. Mention has been made earlier of a 'Summary of Proofs' used in on the papers hearings in the Tribunal. In these reasons reference is made to the type or extent of evidence that the Tribunal may need to receive in a 'Summary of Proofs' so as to be satisfied that an order 'requiring a lot owner to pay to the owners corporation reasonable costs incurred' should be made under s 165(1)(ca) in a particular case.

41. One should not confuse the question of evidence with the 'burden of proof'. The burden of proof in civil cases decided by the Tribunal is the usual civil standard 'on the balance of probabilities'. The applicant bears the onus to discharge that burden of proof, even in an uncontested hearing. In every case, the applicant must produce sufficient evidence for the Tribunal to be able decide, on the balance of probabilities, the factual issues necessary to establish the relevant elements of the claim for relief or remedy.

42. The language 'Summary of Proofs' refers to the *VCAT form*[34] being a statutory declaration and supporting evidentiary documentation accompanying it, that an applicant owners corporation or its representative completes and declares for an 'on the papers hearing'.

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[33] cf s 115C(2) of the VCAT Act, referred to at fn 30.

[34] The full title of the current VCAT *form* is '*Summary of Proofs – Owners Corporation Fee Recovery*'. To the VCAT *form* other relevant evidentiary documents are attached (such as fee notices, final fee notices, letters of demand, invoices). The VCAT *form* itself contains a statutory declaration, to be made on behalf of the applicant owners corporation, attesting to the truth of the evidence set out in the form and the documents it attaches. A false statement is punishable by the offence of perjury. It is also a statutory offence under s 133 of the VCAT Act to knowingly mislead the Tribunal.

Its purpose is an '*evidentiary*' one: [35] to provide sufficient *evidentiary proof* in support of the applicant's claims for:

(a) unpaid owners corporation fees – for orders under OC Act s 165(1)(c)(i);

(b) interest – for orders under OC Act s 165(1)(c)(i);

(c) costs in the proceeding – for orders under VCAT Act s 109 (including Tribunal fees under s 115B and s 115C of the VCAT Act); and

(d) reasonable costs incurred – for orders under OC Act s 165(1)(ca).

43. If the respondent raises a substantive dispute to the substantive claim for fee recovery, or any aspect of it; or to any claim for costs; or to any evidence in support of any such claim, then the hearing does not proceed to an on the papers hearing and is listed for an in person hearing.

44. But if no party has 'opted out' of an on the papers hearing and if there is no substantive dispute in relation to the applicant's claims or the evidence submitted in support of any part of those claims, the member hearing the case 'on the papers' considers the evidence submitted in the Summary of Proofs and bases their final decision solely on that evidence. If the evidence submitted by the applicant is not sufficient to satisfy the member on *a factual* issue on the balance of probabilities, unless the member determines to make further procedural orders (including to adjourn the proceedings and order that further evidence be provided), the member may dismiss the particular claim made in the proceeding altogether.

B. THE CURRENT CLAIMS

45. The 'substantive' claims for fee recovery, and the claims for 'costs *in* the proceeding' pursuant to s 109 of the VCAT Act in these three proceedings,

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[35] That evidence for an on the papers hearing includes details of:
- the owners corporation and lot owner parties,
- tick boxes to indicate what documents are attached,
- amounts of monetary order claimed for:
  - levies (ie fees) and interest to the date of final fee notice,
  - interest calculated to the 'on the papers' hearing,
  - amount of reasonable costs incurred claimed,
  - costs in the proceeding claimed,
- confirmation that the lot owner/respondent is the current registered proprietor of the lot,
- how fees are levied and whether annual fees have been struck in accordance with lot liability and approved by resolution at an annual general meeting of the applicant,
- whether there is a claim for extraordinary fees,
- date of the fee notice and its service and confirmation that the address for service is the address recorded in the owners corporation register (or explanation why service might have been at a different address),
- date of the final fee notice and its service and similar details about its address for service,
- details of reasonable costs incurred by the owners corporation being claimed.

have previously been determined by the Tribunal.[36] What remains in each case before us is a claim by each applicant owners corporation under OC Act s 165(ca) for '*reasonable costs incurred by the owners corporation in recovering an unpaid amount from the lot owner (other than costs in the proceeding)*'.

OC1946/2021

46. By order dated 21 December 2021 the Tribunal ordered that the respondent pay the applicant the sums of:

$1,074.65	for levies and interest to the date of the final fee notice (the date being 30 July 2021);
$40.34	for interest from the date of the final fee notice to the date of hearing; and
$550	costs in the proceeding[37] (including $94.70 for reimbursement of fees[38] paid by the applicant);

a total sum of $1,664.99.

47. What remains to be determined in this matter is a claim for an order for payment of reasonable costs incurred by the applicant pursuant to s 165(1)(ca) of the OC Act being the sums of:

$86.90	for the issuing of a final fee notice dated 30 July 2021; and
$26.26	for a title search conducted on 17 September 2021.[39]

OC1881/2021

48. By order dated 21 December 2021 the Tribunal ordered that the respondent pay the applicant the sums of:

$5,129.63	for levies and interest to the date of the final fee notice (the date being 30 July 2021);

[36] This occurred in separate 'on the papers' hearings' in which orders were made by the Tribunal in each proceeding. Orders were also made in each proceeding to determine the remaining claims under s 165(1)(ca) as a separate issue.

[37] Under s 109 of the VCAT Act.

[38] Under s 115B of the VCAT Act

[39] There was evidence presented to the Tribunal that additional costs and charges had been incurred by the owners corporation (see below) but not claimed against the respondent in this application. It was submitted by Mr Leaman that the fact that additional costs had been incurred could be taken into account by the Tribunal in assessing that the fees and charges actually claimed as 'costs incurred' were reasonable or fair. We reject that submission. The Tribunal can only make an assessment of the reasonableness of the costs *actually* claimed under OC Act s 165(1)(ca) when determining whether it is 'fair' to make an order under OC Act s 165(1).

$184.10	for interest from the date of the final fee notice to the date of hearing; and
$717.45	costs in the proceeding (including $315.60 for reimbursement of fees paid by the applicant);

a total sum of $6,031.18.

49. What remains to be determined in this matter is a claim for an order for payment of reasonable costs incurred by the applicant pursuant to s 165(1)(ca) of the OC Act being the sums of:

$16.50	for the issuing of a final fee notice;
$62.50	for the manager liaising with lawyers; and
$264	for pre-litigation legal fees, including preparing a letter of demand and drafting a payment plan.

OC1889/2021

50. By order dated 21 December 2021 the Tribunal ordered that the respondent pay the applicants the sums of:

$9,699.06	for levies and interest to the date of the final fee notice (the date being 3 August 2021);
$372.02	for interest from the date of the final fee notice to the date of hearing; and
$1,200	costs in the proceeding (including $706.40 for reimbursement of fees paid by the applicant);

a total sum of $11,271.08.

51. What remains to be determined in this matter is a claim for an order for payment of the reasonable costs incurred by the applicant pursuant to s 165(ca) of the OC Act being the sum of $1,900, comprising of:

$900	for 9 final fee notices with respect to Owners Corporation 1 at a charge of $100 per notice, and
$1,000	for 10 final fee notices with respect to Owners Corporation 3 at a charge of $100 per notice.

Summary of proofs and further affidavit evidence

52. Each of the above claims for reasonable costs incurred is supported by a 'Summary of Proofs' [40] attaching various documents and a completed statutory declaration providing evidence in support of the claim under s 165(1)(ca) filed on behalf of each applicant.

53. Each applicant also filed additional evidence by way of affidavits as set out below.

Industry evidence admitted in all proceedings

54. During the course of the hearing, the Tribunal determined that the affidavits of Gregor Evans affirmed on 21 January 2022[41] and Richard Eastwood affirmed on 25 January 2022[42] together with their oral evidence, was admitted as evidence relevant to all of the three matters before the Tribunal.[43]

Affidavit of Gregor Evans

55. Mr Evans deposes that:

    a. He is the President and Board Member of the Strata Community Association Victoria (**SCAV**), and the managing director of 'The Knight', an owners corporation management company.

    b. SCAV is 'the peak industry body of owners corporation managers (**OC Managers**), lot owners, tenants and stakeholders living in or affected by strata title, community title and owners corporations'.[44]

    c. Based on his industry experience and knowledge, he observed that it is 'common practice across the industry' for OC managers 'to charge owners corporations for their *services* in issuing final fee notices to owners whose owners corporation fees are overdue and to manage the debt recovery process',[45] and that 'the *work involved* in owners corporation fee recovery issuing final fee notices and managing the fee recovery process is *generally considered an additional service* not covered by the ordinary fee charged by the manager'. One reason he

[40] The evidence in each 'Summary of Proofs' is considered below by the Tribunal in relation to each claim for 'reasonable costs incurred', as supplemented by the further affidavit evidence relevant to each claim.

[41] Exhibit C.

[42] Exhibit 1.

[43] Transcript page 256, line 27-31. As is discussed below, in an on the papers hearing it would not be usual (or normally necessary) for industry evidence of this type to be filed.

[44] Affidavit of Gregor Evans para 2.

[45] Affidavit of Gregor Evans para 3.

says this is so, is that 'it is not reasonably foreseeable how many lot owners will fail to pay their fees'. [46]

d. That the following fees are common and considered reasonable within the industry:

   i. Up to $110 (plus GST) for issuing a final fee notice; [47]

   ii. Between $55 – $110 (plus GST) for the *service* associated with carrying out 'the work involved in issuing a letter to a debtor advising of impending legal proceedings'; [48]

   iii. An hourly rate in the range of $150 to $260 per hour to manage the *fee recovery process*, with the process being based on 1 – 2 hours.[49] For OC managers that do not charge this as an additional fee for this service 'this usually results in a higher owners corporation management fee' but for those who do charge it as an additional fee charges in the range of $150 to $520 (plus GST) 'are common and considered reasonable within the industry'; [50]

   iv. Typically, attendance at a fee recovery hearing is not included in the core owners corporation management responsibilities and therefore this is subject to an additional fee being charged '*for carrying out this service*'. Again, this is 'usually charge[d] according to an hourly rate for attendance at a hearing' and charges in the 'range of' $150 – $260 per hour (plus travel time) are 'common and considered reasonable within the industry'. [51]

   v. These things are not exhaustive of the costs typically charged. 'There may be circumstances where it would be reasonable for an owners corporation manager to charge more' than these amounts.[52]

e. These range of fees are based on 'anecdotal research' from speaking with numerous OC managers and from 'my overall experience in the industry'.[53]

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[46] Affidavit of Gregor Evans para 4. Further reference is made below to the emphasised passages in this evidence.

[47] ibid para 5.

[48] ibid para 6.

[49] ibid para 7.

[50] ibid para 8.

[51] ibid para 9.

[52] ibid para 10.

[53] ibid para 10.

Affidavit of Richard Eastwood

56. Mr Eastwood deposes that:

a. He is the Executive General Manager - Customer Management for Smarter Communities Ltd's business in Victoria, which trades as Victoria Body Corporate Services (**VBCS**). He is also a member of SCAV which he describes as the 'pre-eminent member-based association for the Victorian owners corporation industry';

b. He has been dealing with owners corporations and their management for over 25 years and has substantial experience in managing owners corporations. VBCS currently manages over 2000 buildings;

c. Recovering unpaid levies for owners corporations is a *time consuming exercise* and while it is assisted with computer based systems it still *requires a lot of staff involvement*.[54]

d. OC managers for individual owners corporations are what he describes as 'the *front line in attempting to recover levies* from lot owners who do not pay on time'.

e. His company VBCS, like many other owners corporation management firms, has '*a dedicated team in house*'[55] to deal with fee recovery before files are transferred to lawyers and an application is made to the Tribunal.

f. The process his company follows is broadly:

i. **Fee 'levy notices'** are issued quarterly to lot owners. (It takes approximately 15 hours of staff time to run the process to issue such notices for some 2000 buildings under management by his company.)

ii. After 'due date' passes approximately a fortnight is allowed before the **first overdue notice** is issued. (The arrears process for the first overdue notice takes approximately 6 hours of staff time across the 2000 buildings that his company manages.)

iii. 14 days later if the fee remains outstanding, a further arrears process is run in order to issue **final fee notices** to lot owners who have not paid. (This takes another 6 hours of staff time across the 2000 buildings that his company manages.)

[54] See affidavit of Richard Eastwood, para 6.

[55] He states that VBCS employs 4 people in the levy recovery team and an in house lawyer.

iv. 14 days later a **subsequent final fee notice** is sent (in most cases) if levies are not paid. (This takes another 6 hours of staff time.)

v. 14 days later **another subsequent final fee notice** is sent (in most cases) if levies are not paid. (This takes another 6 hours of staff time across the 2000 buildings that his company manages.)

vi. After the 4th arrears notice an **SMS** or email is sent to the lot owner advising them that their file will 'proceed' for legal action by a particular date if they do not make payment. (This process takes 3 staff hours to process.)

vii. In a given case, it may take several interactions between the manager/levy recovery team and individual lot owners.

viii. If payment is not then made, then, depending on what the owners corporation wants to do:

1. **further notices** or **demands** will be issued or

2. the matter will be **referred to lawyers** to issue the application to VCAT.

g. It is standard practice for most owners corporations to be charged additional charges for fee levy recovery processes – this ensures that they are not paying for services they do not need;

h. That notwithstanding that the OC Act only requires lot owners to be issued with a fee notice and final fee notice before legal proceedings are issued, it is his company's system for recovery to send these various notices. He states:

> It is *our experience* that sending multiple notices provides lot owners further opportunity to bring their [owners corporation] fees up to date and *results in a significant amount of recovery* without the necessity of the owners corporation to incur legal costs and use the VCAT process. However, sending multiple notices to lot owners who don't pay has a cost incurred by managers which is passed on to owners corporations.

i. His company charges owners corporations the following additional prices for this fee recovery service:

Item (i) The **first overdue notice** (14 days after the due date) is issued, if the fee arrears are $200.00 and above, at a price of $27.50.

This is 'charged to the lot owner' (something that will be discussed further below).

Item (ii) If levies are not paid within 14 days a **final fee notice** is issued at prices of:

$38.50 if the arrears are $500.00 and above;

$53.90 if the arrears are $750.00 and above;

$86.90 if the arrears are $1000.00 and above.

Again, this is also 'charged to the lot owner'.

Item (iii) For lot owners who receive the 4th arears notice and do not pay an **SMS** is sent to advising that the matter will proceed to VCAT if the debt is not paid in full within 28 days and legal costs will be charged. A price of $22.50 per **SMS** is charged to the owners corporation.

j. In the fee recovery proceeding before us in which his company had acted to recover fees from the respondent lot owner, other amounts (in addition to the $86.90 for the final fee notice issued on 30 July 2021 and cost of a title search referred to earlier) had been charged to the owners corporation prior to litigation but, as we have noted above, were not claimed in the proceeding.[56]

Oral evidence of Gregor Evans and Richard Eastwood

57. The oral evidence of Mr Evans and Mr Eastwood was given to the Tribunal concurrently.

Mr Evans

58. Mr Evans stated that he has 16 years' experience in the industry and that SCAV is predominantly an association for OC managers. He explained that he reached the figures in his affidavit from his experience, and by reaching out to colleagues in the industry and seeking their advice about their debt recovery processes. He contacted eight SCAV members and received six verbal or written responses to his request.

59. All SCAV members use the structure of the SCAV form of contract, for which the issuing of final fee notices are not core services. The content of the

[56] These additional amounts claimed in OC1946/2021, which Mr Eastwood said had been incurred by the owners corporation and which he considered 'represented the reasonable costs of the owners corporation incurred prior to litigation' were:
$27.50 for arrears notice fee 4 November 2020– ie item (i);
$38.50 for arrears notice fee 3 February 2021– ie item (ii)(a);
$53.90 for arrears notice fee 4 May 2021 – ie item (ii)(b).
Mr Leaman clarified in his submissions that these additional three amounts were not claimed because they were not included on the Summary of Proofs and therefore the respondent had not been put on notice that those amounts were being claimed. As these items were not part of the claim, we express no opinion concerning the reasonableness or otherwise of escalating fees and refer to our observation at fn 60 below.

SCAV form of contract is recommended, however may be changed in the actual contractual agreement made between an owners corporation and its appointed OC manager.[57] He is unaware of any SCAV policy for debt recovery processes.

60. Mr Evans gave evidence also about a written '*code of conduct'* for OC managers who are members of the industry professional association the purpose of which code of conduct, he said:

> 'is to ensure that managers operate ethically and in good faith in making sure that they're professional in their conduct in the industry'.[58]

61. Mr Evans was taken to that part of his affidavit which outlined the process of referring a matter to a solicitor for further action. He said what would be involved is an investigation to ensure the contact details for the lot owner are accurate. Attempts would be made to try and contact the owner, and a Google search might be undertaken to look for a rental agent. It may require seeking approval from the owners corporation to initiate legal proceedings. Instructing the solicitor for the owners corporation would involve collating and forwarding documents to the solicitor, preparing a Summary of Proofs, ensuring notices were attached, and updating the owners corporation committee.

Mr Evans stated that the experience of the person undertaking such tasks varies, and this may impact the amounts charged. For example, an OC manager who was a franchisee business owner may undertake all debt recovery actions themselves, or they could be undertaken by an employee in a debt recovery team. The staff who may do the work do not require any particular technical qualifications to be part of the debt recovery team.

62. In regard to the issuing of a final fee notice, in his own experience he has used one software system in 16 years. That software program has the ability to pre-populate the details in the final fee notice. In the industry, he believes there is other software used that also has the ability to pre-populate information into the final fee notice, but there are also more antiquated or less sophisticated systems in use, including the use by some OC managers of excel spreadsheets. Further, the practice varies: while many OC managers would send out final fee notices automatically without reference back to the owners corporation committee, other arrangements exist whereby an OC

[57] As we shall come to below when dealing with the contracts of appointment between OC managers and the relevant applicants in each case, the provisions of each contract are very different. We also note that from 1 December 2021, s 119A of the OC Act contains new statutory requirements regarding the terms of an OC manager's contract of appointment and other matters. We have already noted the additional statutory duties on OC managers quite apart from their responsibilities to their owners corporation client under the general law.

[58] The code of conduct was not otherwise explored in evidence, although we note that a contract of appointment of an OC manager in evidence before the Tribunal showed that the provisions of the code are incorporated as contractual terms between the owners corporation and its OC manager.

manager would refer back to the committee before sending out a final fee notice.

63. Mr Evans stated that the figures set out in his affidavit for a charge of 'up to' $110 for the issuing of a final fee notice were determined from the industry feedback which he received, and that $110 is the top of the range. The feedback he obtained from his inquiries included charges of $55, and also that there are some OC managers who do not charge, which then leads to a higher management fee.

64. Mr Evans was not in a position to say what precise work different OC managers he spoke to performed before they sent out a final fee notice although the final step was the same:

> 'So, Deputy President, when I asked the question, it was simply how much you charge for issuing a final fee notice and they came back to me with various charges. *I'm not quite sure in terms of the amount of work by each firm in terms of what they do to issue a final fee notice*, but the issuing of a final fee notice is the same across the board.'[59]

Mr Eastwood

65. Mr Eastwood was taken to his affidavit and asked about the process by which the fees his firm charges escalate. It was his evidence that each notice at each stage attracts a different fee, because the work increases at the next stage of the process. The greater the debt, [60] and the further the outstanding levies are past their due date, the more work is undertaken – including ensuring addresses are all correct. After the fourth notice is sent there is full interaction between the arrears team and the OC manager, with a referral back to the owners corporation prior to commencing proceedings at VCAT, and an attempt at physical contact with the debtor. He said there is a similar approach to debt recovery regardless of the size of the building. The fee charged as a cost to the owners corporation of the different stages does not differ significantly based on the number of lots in the subdivision.

66. Regarding the rationale for this '4 stage' process, Mr Eastwood said it is adopted because it gives lot owners who have fee arrears an opportunity to pay their debts without litigation being commenced, and is a reasonable process. It is a process that is agreed between the owners corporation and the OC manager in management contracts and also by lot owners at annual general meetings. In his experience he said that this process results in fewer matters ending up at the Tribunal in debt recovery proceedings. It is what he termed 'a fee for service model', by which he explained the debt recovery

[59] Transcript page 182 lines 4-10.

[60] While this was Mr Eastwood's evidence it is not at all clear to the Tribunal why the size of the debt should necessarily increase the cost incurred by the owners corporation in recovering what are, after all, standard fees levied to all lot owners. This would require further justification by way of evidence in a future case.

process is not part of the *core* management tasks undertaken by VBCS. Rather OC managers charge the owners corporation for these additional services, which the owners corporation looks to recoup from defaulting lot owners. Usually, the defaulting lot owner will pay the debt recovery charge, but where they do not, owners corporations are billed by the OC manager and paid monthly by the owners corporation.

Additional affidavit evidence OC1881/2021

67. The affidavit of Colin Young affirmed on 20 January 2022 states that he is the finance director of the OC manager Horizon Strata Management Group Pty Ltd (**Horizon**) and is responsible for managing debt collection for the applicant.

68. His affidavit exhibits a copy of the Contract of Appointment between the applicant owners corporation and Horizon.[61] Clause 2.2.4.4 of that contract provides that the manager can charge the owners corporation for the debt collection process at an hourly rate of $150 plus GST chargeable in units of 6 minutes of part thereof.

69. He states that:

    a. 'The current charge for issuing a final fee notice is $15.00 plus GST per notice (being a total of $16.50), which represents one unit of time charged using our hourly rate'.[62]

    b. Horizon charge a debt collection referral fee of $62.50 to the owners corporation for preparing documentation and referral to the debt collection agency.[63]

70. Mr Young describes the process of issuing a final fee notice.[64]

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[61] Exhibit CY-1.

[62] Affidavit of Colin Young para 4.

[63] In the final fee notice in this proceeding, this is described as 'Debt recovery Stage 3'. Mr Young annexed '*A guide to debt recovery*' that his company publishes on its website. After describing the process of '1 Issue fee notice', '2 Issue reminder', '3 Final fee notice' and '4 Notice of legal action', under the heading '5 Legal proceedings' it states that:

> If payment has still not been paid, the debt will be referred to a debt collection agency on the 1st of the following month. At this stage, a debt collection referral fee of $62.50 from Horizon will be charged to the Owners Corporation for preparation of documentation and referral to the agency … Should the lot owner fail to comply with the debt collection agencies [sic] attempts to recover the debt, then an application to VCAT will be lodged requesting an order be handed down to recover the arrears.

Mr Young explained in his affidavit at para 13 that 'This charge is not specified in the Contract of Appointment, which refers to an hourly rate. However, it represents the approximate time of 25 minutes that it usually takes to collate the file for handover (not including GST).'

[64] Affidavit of Colin Young para 7. This is what the final fee notice sent to the lot owner describes as 'Debt recovery Stage 2'.

a. This includes running an aged arrears list for all lot owners using the software system and then examining it manually to select which lot owners should be sent a final fee notice.

b. He also determines which lot owners should be sent reminder notices, and which should have proceedings initiated.

c. Mr Young states that it is his decision[65] as to whether to issue a final fee notice, or whether a phone call or reminder letter is preferrable, and this usually depends on the lot owner's payment history: 'If a lot owner usually pays on time, I may call them on the phone to discuss their circumstances, or send a reminder notice.'

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[65] We note that when it comes to the next stage (stage 3) in the debt recovery process he said he contacted the owners corporation for instructions. However, at this earlier stage there was no express evidence in Mr Young's affidavit that that the applicant owners corporation had actually delegated any *discretion* to its OC manager authorising it to decide whether or not to issue a final fee notice on its behalf. Mr Young states in his affidavit: 'I am the person responsible for managing debt collection for the applicant owners corporation' and that under the contract of appointment the owners corporation appointed his company as OC manager 'to perform all *administrative functions'* for the owners corporation.
While Mr Young was not examined on his evidence and so no conclusion is drawn by the Tribunal, it is not apparent from the exhibited contract of appointment that it actually contains any *delegation* of responsibility for outstanding debt collection to Horizon nor that such debt collection falls within what he calls 'administrative functions' under it: see s 120(1)(d) of the OC Act. Doubtless the sending out of the fee levy notice itself is an 'administrative function'. Under cl 2.1.1.1 of the contract this falls under Horizon's services that are included within its general annual management charge, under the heading '*2.1.1 Management Services – Description of services'* which reads:

> *2.1.1.1. Accounting*
> *The Manager has the functions and duties provided for in Sections 120 – 122 under the Act, including:*
> ...
> - *Issue notices for fees set and special fees levied by the owners corporation*

However, outstanding debt recovery would require a separate delegation from the owners corporation setting out not simply the authority to issue a final fee notice but stating whether any *discretion* is given to the OC manager regarding the issuing of a final fee notice. This is to ensure that the committee of the owners corporation, and the members as a body corporate, retain proper supervision and control over any appointed service provider, such as an OC manager, which acts in this regard in the capacity as an 'agent for collection' of the owners corporation and has legal duties to its owners corporation "principal" that flow from that role.
The fact there is an agreed 'price' to be charged by an OC manager for issuing a final fee notice does not amount to the delegation of any power, let alone *discretion,* by the owners corporation to its OC manager to issue a final fee notice on its behalf. This is made plain by cl 3 of the contract of appointment which deals expressly with 'Delegations to Manager' and states in cl 3.1: (emphasis added)

> 'The Owners Corporation *may <u>by instrument</u>* delegate any power or function of the Owners Corporation to the Manager other than a power or function that requires a unanimous resolution or special resolution.'

Clause 3.2 then continues: (emphasis added)

> 'The Owners Corporation and the Committee by this instrument, hereby delegates to the Manager all the powers functions [sic] of the Owners Corporation that are necessary to enable it to perform its *duties under this Appointment*'.

To find any delegation of authority in regard to outstanding debt recovery in the documentary evidence in this case, one must go to the resolutions of the owners corporation contained in the minutes of its annual general meeting on 21 June 2021 which do provide a limited delegation of authority for outstanding debt collection, but only in the following terms:

> **13 Referral to an agency**
> It was resolved the Manager may refer a lot owners debt to a collection agency in accordance with the requirements set out by the Act.

The resolution does not expressly confer any *discretion* to issue or not to issue a final fee notice.

d. If he decides that a final fee notice is required, he will select that process for the lot owner and the computer system will automatically generate the notice and email it.

e. If the address for service for the lot owner is not an email address, the system will immediately print the notice instead and it will need to be posted manually.

71. As part of this process $16.50 for the production of the final fee notice is automatically charged to the lot owner. When the OC is billed, which occurs monthly, any fees accrued in the previous month will be included, including the manager's charge to the OC of $16.50 per final fee notice.

72. As we have discussed earlier,[66] we note that the charging of the cost of the final fee notice *to the lot owner* is not authorised by the OC Act. It is not lawful and is unauthorised under the OC Act even if a contract of appointment of an OC manager or resolution of the owners corporation passed at a general meeting might purport to authorise it.[67]

73. We note that cl 5.4.8 of the exhibited contract of appointment binds Horizon as OC manager to '*Observe the Code of Professional Conduct of Strata Community Australia (Vic) (SCA) and any other guideline or standard formally approved or adopted by the SCA.'* No doubt that code will be updated following the legislative amendments to the OC Act that came into effect on 1 December 2021. As these reasons make clear, the only basis that such fee recovery costs incurred by an owners corporation can be recovered by from a lot owner is if an '***order'*** is made by the Tribunal either under s 165(1)(ca) of the OC Act or under s 109 or sch 1 or the VCAT Act.

74. In respect of this claim Mr Young states:

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[66] See above at para 20b i and ii.

[67] Under the contract of appointment under the heading '*2.2.4 Dispute Resolution & Debt Recovery'*, in cl 2.2.4.3 there is a statement that '*Issuing of a debt recovery letter'* is 'included' in the general management fee but with a notation that reads '*NB Charged to delinquent Lot owner**' followed by a statement '**Where the Owners Corporation Manager is unable to recover the cost from an individual Lot owner, the Owners Corporation will be legally liable for payment of the charge.*' In clause 2.2.4.4, the cost of '*instructing debt collectors and/or solicitors,* [sic] *prepare documentation and/or generally supervise or attend any legal proceeding or hearings ...*' is charged at a separate hourly rate. Again, there is a notation '*NB Cost for preparing documentation and attendance at legal proceedings associated with debt recovery will be charged to the delinquent Lot owner**'.
As we have said earlier, there is no legal obligation on the lot owner to pay such a claim or charge incurred by the owners corporation. Therefore, to make such a claim or charge against a lot owner as a debt is unlawful.
The minutes of annual general meeting of 21 June 2021 also in evidence before the Tribunal state: (emphasis added)

> **12 Final Fee Notice**
> It was resolved for the Manager to issue a Final Fee Notice *charge* to a lot owner who has not paid any debt 28 days after the due date in the Notice.

Resolution 12, is likewise unlawful in purporting to authorise a '*charge*' to a lot owner for a final fee notice issued by the OC manager.

a. On 6 April 2021 the applicant paid Horizon $16.50 for issuing the final fee notice to the respondent on 29 March 2021.

b. The next stage of the debt recovery process was undertaken by the OC manager on behalf of the owners corporation at a charge of $62.50.

c. This stage involves contacting the owners corporation to seek agreement to refer the matter on, before preparing documentation and referring the matter to lawyers or a debt collection agency to pursue arrears.

d. The charge represents 'the approximate amount of time of 25 minutes that it usually takes to collate the file for handover (not including GST).[68]

e. On June 2021 the applicant paid Horizon $62.50 for the debt recovery referral.

f. CLP lawyers issued an invoice for $264 dated 24 June 2021 for preparation of a letter of demand and attendances on the lot owner and manager in drafting a payment plan and emailing it to the lot owner.

g. Annexure 'CY-10' shows that payment of the amount of $264 was made from the administrative fund on 28 June 2021.

75. The affidavit of Talya Heilbrunn affirmed on 21 January 2022 states that she is a solicitor employed by CLP lawyers. Ms Heilbrunn states that:

a. She was instructed by Colin Young to first issue a letter of demand to the respondent, and then prepare a proposed payment plan;

b. CLP Lawyers' professional fees for each of these services is $120 (plus GST); and

c. An invoice for $264 (incl GST) was issued to the applicant on 24 June 2021 and paid on or about 21 July 2021.

Additional affidavit evidence OC1889/2021

76. The affidavit of Emily Stefano affirmed 20 January 2022 states that she is a manager of McDonald Strata Pty Ltd, which is the OC manager of the applicant owner's corporation. She states in her evidence that:

a. the applicant owners corporations' management contract dated 1 July 2019 with the previous management company Jeffrey McLean & Co Pty Ltd (which was acquired by McDonald Strata Pty Ltd) appoints her

[68] ibid, para 13.

company as OC manager 'to perform all administrative functions of the applicants'.

b. Additionally, owners corporation resolutions at annual general meetings on 19 November 2020 (exhibit ES-2) confer the ability on the OC manager to charge fees to the applicant owners corporations for the recovery of unpaid fee levies from lot owners and authorise the OC manager to charge to the owners corporations 'an amount of $100.00, or such larger amount as disclosed on the contract of appointment, for each arrears matter that has reached stage 3 of the debt collection process'.

c. 'Stage 3 of the debt collection process is the issuing of a Final Fee Notice as per section 32 of the Owners Corporation[s] Act 2006 (though referred to in the 19 November 2020 Meeting Minutes in 'ES-2' above as a 'Legal Notice').'

d. That a final fee notice is issued where the owners corporation fees owing by a lot owner 'are overdue in excess of $10 and/or 7 days after the 28th day [upon] which fees were due'. All lots will be issued a final fee notice where they meet this criteria.

e. McDonald Strata charges an individual owners corporation $100 'for each Final Fee Notice that is issued, including where there are a number of different Owners Corporations on one Plan of Subdivision'.

f. 'In a situation where there is more than one Owners Corporation on a Plan of Subdivision the software [used by McDonald Strata to produce final fee notices] regards the total amount owning across all Owners Corporations at which an owner, such as the Respondent, owns various lots, and generates a separate Final Fee Notice charge for each of the separate Owners Corporations for the one Lot.'

77. Exhibited to her affidavit are both the contract of appointment between Jeffrey E McLean & Co Pty Ltd (as OC manager) and owners corporation numbers 1, 3, 4 and 5 (but not number 2) on the plan of subdivision and for the period 1 July 2019 to 1 July 2022 and the minutes of annual general meeting of each of owners corporation 1, 2, 3, 4 and 5 on the plan of subdivision held on 19 November 2020 which show McDonald Strata Pty Ltd as the OC manager and appoints another manager from McDonald Strata Pty Ltd as the chairperson of that meeting.

78. Also exhibited to her affidavit are invoices to the owners corporations 1 and 3 for 'Legal Notice Processing' dated 30 April 2021 for $1,600 and dated 3 August 2021 for $1,800, and a remittance advices dated 3 May and 5 August 2021 showing payment of those total amounts by the owners corporations.

79. Also exhibited to her affidavit (as they were also attached to her earlier statutory declaration in the Summary of Proofs filed for this claim) are the

final fee notices for OC 1 and 3 (which are each headed 'Legal Notice') dated 30 April 2021 and 3 August 2021 addressed to the respondent in respect of Lots 101, 106, 107, 203 and 208 in the plan of subdivision, in respect to which Emily Stefano states in her affidavit that the applicant owners corporations 'incurred a charge of $100.00 per lot for this service' and that the 'charge appears on the tax invoice issued to the Applicants as a total for all Final Fee Notices issued to each Owners Corporation' on the plan of subdivision on 30 April 2021 and 3 August 2021.[69]

80. Each exhibited final fee notice shows that it is a single notice sent to the respondent lot owner on behalf of each owners corporation in regard to which arrears are owing. In these single notices, charges incurred by each owners corporation are purported to be billed to the lot owner as a payment due by the lot owner. For example, in regard to the final fee notice dated 30 April 2021 for OC 1 and OC 3 for fee amounts owing by the respondent of $23 to OC1 and $700 to OC 3, there is reference to a charge of $100 to OC 1 and a separate charge of $100 to OC3. These charges are included in the total claimed as 'Arrears at 30/04/2021' for Lot 101.[70]

81. We will return to this issue further but again repeat what we have said above at para 72 above.

General observations about the industry evidence

82. Before moving to consider the application of the new statutory power in s 165(1)(ca) to the facts in these cases it is important to make some observations about the industry evidence:

    a. Both industry experts discuss 'the service' that the OC manager provides, and the 'work involved' in delivering that service for the owners corporation which then culminates in a particular charge (ie price) at a particular item fee or hourly rate (eg final fee notice, letter of demand etc). The charge then becomes a 'cost' to the owners corporation which is the 'cost incurred' in respect to which s 165(1)(ca) is concerned.

    b. Mr Evans' evidence was that the additional charges only commence where there is occasion to issue a reminder notice or final fee notice or demand for payment (ie not for sending out the standard fee notices).

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[69] Affidavit at para 10 and 15.

[70] Each of the other final fee notices adopts the practice of including a '*Charge for legal notice*' in regard to each owners corporation on behalf of which the notice is sent. Evident from a notation on each notice is that these charges attract GST. Each final fee notice also contains a further statement under a repeated heading in red ink, '*LEGAL NOTICE*' that states amongst other things:

> 'The above levies, interest and costs remain outstanding. If the above amount due, plus daily interest at the above rate, is not paid within 7 days of the date of this notice, we are instructed to refer the above debt to the Owners Corporation solicitor for legal action.
> All legal and other costs relating to the collection of your debt will be charged to and recovered from you.'

This accords with Mr Eastwood's evidence concerning fees his company charges to its owners corporation customers. Separate charges are only charged for additional services *after* the **fee notice** (namely, the invoice for the fees 'levied' by the owners corporation that lot owners are required to pay) has fallen overdue by a fortnight.[71] Additional separate charges do not relate to issuing the actual fee notice itself.

We interpose to note that a cost charged to and incurred by the owners corporation for the actual fee notice itself would, by definition, not be something that could be claimed under the new s 165(1)(ca) as a 'cost incurred by the owners corporation in recovering an unpaid amount'. There is no amount 'unpaid' until there has been a non-payment or failure to pay the amount in the actual fee notice by its due date for payment under s 31(2)(a) of the OC Act.[72]

c. The next observation to make is that the additional prices charged for the different 'items' referred to above do not fully describe the entirety of the 'service' that is provided by the OC manager to its owners corporation in connection with that line item.

Put another way, the price or fee charged is not the same as simply the 'cost' of preparing, printing and posting a paper letter or notice, or sending it by email or sending out an SMS. Rather it is a 'fee for service' or 'price' charged at a particular interval or event for a more substantive service of managing fee collection and recovery on behalf of the owners corporation client.

While the evidence of the witnesses tended to use the words 'cost' and 'fee' interchangeably they are of course different things. For the purposes of s 165(1)(ca), the section is not concerned with what it might have *cost* the OC manager to provide a service. Section 165(1)(ca) is only concerned with the 'fee' or 'price' charged for the service that becomes the 'cost incurred' by the owners corporation within the meaning of s 165(1)(ca).

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[71] In none of the proceedings in the test case was a claim made for costs incurred by owners corporations for reminder letters or demands for payment made *prior* to the issue of a final fee notice. It will remain for the Tribunal's determination in another case whether a charge incurred as a cost by an owners corporation for such a reminder letter or demand should properly be awarded under s 165(1)(ca). While there may be a proper basis in a given instance to send a reminder letter or demand for payment prior to the issue of a final fee notice, the Tribunal would be discouraged to see the enactment of s 165(1)(ca) leading to the fee recovery process becoming an industry for 'generating' owners corporation management income by the performance of 'additional services', which may not be productive in recovering the funds to which the owners corporation client is entitled. It is to be observed that the only statutory requirement before legal proceedings may be commenced for fee recovery is the sending of a (single) final fee notice that satisfies the requirements of s 32 of the OC Act: see s 163(2).

[72] Under the OC Act, the fees levied by an owners corporation are legally due and payable *within 28 days* from the date of the initial fee levy notice: see s 31(2)(a).

d. The next observation that may be made is that there may be efficiencies gained when a manager automates its processes using IT and potential economies of scale for a manager managing many owners corporation lots. This may well have an impact on the price charged for the service. In contrast, if the provision of the service were to be entirely 'manual' or paper based, it may require more people to perform the required tasks, be more time consuming and ultimately more costly. If that were to be the case, the price asked for the debt collection service for fee levy recovery might be more expensive, but there was no evidence about this.

   Mr Eastwood gave evidence that his company, VBCS manages over 2000 buildings and performs its fee levy recovery service for its owners corporation customers with a dedicated group of people in its 'levy recovery team' using an automated process. Mr Evan's said that some OC managers, however, simply use spreadsheets to reconcile fees and payments

   Thus, it is apparent to the Tribunal that not all OC managers will manage a large number of buildings, have a team, or use an automated process and therefore the individual tasks involved in delivering a fee recovery service will differ case by case.

e. The next observation to make is that the skill and experience of the manager, like the skill and experience of any professional or tradesperson, is a part of the *service* provided to a client or customer and what is paid for in the 'price' for that service. This is evident in Mr Eastwood's observation that:

   > It is our experience that sending multiple notices provides lot owners further opportunity to bring their [owners corporation] fees up to date and results in a significant amount of recovery without the necessity of the owners corporation to incur legal costs and use the VCAT process. However, sending multiple notices to lot owners who don't pay has a cost incurred by managers which is passed on to owners corporations.

   It was apparent from the industry evidence as a whole that there is a level of expertise and judgment entailed in recovering unpaid fees from people owning a lot, and often also living in, an owners corporation building, that is distinct from the necessary people skills, accuracy and the ability to add up numbers and check records that may be required in the debt collection process. Mr Eastman alludes to the skills and expertise further when he says his company employs a 'dedicated team in house to deal with levy recovery before files are transferred to lawyers'.

f. The next observation that may be made is that there will necessarily be a level of 'staff involvement' when dealing with recovery of fees from individuals who may be having financial difficulty. That personal

element is something of value that is paid for, even in an automated process. Mr Eastwood alluded to this in his affidavit, stating that:

> Recovering unpaid levies for owners corporations is a time consuming exercise and whilst it is assisted with computer based systems, it still requires a lot of staff involvement.[73]

g. The next point to observe is that the price agreed between the service provider and the customer or client will always depend on the type or level of service required by the owners corporation at each stage in the process. Mr Eastwood refers to this when he says that when, after their standard process does not result in payment being made then depending on what the 'owners corporation wants to do' further notices or demands will be issued or the matter will be referred to lawyers to issue the application to VCAT.[74]

h. The further point to observe is that while Mr Eastwood talks about 'standard practice' for his company, there will necessarily be different practices within the industry, as Mr Evans attests to. Mr Evans talks about general practices and what may be usual, and talks of a range of prices being charged for the various categories of work performed but makes the observation that there are differences. He also makes the observation that where these things are not charged for separately, 'this usually results in a higher owners corporation management fee.' Accordingly, not only is there a range of pricing, there is a range of pricing and service models in the industry.

We make the observation that all this is to be expected in a competitive marketplace with many buyers and sellers of services. The owners corporation management market place has a variety of participants, large and small, all competing with each other for business. Owners corporations and their committees have a responsibility under the Act to

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[73] This was also evident from the affidavit of Mr Young, in connection with proceeding OC1881/2021, describing the process his company adopts and how, for example, whether he might call a late fee-paying lot owner or send them a reminder notice would, for him, depend on the lot owner's past payment history. Mr Young's company also had a website on which it published '*A guide to debt recovery*' (exhibit CY-3) containing information both for its owners corporation customers and for lot owners in the owners corporation. Its 'Introduction' commences:

> Recovering arrears can be one of the most challenging things facing an Owner's Corporation. They may be recent, or in some cases, long standing, but either way you need an effective process to recover the debt.

The *guide* steps through the structured debt recovery process followed by his company; describes the timeline; discusses each step after the issuing of the fee notice. It ends with a set of FAQs relating to who is liable for the fee notice, how interest is charged and at what rate, whether notices can be sent via email, whether a 'payment plan' is available and how to go about requesting one 'if a lot owner experiences hardship or has a genuine reason for need of a payment plan' (as well as other frequent questions lot owners apparently ask). No doubt that guide will be updated following the amendments to the OC Act that came into effect on 1 December 2021.

[74] Mr Young's evidence shows this too in the *guide* produced by his company.

act in the interests of lot owners[75] and will make judgments about the level of service they require and the pricing they are prepared to agree to on behalf of their owners corporation and its lot owners who are the ultimate payer for the service.

i. The final point to make from the evidence, and also common knowledge, is that market forces, the cost of labour, the cost of business overheads, also impact what pricing in a market may be at any given time for a particular service. The owners corporation profile for Victoria varies between tiers[76] of owners corporations and as does the competitiveness in the market place for these services. Market forces will all affect the 'price' of service and thus the 'cost' for the owners corporation customer or client.

C. DISCUSSION – STATUTORY INTERPRETATION - CONTEXT

83. As noted earlier, ss 165(1)(ca) and (4) of the OC Act commenced operation on 1 December 2021. The new provisions were enacted as part of range of legislative amendments designed to improve both the regulation and the governance of owners corporations in Victoria, implementing the Victorian Government's public review of the legislation controlling the operation of owners corporations.

Secondary legislative material

84. We accept the submission of the amici that these materials in the public review are relevant to the task of statutory construction.[77] It is desirable that we explain why.

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[75] Discussed further below.

[76] Discussed further below.

[77] They submit 'not the least by reasons of s 35(b) of the *Interpretation of Legislation Act* 1984 (Vic)'. That section states:

> **35 Principles of and aids to interpretation**
>
> In the interpretation of a provision of an Act or subordinate instrument—
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and
> (b) consideration may be given to any matter or document that is relevant including but not limited to—
> (i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;
> (ii) reports of proceedings in any House of the Parliament;
> (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
> (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry, Formal Reviews or other similar bodies.

85. The **Explanatory Memorandum** to the *Owners Corporations and Other Acts Amendment Bill 2019* records that its purpose was to amend the OC Act and other Acts to implement 'the outcomes of a public review' into those Acts.

That public review was announced on 21 August 2015 by the Minister for Consumer Affairs and was conducted by Consumer Affairs Victoria: see *Consumer Property Acts Review Issues Paper No. 2: Owners Corporations,* p 2 (**Issues Paper**). Its terms of reference were relevantly set out in *Consumer Property Law Review: Options for reform of the Owners Corporations Act 2006,* p 23 (**Options Paper**),[78] which included examination of the efficiency and effectiveness of the regulatory arrangements governing, *inter alia*, the management of owners corporations.

86. The conduct and recommendations of the public review were helpfully explored by the amici's written submissions, which identified the 'mischief' which the amendments to s 165 were designed to address.[79] Their submissions drew the Tribunal's attention to the following issues that had been explored which we summarise as follows:

a. The Issues Paper had identified that where a lot owner was late with payment, the OC Act did not allow the owners corporation to charge that lot owner with any additional fee to cover the administrative and other costs of collecting arrears, or to make rules to require such a lot owner to pay such costs.[80]

b. One of its 'Discussion prompts' also noted that in proceedings for fee recovery, VCAT did not order the late-paying lot owner to pay 'pre-VCAT legal costs".[81]

c. The Options Paper, in discussing the topic of 'Defaulting Lot Owners', presented options to 'facilitate recovery of debts by owners corporations'.[82] It articulated the issue in the following way:[83]

> The current process for recovering unpaid fees from defaulting lot owners is not cost-efficient and imposes inequitable burdens on other lot owners.

d. Two distinct 'inequities' were identified:[84]

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[78] Both documents are available on the Consumer Affairs Victoria website.

[79] The mischief to which an amendment is directed is relevant to the question of statutory construction of a 'provision of an Act' and to a 'construction that would promote the purpose or object underlying the Act': *Interpretation of Legislation Act 1984* (Vic), s 35(a).

[80] Issues Paper, p 12, section 3.2. We have made reference to this limitation at fn16.

[81] We have made further reference to this limitation at fn 16.

[82] Options Paper, 5.

[83] ibid, 46.

i. that costs of pursuing debts may not be recovered or may only partially be recovered by the owners corporation from the defaulting lot owner; and

ii. that non-defaulting lot owners effectively subsidise a defaulting lot owner, potentially for years, before the debt becomes sufficiently large to justify the owners corporation incurring the costs to recover it.

e. The Options Paper recorded stakeholder feedback, expressing concerns that owners corporations were 'out of pocket' when they pursued recovery of debts from lot owners, and that there was general support for improving the ability of owners corporations to recover pre-litigation debt collection costs from defaulting lot owners.[85] Specific stakeholder feedback identified was that:[86]

> There were some reservations expressed about whether owners corporations should be able to recover pre-litigation costs in excess of the amount owed and it was suggested that placing a limit on the amount of such costs would discourage owners corporations acting hastily or excessively. On the other hand, some stakeholders considered that owners corporations should act quickly to recover a debt and if the matter becomes protracted and costs escalate, the ultimate blame for that lies with the defaulting lot owner.

87. Consumer Affairs Victoria identified four stand-alone options for 'debt recovery' reform and two other options for 'litigation costs' which they described under the following headings as:

> **Stand-alone options for debt recovery**
>
> Option 15A – Require lot owners to lodge bonds for unpaid fees.
>
> Option 15B – Permit owners corporations to adopt payment plans in 'hardship' cases.[87]
>
> Option 15C – Permit owners corporations to recover pre-litigation debt collection costs from lot owners.
>
> Option 15D – Permit VCAT to make default judgements.
>
> **Alternative options for litigation costs**
>
> Option 15E – Align VCAT's costs power with those of the Magistrates Court.
>
> Option 15F – Empower VCAT and courts to .award all reasonable costs.[88]

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[84] ibid, 47.

[85] ibid, 46.

[86] ibid, 47.

[87] We note that Sch 1 to the OC Act has been amended to include at para 3.5 a new power to enable an owners corporation to make 'rules' for the owners corporation for 'Payment of fees by instalments by lot owners in financial difficulty'.

88. Of the 'options for reform' relating to the 'debt recovery', other than option 15B, none of the other options was embraced by the legislature in the terms suggested. The amici identified that the closest was 15C which provided that:

> **Option 15C – Permit owners corporations to recover pre-litigation debt collection costs from lot owners.**
>
> Under this option, owners corporations would be allowed to *levy lot owners* with the reasonable legal and administrative costs of recovering debts where a matter does not proceed to litigation or, if it does, with the reasonable legal and administrative costs incurred prior to the commencement of legal proceedings.
>
> This option would address the problems raised about debt collection in this context but could reduce the incentive for owners corporations to resolve disputes before taking debt recovery action and could result in further disputes about the reasonableness of the costs sought to be recovered.

89. However, as is readily apparent from the terms of s 165(1)(ca), instead of giving the an owners corporation itself the statutory power[89] to 'levy' the lot owners for the additional costs incurred in debt recovery, the statutory power to 'order' costs was given to VCAT. That statutory power provides that the Tribunal *may* order '*payment of reasonable costs incurred*' where the Tribunal considers it 'fair'. The other point of difference, as we have already observed, is that this statutory power to make 'order' only arises where a matter does proceed to litigation as an 'owners corporation dispute' in the Tribunal.[90]

90. The *Explanatory Memorandum* states in relation to cl 70 of the Bill that it: (emphasis added)

> … amends section 165 of the Act, which details the orders that VCAT may make in determining an owners corporation dispute.

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[88] Option 15F, despite its heading, was confined to 'litigation costs'.

[89] It is to be recalled that 'owners corporations' under the OC Act are a particular type of *statutory* body corporate, incorporated and created under Part 5 of the *Subdivision Act 1988 (Vic)*. They have functions and power to do only the things that the legislature has conferred functions and power on them to do under the OC Act or other statutory provision. An owners corporation has the powers and functions set out in Division 1 of Part 2 of the OC Act. An owners corporation does not have the same flexibility that an ordinary company may have under general corporations legislation to bind members of a company under the company's constitution and rules (previously known as memorandum and articles of association) that govern the internal management of a company and the relationship between the shareholders or members of the company. By s 29 of the *Subdivision Act 1988 (Vic)*, an owners corporation is excluded from the whole of the 'Corporations legislation' and accordingly neither the *Corporations Act 2001 (Cth)* nor Part 3 of the *Australian Securities and Investments Commission Act 2001 (Cth)* apply in relation to an owners corporation in relation to its performance of functions or exercise of powers under the *Subdivision Act 1998 (Vic)* or the OC Act.

[90] As the amici identify, 'the amending Act *does not* implement the proposal to empower owners corporations to *levy* lot owners with the reasonable costs … of recovering debts where a matter does not proceed to litigation'.

> Subclause (1) *amends section 165(1) to insert new paragraphs (ca)* and (n), which provide that *VCAT may make orders regarding the payment of reasonable costs to the owners corporation incurred in recovering unpaid amounts from lot owners (other than costs in the proceeding)…*
>
> Subclause (2) inserts a new section 165(4), which clarifies that this section does not affect VCAT's power to award costs under section 109 of the Victorian Civil and Administrative Tribunal Act 1998. [91]

91. This new power conferred on the Tribunal to make such an 'order' was not the only legislative change coming out of the public review affecting the Tribunal. The Tribunal was also given additional jurisdiction through the expansion of the matters that come within the notion of an 'owners corporation dispute' under s 162.[92]

92. The *Explanatory Memorandum* to the Bill discusses that the various proposals emerging from the public review were all designed to make owners corporation buildings better governed, more financially responsible, sustainable and liveable, taking into account stakeholders' experiences and industry development since the OC Act commenced in December 2007.[93] In addition to the Tribunal's new jurisdiction and new powers to make orders in the disposition of an 'owners corporation dispute' under Part 11 Division 1 of the OC Act, the amendments create five tiers[94] of owners corporation imposing distinct governance and financial reporting and account auditing

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[91] The Statement of Compatibility tabled by the Minister in accordance with the *Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 28 makes no specific reference to the new power in s 165(1)(ca). However it does show its relationship to s 167 when discussion another new statutory power inserted in s 165(1) – s 165(1)(n) (the power to grant entry to a lot or building to a person authorised under s 50) – stating that:

> VCAT will only make such an order if it considers it appropriate to do so in all the circumstances. Further, section 167 of the Principal Act provides that when VCAT makes an order, it must consider the conduct of the parties, any actual or proposed act or omission by a party, the impact of a resolution or proposed resolution on lot owners as a whole, whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against lot owners and any other matter it thinks relevant.

See *Parliamentary Debates (Hansard) Legislative Council Fifty-Ninth Parliament First Session Thursday, 20 February 2020,* 576.

[92] See s 162(d) and (e). VCAT's power to make 'orders' was also expanded to accommodate the additional jurisdiction conferred by s 162(d) with the power to make orders of a type described in s 165(1)(n).

[93] Amongst other things it states that the amendments seek to—

a. rationalise the regulation of owners corporations;
b. improve the quality of owners corporation managers and enhance protection for owners corporations;
c. expand and improve developers' duties to the owners corporations they create and enhance protection for owners corporations;
d. improve the governance and financial administration of, and internal relations in, owners corporations.

[94] See s 7 and fn 95 and 102 below.

obligations.[95] The amendments also impose new substantive legal obligations,[96] including on *all* members of owners corporation committees and subcommittees by creating a *statutory duty* 'to act in the interests of the owners corporation'[97] and creating additional new statutory duties on OC managers.[98]

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[95] The Minister's second reading speech (*Parliamentary Debates (Hansard) Legislative Council Fifty-Ninth Parliament First Session Thursday, 20 February 2020*) explains (at 577) that:

> This Bill implements the outcomes of the Victorian Government's sweeping review of legislation governing the operation of owners corporations in Victoria, undertaken as part of the Consumer Property Law Review.
>
> This review examined both the conduct of owners corporation managers, and the functions and management of owners corporations.

Discussing the refinements to the existing model of regulation and governance of owners corporations in Victoria, the Minister said (at 577-8, para 12):

> The Bill will improve the regulation of owners corporations in a number of important ways. For example, a new, more logical, five-tier system based on owners corporation size will be introduced, establishing new thresholds for the requirements to have committees, prepare annual financial statements and commission external audits or independent reviews, and have maintenance plans and funds. Larger owners corporations will be subject to a greater number of requirements, whilst smaller ones will be subject to less stringent regulation.

[96] The Minister continued (ibid, at 578) stating that the Bill implements:

> a number of proposals to improve the governance and financial administration of, and internal relations in, owners corporations.

This includes expanding the duty of committee members to include a duty to act in the owners corporation's best interests; restricting proxy farming and committee proxies, and prohibiting contractual limitations on lot owners' voting rights …

[97] The amended s 117(1)(c) places this distinct legal *duty* on a member of a committee or sub-committee, 'in the performance of the member's functions'. It is in addition to the pre-existing statutory duties to 'act honestly and in good faith' (s 117(1)(a)); to 'exercise due care and diligence' (s 117(1)(b)); and 'not to make improper use of the member's position to gain an advantage' for themself or any other person (now contained in s 117(2)).

[98] Amendments to s 122 and the insertion of s 122A and s 122B also imposes several additional substantive legal *duties* on OC managers. Section 122(1) now reads:

> **122 Duties of manager**
>
> (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; *and*
>
> *(d) must take reasonable steps to ensure that any goods or services procured by the manager on behalf of the owners corporation are procured at competitive prices and on competitive terms; and*
>
> *(e) must not exert pressure on any member of the owners corporation in order to influence the outcome of a vote or election held by the owners corporation; and*
>
> *(f) before a contract is entered into for the supply of goods or services to an owners corporation under which a manager is entitled to receive a commission, payment or other benefit, must give written notice to the chairperson of the owners corporation disclosing the commission, payment or other benefit in accordance with section 122B.*

Relevance of new statutory duties to power to make orders under s 165(1)(ca)

93. When we come to the elements of a claim under s 165(1)(ca), the amici submitted that under the new section, amongst the 'factors which may be relevant to the assessment of the reasonableness of each cost claimed' the Tribunal should take into account:

> The owners corporation's obligation of good faith including the obligations of honesty, due care and diligence, set out at s 5 of the OC Act (and the manager's equivalent obligations set out at s 122(1)(a) and (b) of the OC Act).

94. We agree. To these we would also include:

a. the statutory *duties* on members of committees and sub-committees – including duties of honesty and good faith, due care and diligence and, as mentioned, as from 1 December 2021, '*to act in the interests of the owners corporation*' – see s 117(1)(a), (b) and (c) of the OC Act;[99] and

b. the new and additional statutory *duties* imposed on OC managers including that an OC manager:

> '*must take reasonable steps to ensure that any goods or services procured by the manager on behalf of the owners corporation are procured at competitive prices and on competitive terms*' – see s 122(1)(d) of the OC Act. [100]

95. We also make the observation that these duties not only inform the question of 'reasonableness' but also the element of 'fairness', and the relevant application of the criteria under s 167, which might, in a given case, inform the exercise of the discretion whether or not to order payment by the lot owner of the costs incurred in recovering an unpaid amount claimed by the owners corporation from the lot owner.

96. For present purposes it is simply relevant to note as important to the 'legislative context' of the new ss 165(1)(ca) and (4) that these provisions were enacted by Parliament as part of a suite of legislative changes following a 'sweeping review of legislation governing the operation of owners corporations in Victoria' which examined the changing complexion of owners corporations since the OC Act was first enacted in 2006 to create the new 'legal framework for the governance of bodies corporate created under the *Subdivision Act* 1988, to become known as 'owners corporations'' in Victoria.[101]

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[99] See fn 97 above.

[100] See fn 98 above.

[101] On 20 July 2006, in his second reading speech for the Owners Corporation Bill, the Attorney-General informed Parliament that:

97. In 2021, the Minister provided a snapshot of the changes to the owners corporation landscape in Victoria that had occurred since 2006 and why the amendments were being made:

> Apartment and unit living is an increasingly popular option for many Victorians and brings together a wide range of people who have diverse goals, interests and expectations. There are currently over 85,000 active owners corporations in Victoria, covering more than 772,000 individual lots. It is estimated that around 1.5 million Victorians—a quarter of the state's population—either live in, or own property in, an owners corporation.
>
> Given the passage of time since the Owners Corporations Act 2006 commenced in December 2007, it is important to take the opportunity to reform and modernise our legislation to ensure risks are appropriately managed and stakeholder expectations are met. [102]

98. Clearly the new and distinct statutory power permitting the Tribunal to order that a 'lot owner' who has not paid their fees (or other 'unpaid amount') – and whom the owners corporation has needed to bring proceedings in the Tribunal for their recovery – must pay the '*reasonable costs incurred by the*

> In 1988, when the Subdivision Act was passed to govern the operations of bodies corporate, there were approximately 35 000 bodies corporate in Victoria in which 200 000 people lived and worked. *Most were small suburban apartment blocks of between two and six units*. Even a brief examination of the changing number and range of bodies corporate reveals that there has been a profound social transformation in the way Victorians live and work over the past two decades
>
> *Today there are more than 65 000 bodies corporate in Victoria, incorporating over 480 000 lots. It is estimated that at least l million people, or approximately 20 per cent of all Victorians, own, live or work in bodies corporate. We have seen the rise of large multistorey apartment developments. While bodies corporate with less than five lots account for around 30 per cent of the total number of bodies corporate, those, consisting of more than 100 lots now represent a quarter of all lots in Victoria These different sets of numbers indicate two significant developments since 1988. Firstly, there has been an enormous increase in the number of Victorians living and working in bodies corporate. Secondly, the average body corporate is growing in size, with more lots per body corporate…*
>
> Increasingly, bodies corporate are complex entities. Growing numbers of high-rise apartment buildings present a new set of policy challenges. These challenges increase when we consider the mix of uses for bodies corporate, which can relate to common property owned by residential, commercial, or industrial interests …
>
> The primary challenge for the government in reforming the law in this area is to keep regulation to the minimum necessary to guide and support the operations of bodies corporate, while at the same time keeping pace with the increasingly complex and sophisticated body corporate environment.

[102] See *Parliamentary Debates (Hansard) Legislative Council Fifty-Ninth Parliament First Session Thursday, 20 February 2020,* 577. It is to be noted that the 2021 figures represent an increase of 20,000 owners corporations (or 30% over 14½ years) and an increase of 292,000 lot owners (60.8% over 14½ years). In 2021 the density profile of owners corporation buildings has changed and in the parliament has addressed this change by introducing five tiers of owners corporations in s 7 which defines them as:

> Tier 1: more than 100 occupiable lots
> Tier 2: 51 – 100 occupiable lots
> Tier 3: 10 – 50 occupiable lots
> Tier 4: 3 – 9 occupiable lots
> Tier 5: 2 lots or a 'services only owners corporation'

owners corporation in recovering an unpaid amount from the lot owner', is a reflection of Parliament's recognition that timely payment of fees and other 'unpaid amounts' due by a lot owner to an owners corporation are critical for the proper and efficient functioning of owners corporations and the discharge of their responsibilities to their lot owners as a whole.

99. Implicit in the new statutory power in s 165(1)(ca) of the OC Act to order payment of the 'reasonable costs incurred' – like the power under s 109 of the VCAT Act to award 'costs in the proceedings' – that is called to be exercised in circumstances where there *is no pre-existing underlying legal liability to pay such costs*, is the recognition by Parliament that non-payment of 'unpaid amounts' found to be due by lot owners creates additional financial burden for owners corporations and that such additional costs incurred by the owners corporation in recovering unpaid amounts *may,* if not should, properly be borne by those who cause the costs to be incurred rather than the owners corporation, provided always that the costs incurred are 'reasonable' and the Tribunal considers it 'fair' to order payment.

The legal test under s 165(1)(ca)

100. We now turn to the elements of s 165(1)(ca). It is convenient to set out again the newly enacted provisions in full:

> **165 What orders can VCAT make?**
>
> (1) In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following –
>
> …
>
> *(ca) an order requiring a lot owner to pay to the owners corporation reasonable costs incurred by the owners corporation in recovering an unpaid amount from the lot owner (other than costs in the proceeding).*
>
> ...
>
> *(4) This section does not affect VCAT's power to award costs under section 109 of the* ***Victorian Civil and Administrative Tribunal Act 1998****.*

101. These provisions are to be read together and with s 167.

102. As we have noted in construing a provision of the OC Act the section is to be *read as a whole* and given its ordinary meaning, in light of its context and purpose.[103]

Elements

103. On the plain words of the section the following criteria must be found by the Tribunal to be met before an order under s 165(1)(ca) can be made:

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[103] See authorities cited earlier at n 20.

i) Is there an 'owners corporation dispute'?

ii) Are the costs 'incurred' by the owners corporation?

iii) Are the costs incurred 'in recovering an unpaid amount from the lot owner'?

iv) Are the costs 'other than costs in the proceeding'?

v) Are the costs incurred 'reasonable' and does the Tribunal, in the exercise of its discretionary power, consider it 'fair' to make an order for payment by the lot owner?[104]

The element of what is 'fair' must involve a consideration of the matters set out in s 167(1).

104. The joint submissions of the applicants' solicitors and the written submissions of the amici both identify with different emphasis each of these as the relevant elements. We deal with each element in turn in relation to each proceeding in the test case.

i) ***Is there an 'owners corporation dispute'?***

105. An owners corporation dispute is defined in s 162 of the OC Act. The bringing of a fee recovery claim in the Tribunal is by definition an 'owners corporation dispute'.[105]

106. This criterion is satisfied in each proceeding.

ii) Are the costs 'incurred' by the owners corporation?

107. The word 'incurred' is not defined and therefore should be given its ordinary English meaning.[106]

108. In the context of its use in the phrase 'costs incurred', the word 'incurred' means for the owners corporation to have either 'paid' the monetary cost or at least to have incurred a legal liability to pay it.[107]

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[104] While, as we discuss, reasonableness and fairness are different concepts, they contain some overlapping considerations.

[105] Such a claim comes within both the general opening words of s 162 and the specific words of s 162 (b). Section 28(1) of the OC Act creates the obligation on a lot owner (or purchaser etc) to pay fees levied by the owners corporation. Section 29 creates the obligation to pay interest on arrears if the conditions of that section are met. Section 30 provides that the money due by a lot owner is recoverable as a 'debt'. Sections 31 and 32 are the preconditions that must be satisfied to the recovery of moneys. Section 30(2) makes it plain that 'Division 1 of Part 11' applies 'to the recovery of money owed to the owners corporation by a lot owner'. As we have noted, s 162, the new ss 165(1)(ca) and (4) and s 167 are all contained in that division.

[106] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; *R v A2* (2019) 269 CLR 507.

Level of evidence

109. The issue then arises as to what evidence is necessary to establish this element?

110. The submissions of the amici curiae were that where there was no dispute raised by a respondent, the Summary of Proofs and on the papers process were appropriately adapted to the final determination of claims for reasonable costs incurred but that Tribunal should still require (as part of that process) evidence of the costs being 'incurred' by way of an actual invoice to the owners corporation from the entity charging the cost. They also submitted that the invoice itself should identify the date and amount of the cost, what it is for, and the lot in relation to which the cost has been incurred.[108]

111. The applicants submitted that this *level* of evidence[109] should not be required by the Tribunal in an on the papers hearing. In an on the papers hearing, where no dispute has been raised about this issue, the Tribunal can be satisfied on less evidence taking into account the manner in which it can inform itself under s 98 of the VCAT Act.[110] Thus, they submitted, that in the context of an on the papers hearing, provided there was clear evidence in the Summary of Proofs upon which the Tribunal could be satisfied, such as a statement by way of statutory declaration that the amount had been incurred, that was sufficient.[111]

112. They also warned that there was a practical and real risk that if the extent of evidence became too burdensome, then the costs of evidentiary proof of these small amounts could exceed the "reasonable costs" claimed. The basis for this submission was that the software systems of OC managers do not

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[107] A liability to pay which is contingent on some event or circumstance which may not occur may not be sufficient. We do not need to decide this point. *Mainieri & Anor v Cirillo* [2014] VSCA 227 at [43] – [52] contains a discussion of this distinction in the context of the award of legal costs.

[108] Outline of submissions of the amici curiae para 79.

[109] We discuss below further below the question of sufficiency of evidence required. See n* below.

[110] Section 98(1) of the VCAT Act relevantly provides that the Tribunal:

(a) is bound by the rules of natural justice;

(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;

(c) may inform itself on any matter as it sees fit;

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

[111] They also submitted that if the respondent raised an evidentiary dispute about this question then in a contested hearing further and more fulsome evidence might then be led to address the evidentiary question that was put in dispute.

always (and in some cases may be unable to) generate individual invoices to owners corporations for these individual fees.[112]

113. In short, they submitted that a statutory declaration in the Summary of Proofs that a fee has been incurred by the owners corporation, together with the provision of final fee notice showing the charge has been allocated to the lot owner should, in most cases, be sufficient evidence to establish on the balance of probabilities that the applicant has *incurred* the charges which are the subject of the claim.

114. We accept the applicants' submission that in *most* cases, taking into consideration the Tribunal's statutory obligations under s 98(1) of the VCAT Act, in the absence of contradictory evidence in an 'on the papers hearing' it will normally likely be sufficient evidence for the applicant's Summary of Proofs[113] to declare that the amounts claimed as costs in recovering an unpaid amount from the lot owner are 'costs' that have been *incurred* by the owners corporation. The Summary of Proofs should properly attach:

    a. any documentary evidence that has been produced during the fee recovery process showing the amount of the charge; and

    b. that it relates to the recovery of unpaid amounts from the lot owner against whom the claim is brought.

    However, for reasons which we explain, a final fee notice or statement of account *to a lot owner* showing the cost as a charge payable by the lot owner is *not evidence* on which the Tribunal can rely of such a charge being 'incurred' by the owners corporation.

iii) Are the costs incurred 'in recovering an unpaid amount from the lot owner'?

115. This is the third element required for the making of an order under s 165(ca).

116. There was little dispute or argument on this issue. In the light of the explanations given by the statutory declarations in the summaries of proof and affidavit evidence in each proceeding, it was sufficiently clear that the costs were incurred in each instance for this specific purpose or reason.

117. The amici described this third issue as involving a question of 'nexus': 'there must be a nexus between incurring the cost and the recovering of an unpaid amount from the lot owner against whom the order is sought'.

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[112] There was some evidence of this limitation before the Tribunal but it is not an issue about which the Tribunal need make any concluded finding, save to observe that it is common knowledge that software programs are commonly updated.

[113] As we have noted earlier the Summary of Proofs is in the form of a statutory declaration, attracting the penalties for perjury where false declaration is made.

118. An example where the nexus might not be established is where, by the nature and description of the cost claimed it is unrelated to the recovery of *an unpaid* amount from the particular lot owner. An example in these proceedings was a claim for a replacement garage remote, which was retracted as a mistaken claim. Such a charge, although it may well have been incurred, is patently unconnected with the *recovery* of any amount from the lot owner.

119. However, the amici also submitted that there needs to be evidence before the Tribunal that shows that the owners corporation has been charged a fee that links the fee charged to the recovery of the unpaid amount from the respondent in the proceeding. They submitted that an invoice from the OC manager to the owners corporation for fees that does not specify the lots in relation to which the charges have been incurred, without more, would be insufficient.[114]

120. We agree with the amici. In the usual course in an on the papers hearing, extensive affidavit evidence is not normally filed. And nor indeed is it required. However, in the usual course it will still be necessary for there to be sufficient evidence for the Tribunal to be satisfied about this issue when conducting a hearing and determining a claim on the papers. Much like the previous element, in the usual course it would likely be sufficient evidence for the applicant to declare in a properly executed Summary of Proofs that the cost amounts claimed by it were incurred by the owners corporation *for the purpose of recovery* of – or in the language of the section, '*in recovering*' – the claimed unpaid amount from the lot owner. Where the costs claimed are not self-evident from their description in an invoice *to the owners corporation*, a more fulsome explanation by way of evidence might be necessary. Where there are numerous services attracting a composite charge, there may need to be more evidentiary explanation than in a simple case of a single line item fee charged to the owners corporation for the debt recovery service performed of, say, sending a final fee notice.

121. The amounts the subject of these claims are all clearly amounts that have been incurred in recovering an unpaid amount from the relevant lot owner. As we have noted, one proceeding originally contained a mistaken claim for the supply of new garage remote controls, however this claim was withdrawn at the commencement of the hearing as being in error. Needless to say, had such a claim been pursued, it would have been rejected as self-evidently not being a cost that on its face answers the description of a 'cost incurred in

[114] The example given of a document they submitted may be insufficient was a remittance advice (ES-5) that simply showed a payment having been made of tax invoices from the OC manager to the owners corporations on the plan of subdivision for 'Legal Notice Processing' during a period (ES-4). However, we note that in that case there was also affidavit evidence attesting to the fact that the charge for final fee notices 'appears on the tax invoice issued to the [owners corporations] as a total for all Final Fee Notices issued to each owners corporation' on the relevant plan of subdivision and a statement that the payments were made by each owners corporation 'for the issuing of the Final Fee Notices to the Respondent'.

recovering an unpaid amount from the lot owner' and such a claim would have been dismissed on that basis. It serves as a reminder that summaries of proofs must be prepared with accuracy.[115]

iv) Are the costs 'other than costs in the proceeding'?

122. Section 165(1)(ca) makes clear that the costs that can be ordered by the Tribunal under the new statutory power are '*other than costs in the proceeding*'.

123. Section 165(4) of the OC Act confirms that s 165 does not affect the Tribunal's power to award costs in the proceeding under section 109 of the VCAT Act.[116]

124. In a usual case[117] when a substantive claim for fee recovery is decided on the papers it is determined at the same time as any claim for 'costs in the proceeding' (ie under s 109 of the VCAT Act) and at the same time as any claim for costs under s 165(1)(ca) of the OC Act. In a usual case, part of the consideration for the Tribunal will be whether a particular recovery cost claimed is either a 'cost in the proceeding' (in which the provisions of s 109 and Sch 1, s 51ADA of the VCAT Act may be applicable), or a reasonable cost incurred 'other than costs in the proceeding' (in which s 165(1)(ca) of the OC Act may be applicable). This will be a question of fact in each case and the following inexhaustive factors will be relevant:

    a. The time when a cost is incurred will be relevant, as will be the nature of the cost claimed. A letter of demand from a solicitor, for example, sent just before legal proceedings are issued is typically part of the costs recoverable under s 109 of the VCAT Act. A title search to establish ownership might also be, although, if incurred at a significantly earlier stage in the debt recovery action, it might more properly be characterised under s 165(1)(ca) of the OC Act.

    b. In all cases the onus will rest with the applicant to clearly distinguish between the two types of costs.

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[115] It also serves as a cautionary example of a situation where a claim for something which is self-evidently unrelated might create a level of doubt about the reliability of evidence in the Summary of Proofs which may result in a claim being found not to be established on the evidence and thus dismissed or causing delay and additional cost for the issue to be clarified or corrected.

[116] As we have noted earlier, s 165(1)(ca) therefore grants a new power to order costs other than costs in the proceeding, when prior to the legislative amendment the Tribunal had no power to consider or order such costs.

[117] In the proceedings in this test case before the Tribunal, the substantive claims and the costs in the proceedings have already been determined by the Tribunal and final orders made leaving for this separate hearing the determination of the respective claims in each proceeding for reasonable costs incurred other than costs in the proceedings. Usually this would not be the procedure followed by the Tribunal, and the substantive claim, the costs in the proceeding, and the reasonable costs other than in the proceeding, would all be determined by the Tribunal at the one time, on the papers if it were appropriate in the circumstances of that particular proceeding to do so.

c. This would typically be clearly set out and identifiable from the material contained in a properly executed Summary of Proofs.

125. As has been noted, the discretionary considerations listed under s 109(3) of the VCAT Act and s 165 and 167 of the OC Act differ. While in many cases the practical outcome may be no different, in certain contexts the ground on which a cost is claimed might result in a different order because, as we have said, the factors that inform the Tribunal's discretion under s 109(3) of the VCAT Act pertain to the conduct of, and other matters in, the proceeding itself; whereas the factors that inform the discretion in s 165(1)(ca) under s 167 of the OC Act pertain to matters generally outside of the legal proceeding.[118]

126. Thus, by way of example, in one of these proceedings, a question may have arisen whether a title search obtained by a solicitor before the proceeding was commenced might have been claimed as a distinct cost under s 165(1)(ca) of the OC Act because it was incurred sometime before proceedings were issued in the Tribunal. However, in that case it had actually been claimed as a part of the 'costs in the proceeding' under s 109 of the VCAT Act, and a ruling and orders have already been made about it at the on the papers hearing of that particular claim.

127. In comparison, in another proceeding in the test case, solicitors' fees for preparing a payment plan before legal proceedings were commenced, were claimed under s 165(1)(ca) as relating to a cost incurred in recovering fees outside of the costs in the proceeding (and were not claimed as 'costs in the proceeding' under s 109).

128. Where a solicitor does incur a fee or disbursement that might fall into a different category the Tribunal can only consider it as a cost in that category if it is both properly itemised as a 'fee' or 'disbursement' and the Summary of Proofs provides sufficient explanation about the reason for it being incurred.

v) Are the costs incurred 'reasonable' and does the Tribunal consider it 'fair' to make an order for their payment by the lot owner?

129. The issue that took up much of the submissions to the Tribunal was the vexed question of whether the costs claimed in each proceeding are 'reasonable'. Less attention was focussed on the final question of whether to order them would be 'fair'.

130. Although they are distinct issues it is convenient to address them together because they raise overlapping considerations both as a question of statutory construction and when it comes to the Tribunal's exercise of the discretion

[118] The application of the discretionary considerations under ss 109(1), (2) and (3) of the VCAT Act also operate differently to s 165(1)(ca) of the OC Act because of the legislative presumption in s109(1) of the VCAT Act.

whether or not to order the payment by the lot owner of the costs incurred by the owners corporation under s 165(1)(ca).

Reasonable – its meaning in s 165(1)(ca)

131. The difference in submissions regarding 'reasonableness' reduced to two critical issues of statutory interpretation:

    a. What does 'reasonable' mean and does proportionality bear upon the determination of whether a cost was a 'reasonable cost incurred'?

    b. Does being satisfied that the costs are reasonable require the Tribunal to form a view that the costs incurred were reasonable in both their amount (in the sense that they were not too expensive to be regarded as reasonable) and their incurrence (in the sense that they were properly incurred so as to be regarded as reasonable).

132. In relation to both issues, each raised the separate question of what evidence is required to establish whether a cost incurred is reasonable.

133. The word 'reasonable' is neither defined in the section nor in the Act.

134. Nor (as is the case in regard to the award of legal costs) is there any scale of costs for parties or the Tribunal to have reference to. Nor does the legislation contemplate that the Tribunal has any statutory power to set a scale of reasonable costs incurred in the recovery of unpaid amounts that might be ordered by the Tribunal under s 165(1)(ca).

135. What did the Legislature therefore intend the provision to mean when it used the phrase 'reasonable costs incurred' in the context of a claim for such costs being incurred as part 'in recovering an unpaid amount from [a] lot owner'?

Statutory interpretation – text, context, purpose

136. In approaching this question of statutory construction, the Tribunal applies the usual rules laid down by the High Court in countless decisions which focus on the legislative words used, their context and the objective or purpose of the particular section.[119]

(a) Text

137. Commencing with the text, the word 'reasonable' is a ubiquitous word that has a variety of ordinary English meanings.

138. In law it is used in innumerable contexts. Under the common law, for example, in the law of tort it is used to describe a legal standard of care to be met when a tortious 'duty' of care is established as owing by one person to

[119] See fn 20 above.

another: the duty is to take reasonable care. In other areas of law – whether statutory, common law or equity – the word 'reasonable' is used to provide a framework or standard for both analysis and for measurement. It is often combined to form a parasynthetic adjective: 'reasonable wear and tear'; 'reasonable contemplation'; 'all reasonable steps'; 'reasonable access'; 'reasonable adjustment'; 'reasonable compensation'; 'reasonable force'; 'reasonable time'; 'reasonable flow (of water)'; 'reasonable certainty'; 'reasonable suspicion'; 'reasonable cause', 'beyond reasonable doubt'. Sometimes the word 'reasonably' is used in conjunction with another adjectival word, such as 'reasonably practicable' or 'reasonably foreseeable', or the word 'reasonable' is used alongside another adjective, such as 'reasonable and appropriate'; 'reasonable and equitable', 'reasonable and proportionate'; 'reasonable and prudent'. Each use of the expression has brought with it a unique jurisprudence directed to the topic or area of law at hand.

Dictionary meanings – 'reasonable'

139. The CCH Macquarie Concise Dictionary of Modern Law (CCH Australia Ltd, 1988) says of the word 'reasonable':

> **Reasonable** an adjective much resorted to in the law (where it has come to mean something approaching 'moderate' or 'average', liability frequently being made to depend upon an assessment of what a reasonable person would have foreseen, or realised, or how a reasonable person would have acted, or reacted, etc.

140. Another legal text, '*Legal Thesaurus*, William C Burton' 2nd ed (ed S. De Costa, Macmillan) is a Canadian publication which attributes to the word 'reasonable' (in the context of meaning 'fair' as opposed to 'rational') the following variety of synonyms:

> **REASONABLE** (*Fair*), ***adjective*** *aequus*,[120] conscionable, equitable, fit, fitting, judicious, just, *modicus*, not excessive, not extreme, proper, *rationi*, [121] *consentaneus*, [122] restrained, suitable, temperate, tempered, tolerable, unextravagent, unextreme.

141. In regard to its ordinary English meaning *The Maquarie Dictionary*, 4th ed, defines the word 'reasonable' as having a variety of meanings depending on its context:

> **Reasonable** …/adjective
>
> **1.** endowed with reason.

[120] Latin for 'equal' or 'impartial' or 'just'.
[121] Latin for 'reason'
[122] Latin for 'suitable' or 'conformable'

> **2.** agreeable to reason or sound judgement: *a reasonable choice*.
>
> **3.** not exceeding the limit prescribed by reason; not excessive: reasonable terms.
>
> **4.** moderate, or moderate in price: *the coat was reasonable but not cheap*.

142. The *Oxford English Dictionary* (Database) (LP) relevantly defines it the same way:

> **A.** *adj*.
>
> **1.** Within the limits of what it would be rational or sensible to expect; not extravagant or excessive; moderate.
>
> †**2.** Proportionate. Also with *to*. *Obsolete*. *rare*.

143. The *Cambridge English Dictionary* defines reasonable as 'based on using good judgement and therefore fair and practical'.

(b) Context – 'reasonable costs incurred'

144. In s 165(1)(ca) the expression 'reasonable' is used in the composite phrase 'reasonable costs incurred' for achieving a particular objective.

145. Accordingly, the word 'reasonable' is concerned principally with the amount spent and in relation to the particular objective, which is to say recovering debts alleged to be due. Therefore, the central meaning imports the notions of being rational or sensible in connection with the objective and being in proportion to the amount sought to be recovered in the sense of not being extravagant or excessive but rather moderate or fair, but not necessarily cheap.

Market setting

146. The other important context in the interpretation of the expression is that the assessment is to be made in an entirely commercial setting, between a 'service provider' OC manager and its 'customer' or 'client' owners corporation, being amounts concerning which a decision has been made and authorisation given by the owners corporation to be incurred in a given instance and about which the method of charging has been agreed as the price to be paid in a competitive market for these services. Further, it needs to be noted that in the *performance* of the particular service, the particular 'cost' incurred will not always have been a charge for a service actually performed by the OC manager itself, but a cost that has been incurred for a service performed by someone else, such a debt collection agency or law firm that is engaged to act for the owners corporation. Additionally, while in some cases the cost may well be negotiable, in many cases the cost will be an amount which the owners corporation or OC manager will have no ability to negotiate, such as the cost of an ASIC search or title search to establish that

the details are correct and that the person to whom the final fee notice has been sent is still the lot owner. And as we have noted, with effect from 1 December 2021 an OC manager has a new additional statutory duty to 'take reasonable steps to ensure that any goods or services procured by the manager on behalf of the owners corporation are procured at competitive prices and on competitive terms': s 122(1)(d).

Secondary legislative materials

147. The second reading speech, while providing no express guidance as to the use of the expression 'reasonable' or the manner in which the Tribunal might approach the exercise of the statutory power to order payment against a lot owner, does draw attention to the background context that the legislature is acutely aware that owners corporation industry continues to expand in its size and complexity; that owners corporations are managed for the benefit of lot owners by committees and by managers appointed under commercial contracts whose business it is to manage owners corporations; that the variety of owners corporations in Victoria is now so diverse and complex as to require 5 distinct tiers to ensure proper regulation and governance and to require new duties to be imposed on both members of committees of the owners corporation and OC managers; and that, self-evidently from the enactment of the new power in s 165(1)(ca), owners corporations need to be able to recoup the reasonable costs incurred in recovering outstanding amounts, both to encourage timely payment of the money that owners corporations require to be able to function and operate properly and efficiently, and to protect owners corporations, and thus their constituent lot owners, from being left to bear that financial burden.

148. In other words, it is plain that Parliament was well aware that the amounts that would be claimed as 'costs incurred' would be costs comprised of commercial fees charged by service providers to owners corporations in the market place. Prices for a service inevitably differ in a competitive marketplace. Service offerings inevitably differ. Levels of service purchased by owners corporation as customers or clients inevitably differ. And the manner in which those service providers will deliver those services, will inevitably differ depending on factors such as their expertise and experience, size and capability, overheads and staffing levels. In short it is plain that Parliament intended that the Tribunal would exercise the new statutory power in s 165(1)(ca) in this context.

(c) Legislative purpose

149. We turn finally to legislative purpose or objective of the new statutory power. We have already remarked upon its purpose being remedial. The power is remedial in two distinct senses. The most obvious is that the section confers a statutory power on the Tribunal to, quite literally, grant a particular remedy in a civil action or claim.

Remedial legislation

150. But in this context it is the other sense of the word 'remedial' that bears closer attention. The enactment of this new statutory power is *legislatively* remedial in that it is intended to remedy a deficiency or gap in the law that previously existed, namely to positively enable owners corporations to lawfully recoup reasonable costs they incur in recovering unpaid amounts due by lot owners.

151. That being the 'remedial purpose' of the new power it is therefore a statutory provision that should properly be construed beneficially and purposefully in a way that enables that objective to be achieved.[123]

Beneficial interpretation

152. Adopting a beneficial or purposive approach, this would suggest that the Tribunal should not be encouraged to adopt an interpretation that, in the hearing and determination of claims for recovery of such costs, would necessitate an overly complicated examination of this question. Rather the determination of these claims and the exercise of the discretionary power to make such orders that the Tribunal considers 'fair' should instead be guided by a more common sense and practical considerations of whether the costs incurred appear to be reasonable, and bear a level of proportionality to the substantive claim in the proceeding, in an analogous manner in which the amount of costs might be awarded under s 109 of the VCAT Act.

153. While we agree with the amici that what is reasonable is not to be defined by what it is not, the ordinary English definition of the word 'reasonable' does positively embrace the notion that reasonable can mean 'not excessive' or 'not exceeding the limit prescribed by reason'. When one is talking about price or cost, it can also mean 'moderate' but not cheap. The concept of what is 'fair' also necessarily imports considerations of proportionality to the substantive claim as well as considerations regarding the conduct of the parties.

154. As we have said, in determining whether a cost incurred was reasonable the issue is not simply about the price (namely the cost to the owners corporation) but about whether it was reasonable for the particular service for which the price was incurred to have been engaged in or performed.

155. And again the industry evidence was instructive on this question. What it demonstrated is that there is no uniform yardstick or approach to the task of recovering unpaid fees from lot owners who do not pay their owners corporation fees on time. There are also different levels of service. Indeed, although the evidence did not address this topic (it not being relevant to the cases at hand) s 165(1)(ca) is not confined to the recovery of owners

[123] *Interpretation of Legislation Act 1984 (Vic)*, s 35(a). See fn 77 above.

corporation fees levied by the owners corporation. The power in s 165(1)(ca) to order costs be paid to the owners corporation embraces the costs of recovery of any 'unpaid amount from the lot owner'. Other such recovery claims may well be likely to involve different types of service, approach and amount to the more typical fee recovery proceedings that were the subject of these proceedings.

156. What the industry evidence also demonstrated was that while some fee recovery processes can be – and many are – automated, through the use of software and IT, and while some tasks can be performed in a relatively routine manner, the process as a whole is one that requires a level of skill and expertise. And in the particular context of moneys owing to owners corporations where the debtors against whom moneys are to be recovered are the actual owners of lots, and often occupiers, within a common building or buildings managed by the owners corporation, who are in their turn lot owner 'members' of the owners corporation, this skill and expertise necessarily embraces a level of interpersonal skill, strategic planning and owners corporation engagement and communication.

157. What the industry evidence also alluded to, if not establish, was that:

    a. Considerable work can be involved by OC managers to collect fees when they are unpaid;

    b. Timely fee payment is acknowledged as critical to the proper functioning and operation of an owners corporation;

    c. Some OC managers have developed organised, even dedicated, resources and teams for the collection of fees levies and other arrears across the owners corporation clients they represent;

    d. Within OC managers the approach to the recovery of unpaid fees varies with some adopting a staged process in which more work and higher fees are charged;

    e. For some owners corporations the authorisation to the OC manager to collect outstanding fees is delegated to it not simply in 'function' (which appears fairly standard practice) but in the very practical sense that it is sometimes a matter left to the OC manager to undertake once that authorisation is given at annual general meeting or by the owners corporation committee.[124] In other owners corporations the process is more closely overseen by the members or the owners corporation committee or subcommittee. The latter situation then necessarily involves the OC manager having greater interaction – potentially involving more reporting, discussions and correspondence – with the

[124] We have commented earlier on the authorisation and delegation of authority required to be given to an OC manager as agent for collection on behalf of an owners corporation.

body of lot owners or their elected committee members or their chair of committee.

f. There is a general but not uniform practice of OC managers charging additional fees for fee levy collection that are on top of the annual management fee. This 'fee for service' approach is said to have a number of benefits including:

   i. Additional fees are only charged 'if and when' there is a non-paying lot owner.

   ii. Those fees charged to the owners corporation relate to the particular debt collection work performed in that given instance.

   iii. This approach results in the general body of lot owners not paying for a service their owners corporation client may not require as part of the general service of its OC manager (ie additional costs are only incurred as and when the debt collection service is needed).[125]

g. There is no uniform fee for the different items of service. Sometimes a line item service is charged at a particular fixed price on, perhaps, a sliding scale depending on the amount or depending on the stage of the fee collection process. In some examples an hourly rate is charged per unit of time but at a range of hourly rates.[126]

h. As would be expected in a market in which there are many participants, fees for different services vary in their amount, sometimes quite considerably. And likewise, the type of service and the way it is supplied organisationally or performed in each instance is different across owners corporations and OC managers. The variation is likely to be even more granular across a whole industry, reflecting the huge variations in owners corporation size, in the composition of different owners corporations within a development, and the difference in the level of involvement and oversight by committees and subcommittees and lot owners in general meeting. The Tribunal would have been surprised and concerned to see the exact same prices being charged in a market.

158. Against the whole of this background context, Parliament could not have expected by its selection of the expression 'reasonable costs incurred' that its

[125] There is an inherent logic to this approach but whether it results in lower general fees was not established by the evidence (a question which would require an independent productivity analysis of significant industry scale to do so).

[126] The evidence suggested, but did not establish, that different hourly rates might correspond to the OC manager's own 'costs' in employing different levels of seniority or experience. The different hourly rates may, one might surmise, also reflect that as in any marketplace different 'prices' are charged by suppliers.

assessment would entail any assessment of whether the *level of prices* charged for services in a marketplace were reasonable. Setting 'prices' to be charged in an industry is not the function of the Tribunal exercising its civil jurisdiction. It is not the statutory purpose of s 165(1)(ca) to lead to such a result. Nor is it the function of the Tribunal in these types of civil disputes to determine whether the 'costs' of supply of a service meet any particular standard of efficiency or productivity. Indeed, for the Tribunal to attempt to embark on such assessments in legal disputes of this nature between owners corporations and their lot owner would be the antithesis of the Tribunal's statutory responsibility under s 98 of the VCAT Act performing its functions as a tribunal of law.[127]

159. The Parliament must have assumed that fees in the market would be different and not uniform. And the Parliament did not set any scale of fees or benchmarks by reference to which any quantitative assessment of reasonableness could be made.

160. All of this points to the view that what Parliament sought to achieve by the use of the expression was a more common sense[128] approach in the determination of what is 'reasonable'. As we have already said, the modest amounts generally likely to be associated with these claims for 'reasonable costs incurred' does not justify the cost and time associated with a large evidential inquiry. That would not remedy the mischief that the section was clearly intended to remedy as it would result in more expenses being incurred by owners corporations – through OC managers, lawyers and representatives proving the reasonableness of a claim for costs incurred – than the costs claimed under s 165(1)(ca) themselves, which would then be potentially claimed as a further cost to the owners corporation in the proceeding itself.

161. Before we turn to the final element of 'fairness', there is a further and important consideration of textual context that is relevant to the interpretation of the word 'reasonable' in s 165(1)(ca). The word is used in the context of the grant of the statutory power conferred on the Tribunal 'in determining an owners corporation dispute' to make orders the Tribunal considers 'fair' for the payment of money. As we have noted, this particular power conferred by Parliament on the Tribunal is a discretionary power and does not depend upon the existence of any underlying legal liability for payment of the amount that may be ordered by the Tribunal.[129]

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[127] Parliament could not have intended by the use of the expression 'reasonable costs' that its assessment would entail any evidentiary assessment by the Tribunal of whether the price of services *charged in a market* are reasonable. That is not the function of the Tribunal which has no role as any form of price setting authority. Nor is the function of the Tribunal to assess whether services offered by private businesses (and accepted by clients or customers in the market) are outputs of production that are produced at the lowest cost. The Tribunal does not perform any role as a productivity commission.

[128] To use the expression of the amici.

[129] The alternative suggested by the Review of empowering owners corporations themselves to make rules authorising owners corporations to levy charges for these additional costs of fee recovery was not adopted

162. The discretion is one that calls to be exercised in the context of a hearing of a claim for recovery of an amount or amounts claimed to be owing, and in which other sorts of costs may be recoverable as 'costs in the proceeding' where such discretionary costs are awarded in a broad brushed manner that achieves a level of predictability across cases decided by the Tribunal.

163. This element is not unimportant given the statutory role of the Tribunal in 'determining' owners corporation disputes. It is of practical importance, as such an approach offers a general level of predictability to applicants and respondents as to potential or likely reasonable costs to be awarded pursuant to s 165(1)(ca).

164. For these reasons the word 'reasonable' must be interpreted and applied to a claim for 'reasonable costs incurred in recovering an unpaid amount' in a practical way to mean not exceeding the limit prescribed by reason, not excessive; moderate but not cheap; proportionate in the sense of being not disproportionate to the fees that are being recovered.

Proportionality

165. 'Proportionality' was argued by the applicants to play no role in the assessment of 'reasonableness'. It was submitted that Parliament deliberately decided not to use that word, as it has in other legislation such as the *Civil Procedure Act 2010* (Vic).

166. We respectfully disagree with that submission. Proportionality is not only an element of the ordinary meaning of the word 'reasonable' (eg fitting, not excessive, proper, suitable) it also is embraced within the notion of what is 'fair', a word that appears in the introductory words of s 165(1) and which controls the Tribunal's exercise of the power under s 165(1)(ca). Having noted earlier that this new discretionary power is not dissimilar in its character to the discretionary power to award legal costs where proportionality is relevant – and should be at 'front of mind' – in legal disputes and in the conduct of legal proceedings in the Tribunal, the relationship between the substantive claim for fee arrears and the determination and making of orders for payment of the 'reasonable costs incurred' in their recovery will necessarily entail a question of proportionality.

Fairness

167. The Tribunal's power to order payment of 'reasonable costs incurred' is circumscribed, and ultimately confined, by what the Tribunal 'considers fair'. It is a distinct consideration which itself imports notions of proportionality in the context of the exercise of a discretionary remedy.

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by the Parliament. Instead the legislature conferred on the Tribunal the statutory power to 'order' them in the context of a legal proceeding brought in the Tribunal.

168. The written submissions of the amici described the element of 'fairness' as 'the touchstone' which requires a consideration of the matters set out in s 167(1) that the Tribunal is bound to consider. We respectfully agree.

169. The applicants submit that an order will always be fair, if the costs are reasonable and have been incurred, as it would be unfair for the owners corporation to be out of pocket for those costs, rather than the defaulting lot owner.

170. The amici submitted to the contrary:[130]

> If the Tribunal considers, taking into account the s 167 factors, that it would not be fair to make an order requiring a lot owner to pay to the owners corporation costs incurred by the owners corporation in recovering an unpaid amount from the lot owner, then it ought not to make an order under s 165(1)(ca) – whether or not the costs are (or would otherwise be) 'reasonable costs'.

171. As examples, the amici suggest 'it might be unfair to require a lot owner to pay fees incurred by the owners corporation to send final fee notices to the lot owner in circumstances where the owners corporation manager has mistakenly sent fee notices or reminder notices to an incorrect address or when the owners corporation has unreasonably refused a lot owner's offer to pay arrears by instalments'.[131]

172. We respectfully disagree with the applicants' submission.

173. While in part we embrace the amici's central submission, the examples given by the amici did not present themselves for determination in any of the cases before the Tribunal and we express no view.[132] Evidence and argument would need to be considered as the basis on which the Tribunal should properly assess a situation where a lot owner made an offer to pay arrears by instalments and such an offer was refused. A case of fee notices being sent to an incorrect address might involve a consideration of whether there was actually a 'mistake' made by the owners corporation or its OC manager or a failure by the lot owner themself to inform the owners corporation or OC manager of its change of address. We do not wish to make any comment one way or the other.

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[130] Amici submissions, [43].

[131] Amici submissions, para 42 - 43.

[132] As we have noted, the claims were all uncontested. There was no evidence before the Tribunal suggestive of the two examples given. Were a lot owner to argue and present evidence in support of the proposition that it was 'unfair' to order the costs for either of those reasons, the case could not be heard on the papers and the matter would be heard in an in person hearing. The owners corporation would have the opportunity to meet such a claim, if it contested it, presenting its own evidence and argument. Depending on whether the argument raised in defence was successful or unsuccessful, it might enliven the discretion for further additional costs to be awarded under s 109 and Sch 1 of the VCAT Act or potentially under s 165(1)(ca) of the OC Act in favour of the owners corporation if it was ultimately successful in its claim.

174. The part of the submission we do embrace is that the two considerations – 'reasonableness' and 'fairness' – are distinct considerations. It follows as a matter of statutory construction that the fact that costs incurred might be *reasonable* does not mean that it is necessarily *fair* for the Tribunal to order that they be paid *by the lot owner*.

175. However, we did not understand the amici to suggest by the submission that, where fairness was not established 'then [the Tribunal] ought not to make an order under s 165(1)(ca)', that the Tribunal had no power to order that part of the amount of a claim for reasonable costs that the Tribunal considers it fair to order. If the Tribunal did not have power to do that it would lead to illogical results.

176. For example, if the total costs incurred were determined to be 'reasonable' but it was considered 'unfair' to order them to be paid in full in the context of the particular claim, then if that meant that no order could be made at all under s 165(1)(ca) then the owners corporation would be left to carry the entire cost even if it might have been 'fair' to order payment of some part of the cost it had incurred in recovering the unpaid amount from the lot owner. It might raise practical difficulties too, for example, where an owners corporations agreed to pay fixed prices for debt recovery services (so as to have budgetary and pricing certainty) which might be reasonable in their agreed amounts but unfair to be ordered at that fixed price against a lot owner in the context of a particular claim for debt recovery. Even agreeing to the flexibility of charges based on time spent and charged at an hourly rate might be reasonable in amount but unfair to allow in full in the context of a particular debt recovery claim.

177. We consider that by enacting the new power in s 165(1)(ca) the Parliament conferred a discretion on the Tribunal that need not be exercised. As we have noted, there is no presumption that it should be exercised. But in its exercise the Tribunal must make an order that 'it considers fair' and must take into consideration the factors in s.167. In the conferral of such a discretionary power, given its context and purpose and the language of the section when read as a whole, we consider that it permits the Tribunal to make an order for payment that allows such part of a claim for reasonable costs that the Tribunal determines to be fair.[133]

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[133] To adopt the language of the current Anstat publication cited earlier at [165.01]:

> The Tribunal is not confined to making an order that fits into one of the categories listed in the sub-paragraphs … when determining an owners corporation dispute. *It may make any order it considers fair.*
>
> … having made out a cause of action (a legally maintainable claim) *made available under the Act* or otherwise known to the law, the Tribunal in exercise of its power under s 165(1) *has flexibility in fashioning an appropriate order to achieve the remedy*….
>
> The Tribunal's power to make any order it considers fair includes a power not to make any order at all if, if in all the circumstances, it considers it fair not to make any order'.

178. It is common knowledge that a defaulting lot owner is not a party to a contract between an owners corporation and its OC manager (or any other debt recovery agent it engages). It is also a somewhat unique scenario in that owners corporations agree prices for fee recovery with OC managers with the hope, if not an expectation (on the evidence before the Tribunal), that the costs of the fee recovery process will be sought to be passed onto the defaulting lot owner. Given this context, a contractually agreed fee as between an owners corporation and its OC manager, will not necessarily be either reasonable or fair to order to be paid by the lot owner in the circumstances of a particular proceeding. There are likely to be proceedings in which the Tribunal will require additional evidence before the Tribunal can be satisfied that a claimed cost incurred by an owners corporation is reasonable and that it is fair that an order for its payment should be made under s 165(1)(ca).

Section 167(1) factors relevant to the assessment of 'fairness'

179. We have mentioned that 'fairness' is to be considered against the elements in s 167. As we shall come to in a moment, in each of the cases before the Tribunal the three factors that are most apposite to each case are:

    i. 'the conduct of the parties' – s 167(1)(a);

    ii. 'an act or omission … by a party' – s 167(1)(b); and

    iii. 'any other matter VCAT thinks relevant' – s 167(1)(e).

180. In relation to the first and second, the non-payment of amounts established to be owing by a lot owner is both to 'conduct' of the respondent parties and an 'omission' by each of them.

181. In relation to the third ('any other matter') we are of the view that the consideration of 'fairness' imports the underlying legislative rationale for the conferral of the statutory discretion in s 165(1)(ca) itself that, following a public review, now empowers the Tribunal to order payment of 'reasonable costs incurred' in the determination of these types of 'owners corporation disputes', namely where a 'lot owner' has not paid an amount found due to the owners corporation and the owners corporation has incurred reasonable costs in recovering the unpaid amount.

182. Incorporated in this ' other matter' which the Tribunal considers relevant is that the general body of lot owners should not be put to extra expense because of the conduct or omissions of the few who do not pay the levies set by the owners corporation in general meeting, being funds required for the ongoing management of the owners corporation and the payment by it of all expenses such as insurance and services and other costs required to ensure the owners corporation buildings and their common areas can be managed for the benefit of *all* lot owners.

183. A further and opposing relevant 'other matter' is any conduct engaged in by the owners corporation through its OC manager or other agent for collection which falls outside that which is authorised by law, or conduct which is misleading to the lot owner or inaccurate or confusing. In a given case this may cause the Tribunal in its discretion to decline to make any order under s 165(1)(ca) or make such order for payment that it considers 'fair'.

184. In making 'any order it considers fair', in addition to being satisfied that the costs claimed are reasonable, the Tribunal will necessarily have regard to whether they are proportionate. In making a 'fair' order the Tribunal may determine to order to be paid the *whole* of the amount claimed or only to order to be paid that *part* of the amount claimed that the Tribunal considers to be fair.

185. As claims are determined in the Tribunal under this new legislative provision, members of the Tribunal exercising their own independent discretion will make decisions that they consider to be 'fair' in exercise of the new statutory power. The determinations in this case are the first of such decisions.

Level of evidence in on the papers hearing

186. When it comes to the level of evidence required for an 'on the papers hearing', we make the same observations to those made earlier in regard to the other elements about which the Tribunal must be satisfied before making an order under s 165(1)(ca).

187. There was some considerable debate between the parties and the amici regarding what evidence is required on the issue of 'reasonableness' and it is therefore necessary to elaborate.

188. In *Epeabaka v Minister for Immigration and Multicultural Affairs* [1997] FCA 1413; 150 ALR 397,[134] Finkelstein J endorsed powerful observations made by Dixon J (as he then was) regarding the evidentiary burden in a civil case: (emphasis added)

> When deciding a case the Tribunal must have regard to what is an appropriate standard of persuasion. In *Sodeman v R* (1936) 55 CLR 192 at 216 Dixon J said that the common law only knew of two such standards, that applicable to criminal cases, beyond a reasonable doubt, and that applicable to civil cases, the preponderance of probability. However, Dixon J pointed out that '*questions of fact vary greatly in nature and, in some cases, greater care in scrutinising the evidence is proper than in others, and a greater clearness of proof may be properly looked for*'.[135]

[134] A case dealing with a tribunal performing what in the language of the VCAT Act is 'review jurisdiction'.

[135] Finkelstein J therefore concluded that in regard to the tribunal exercising review powers in that case:

189. Finkelstein J also made very relevant comments about the rules of evidence and their application by that tribunal which, like VCAT, is not bound by the rules of evidence. In this connection, he commented: (emphasis added)

> In the course of deciding whether it has been persuaded, on the balance of probabilities, of the existence of a particular fact or event the Tribunal is not bound by the rules of evidence. That is not to say that the rules of evidence should be set aside. In *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 Evatt J pointed out that those rules were developed 'to prevent error and elicit truth'. Nevertheless, because it is not bound by rules of evidence *the Tribunal can act on any material that is helpful in coming to a decision. That includes material that might be admissible in a court of law. It includes hearsay that might not be admissible in a court; presumably the hearsay must be reliable*: *Kavanagh v Chief Constable of Devon and Cornwall* [1974] 1 QB 624 at 633. *But in all cases the evidence relied upon must be logically or rationally probative of the fact to be determined*. This was the point that was made by Diplock LJ in *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 465 at 488:
>
> > 'The *requirement that a person exercising quasi-judicial functions must base his decisions on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevan*t. It means that he must not spin a coin or consult an astrologer, *but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above*. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.'
>
> Lord Diplock returned to this topic when delivering the advice of the Privy Council in *Mahon v Air New Zealand* [1984] AC 808. There His Lordship said (at 820) that one rule that governed administrative decision-making was that the decision must be based 'upon evidence that has some probative value'. He explained (at 821) that 'what is required is that the decision to make a finding must be based on <u>some</u> *material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory*.' Once it is accepted, as I think it should be, that the Tribunal is required to base its findings on probative evidence it must follow that the Tribunal is also under an obligation to rationally consider that evidence. There would be little point to the imposition of an obligation upon a tribunal

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… when the Tribunal is required, as a step in the process of arriving at its decision, to determine whether a fact does or does not exist generally the civil standard should be held to apply to its decision-making with due regard being paid to serious issues… It is more likely to arrive at the correct or preferable decision if its obligation is to determine the existence of facts in accordance with the civil standard except in respect of those matters where the nature of what must be decided makes this inappropriate.

> to decide a case on probative evidence if there was not an additional obligation to rationally consider that evidence. Each obligation is designed to ensure, so far as may be possible, that the Tribunal does indeed arrive at a decision which is the correct or preferable decision. Conversely if each obligation is not imposed there will be a tendency for administrative decision-making to be arbitrary.

190. These observations are apposite to claims for reasonable costs incurred which the Tribunal has power to award under s 165(1)(ca) of the OC Act in the exercise of the Tribunal's original jurisdiction under the s 43 of the VCAT Act and s 162 and 163 of the OC Act.

D. SUMMARY - CLAIMS FOR REASONABLE COSTS INCURRED & ON THE PAPERS HEARINGS – GENERAL GUIDANCE

191. Before we turn to the individual claims in each proceeding, being a test case it is helpful that we make some general concluding remarks by way of general guidance.

Evidence

192. If a claim for reasonable costs incurred is a simple and straight forward claim – for example, the cost of services associated with the sending of a final fee notice or subsequent letter of demand – the evidence required to satisfy the Tribunal about the issue of 'reasonableness' will be different from a case where some further explanation might be needed to demonstrate why a cost was incurred or is reasonable – for example: to have sent numerous demands or notices or engaged particular services prior to commencing legal proceedings; or charged multiple fees for the sending a single notice or demand to a lot owner who owns multiple lots; or where there may be different owners corporations claiming unpaid fees against the same lot owner in a single development.

193. We do not wish to be prescriptive.

194. What evidence will be required in each case will ordinarily be answered by adopting a common sense approach to provide a *clear* and, most importantly, *accurate* evidentiary statement of explanation to the Tribunal, describing why an amount was incurred and why it is claimed as reasonable both to have been *incurred* by the owners corporation and in its *amount*. That explanation should clearly identify the relevant cost charged to the owners corporation for the services involved in recovering the unpaid amount from the specific lot owner.

195. In conformity with the Tribunal's obligations under s 98(1) of the VCAT Act, in the normal course the Tribunal would normally expect there to be such an explanation, albeit as brief as possible, provided by way of evidence on statutory declaration.

196. It would likely be insufficient for that explanation to simply state that the fee charged was one provided for in a management contract. Such evidence goes primarily to the question of the owners corporation's 'liability' for the cost (ie that it was one *incurred* by the owners corporation). Without more, it does not necessarily establish its 'reasonableness', albeit it is a necessary step along the path to establishing it. In the normal course a further statement of explanation would be required providing the reason a debt recovery step was taken for which the cost was incurred.

197. Again, without intending to be prescriptive such a statement might explain, for example (and assuming it to be factually the case), that the particular step was taken in accordance with the usual practice and agreed with the owners corporation in advance, and determined by the owners corporation (or its management committee, as the case may be) to be appropriate for the OC manager to take before legal proceedings were commenced. As an agent for collection of the owners corporation, evidence of instruction by the owners corporation or delegation of authority from it to take the debt collection step in recovering arrears will be required.[136]

198. In examining what is 'reasonable', the Tribunal will give consideration to whether the claimed cost incurred by the owners corporation was reasonably incurred, reasonable in amount, and reasonable considering the proportionality of the cost incurred relevant to the substantive claim for amounts owing.

199. If a step taken for which a fee charged falls outside what might be a standard or usual practice, a more specific explanation explaining the reason why would then also likely be necessary. For example, it may be that in a particular case the lot owner requested time to pay the arrears and then did not pay. In another case it may be that a decision was taken by the OC manager authorised by the owners corporation to conduct outstanding fee recoveries, or an owners corporation committee oversighting the process, to adopt a particular approach because of a particular situation. As we have said, it is not possible to be prescriptive about the evidence that might be required in a given case, nor should we attempt to do so.

200. In an on the papers hearing, provided there is a sufficient explanation by way of evidentiary proof provided that the cost has been incurred by the applicant; that the item or service for which the cost charged to the owners corporation relates to the recovery of owners corporation fees for the lot in question; that there is an explanation as to the contractual basis and authority upon which it has been incurred; and there is nothing in the circumstances that might suggest it is disproportionate or excessive or unfair, then in the

[136] As we discuss, debt collection of *outstanding amounts* that are in arrears from a lot owner is not an 'administrative' function that is equivalent to sending out the initial fee levy notice or receiving and receipting payment of fees levied by an owners corporation. Debt collection of outstanding unpaid amounts is a service of an altogether different character.

usual course this will be likely to be sufficient evidence to establish that it is 'reasonably incurred'.

Disputes about claims or evidence

201. Civil claims disputes are resolved by the Tribunal under the common law adversarial system of trial. An element of that process is that the Tribunal, like a court, is required to determine only the issues that are contested. It is open to any party to a proceeding to contest an issue or factual allegation or evidence put against them if they dispute it. Where, however, claims and evidence are uncontested then the Tribunal, like a court, will treat evidence presented as uncontested and is able to rely on it if it is otherwise reliable and probative. But as we have said, the evidence must always rise to the level that it establishes a proper evidentiary basis for the Tribunal to exercise the particular statutory power that is conferred upon it by legislation.[137]

202. Where a respondent does dispute a claimed 'cost', the claim would then become one that was unsuitable for an 'on the papers hearing' as it would require further evidence and argument. It would then result in a 'hearing in person' being scheduled at which further evidence and argument could be presented in the usual way by either party. If a party is then ultimately unsuccessful on the matter in dispute, this may result in that party having costs awarded against it as 'costs in the proceeding' under s 109 or Sch 1 Part 15AB, s 51ADA of the VCAT Act.

Section 98 of the VCAT Act

203. Owners corporations in Victoria exist to serve their lot owners as a whole. As we have noted, s 165(1)(ca) came into operation against a backdrop of other significant reforms enacted by Parliament that impose express obligations on OC managers and owners corporation committees to act in the interests of the owners corporation. As is apparent from the second reading speech and the ancillary materials to which we have referred above, the reforms were intended to improve regulation and governance within this significant sector of the community that impacts the day to day lives and livelihoods of people and families and businesses that own and occupy lots in owners corporations.

204. Despite other alternatives put forward in the public review, the new statutory power that has been conferred on the Tribunal in a proceeding is a discretionary power to order payment by a lot owner of 'reasonable costs

[137] The applicants submitted that the 'on the papers' process is somehow analogous to the default judgement process that operates in the Magistrates Court. This comparison is incorrect and the analogy must be rejected. The Tribunal is not vested with the power to make orders on a default basis. The process implemented by the Tribunal in the conduct of fee recovery hearings 'on the papers' results in a final hearing, and is a final hearing in that ordinary context. It is not a default judgement process. Conducting a final hearing 'on the papers' does not remove the requirement by the applicant to prove its case with evidence that satisfies the Tribunal that the costs claimed as incurred are, amongst other things, 'reasonable'.

incurred' by the owners corporation in recovering arrears. It is a power conferred against the statutory context that in proceedings in the Tribunal, the Tribunal is bound by s 98 of the VCAT Act. The modest amounts typically associated with these fees do not justify a large cost of evidentiary proof for these 'reasonable costs incurred' claims. That would not remedy the mischief that the new section was clearly designed and intended to address as it would result in potentially far greater cost being incurred by owners corporations (through their OC managers, lawyers and representatives) to prove a claim for 'reasonable cost incurred' than the cost itself incurred. And were that to happen, that additional 'cost of proof' would not merely become a further cost to the owners corporation but potentially a further cost awarded in the VCAT proceeding itself.[138]

Legal determination of reasonableness and fairness

205. For the reasons we have explained, the Parliament must be taken to have assumed that claims for reasonable costs incurred under s 165(1)(ca), being fees and prices charged in the market, would be different from case to case and not uniform. And Parliament did not set any scale of fees or benchmarks by reference to which any quantitative assessment of reasonableness could be made.

206. The section confers a discretion on the Tribunal that need not be exercised but if it is to be exercised the Tribunal must take into consideration both:

    a. the introductory words in s 165(1) of the OC ACT – 'In determining an owners corporation dispute, VCAT *may make any order it considers fair* including …'; and

    b. the factors in s 167 that direct VCAT to '*What must VCAT consider?*' in making an order under s 165.

207. The new statutory power to order 'reasonable costs' is to be exercised in the context of the different powers available to the Tribunal to award 'costs in the proceeding' under the VCAT Act itself, under s 109 and Sch 1 Part 15AB, s 51ADA.

208. The Tribunal will assess whether to make an order in a given case against the normal contextual setting of a claim, including the legal obligations and duties placed on an owners corporation and its committees and appointed OC managers and any conduct, act or omission by the owners corporation or its OC manager or the lot owner themselves which might be shown to have resulted in unnecessary costs being incurred, or any conduct that might be inappropriate, unauthorised, inaccurate or misleading. These considerations

[138] Which, may, depending on the outcome of the case and the adequacy of the original Summary of Proofs, be a cost potentially to be borne by the lot owner or the owners corporation as a 'cost in the proceeding' in VCAT under s 109 or Sch 1 Part 15AB, s 51ADA.

are non-exhaustive. In a given case there may be other matters of relevance to that particular case. In the end, what is ultimately 'reasonable' is to be assessed based on its ordinary meaning, in the context of each individual case.

E. FINDINGS & ORDERS IN PROCEEDINGS

OC1946/2021

209. In this proceeding the Summary of Proofs declared on 15 November 2021 states that the applicant has incurred a cost of $86.90 for sending a final fee notice on 30 July 2021 and $26.26 for a title search.

210. In respect of the fee for the title search, an issue arises as to whether this fee falls within a s 165(1)(ca) claim or is in fact part of the costs in the proceeding under s 109 of the VCAT Act, which have already been determined by order dated 21 December 2021. The applicant produced a tax invoice dated 30 September 2021 from Tisher Liner FC Law addressed to the applicant. The invoice is for the amount of $580 being for 'Professional costs – VCAT Application – Initial Account'. The description of the work undertaken is as follows: (emphasis added)

> To our professional costs of and including all work carried out on your behalf in relation to the preparation of the VCAT application to recover debt against the above Lot owner, including receiving your instructions, reviewing documents, correspondence with VCAT ***and all title searches***.

211. Despite the submissions from the applicant, it is clear to the Tribunal on the face of this invoice, that the title search undertaken by the applicant's lawyer on 17 September 2021 has been charged to the applicant as part of the legal costs *in* the proceeding. The evidence in this case therefore does not support the contention that the title search was incurred as costs other than in the proceeding. [139] The Tribunal has already considered and awarded legal costs in this proceeding, and the title search cannot be claimed again pursuant to s. 165(1)(ca) of the OC Act. That part of the claim under s 165(1)(ca) shall be dismissed.

212. What remains in this proceeding is for the Tribunal to consider the claim for the sum of $86.90 for sending a final fee notice on 30 July 2021. The Tribunal is satisfied that the applicant has *incurred* this cost in recovering an unpaid amount from the lot owner. We base that factual finding on the statement declared in the Summary of Proofs.

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[139] This finding in this case is not to say however, that in other cases a title search could not be properly claimed as costs other than *in* the proceeding. It will be a question of fact to be determined in each case, and it will depend upon the timing of such a search, and its purpose. It is not in the interests of lot owners or owners corporations for the Tribunal to discourage the conducting of title searches in circumstances where that may result in a correct lot owner and address for service being identified.

213. Is the cost claimed reasonable? The Summary of Proofs dated 15 November 2021 states that the cost 'represents a fair and proportionate amount for action taken by the applicant owners corporation in attempting recovery of the levies which are overdue'.[140]

214. Ordinarily, this would be an insufficient explanation on its own to establish reasonableness. There is no factual basis put forward in such a statement by which the Tribunal can make that assessment. A mere statement of opinion is insufficient. The basis on which that opinion is made is entirely unexpressed.

215. As we have said it will generally not be necessary for detailed evidence to be placed before the Tribunal as to the work involved, or time undertaken in generating and sending a final fee notice (or other demand) for payment of arrears to the respondent. But some explanation will be required of the type to which we have referred earlier in our reasons to provide an evidentiary explanation justifying why the cost incurred by the owners corporation is contended to be reasonable.

216. In this case the additional evidence of Mr Evans is that there is a range of charges up to a figure of $110.00 plus GST that are considered normal in the industry. There was also general evidence given in affidavits and in oral examination of the types of tasks undertaken in different stages and that the short form description that is contained in the Summary of Proofs of '$86.90 *cost charged* by the [OC manager] *for sending a final fee notice*' represents not the 'cost' to the OC manager but a 'price' that is charged for services that culminate in that step being taken in connection with the recovery of the unpaid amount. While the price charged for sending a final fee notice of $86.90 might be on the higher end of the spectrum given the automated nature[141] of these notices in which figures are produced and included in the notice, undertaking this fee recovery process entirely manually might be less efficient and more prone to error and potentially more expensive.

217. There being no particular evidence in this case to justify the reasonableness of the amount of $86.90 but no particular evidence that indicates it to be unreasonable or disproportionate to the substantive claim of $1,074.65 for unpaid levies and interest, the Tribunal, in the exercise of its discretion and taking into account the relevant considerations contained in s 167 of the OC Act, will allow a sum which it considers to be reasonable and fair in all of the circumstances of this particular proceeding, and will make an order under s

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[140] The Summary of Proofs continued: 'The Owners Corporation and non defaulting lot owners should not be left out of pocket for pre litigation recovery action taken against a defaulting lot owner in circumstances where the lot owner has failed to pay their levies on time as required.'

[141] Noting that there are undoubtedly overhead costs, training, software updates and programming, as well as data entry associated with the creation of the automated notice, and other tasks one would anticipate might be associated in a given case of cross checking records to ensure that the payment has not in fact been received before the additional service of sending a further fee notice is performed.

165(1)(ca) that the amount of $70.00 be paid by the respondent lot owner to the applicant owners corporation.

OC1881/2021

218. The affidavits of Colin Young and Tayla Heilbrunn provide evidence to the satisfaction of the Tribunal that the amounts claimed have been *incurred* by the owners corporation in recovering an unpaid amount from the lot owner, and also that these amounts are not costs *in* the proceeding.

219. The affidavit material also satisfies the Tribunal that the costs were incurred reasonably, and that the amounts charged are reasonable given the services that were performed.

220. It is not necessarily the case that such extensive affidavit evidence as to these issues will need to be provided in future proceedings. It is likely to be sufficient for an applicant to provide evidence by way a paragraph in the Summary of Proofs, as to why the costs claimed are reasonable, explaining briefly why the steps taken were reasonable to undertake and why the amount charged as a cost to the owners corporation is reasonable.

221. In this case, there is evidence that Horizon has advertised its policy of charging $16.50 for the issuing of a final fee notice. While it is clear from cl 2.1.1.1 of the contract of appointment of the OC manager that the issuing of a fee levy notice pursuant to s 31 of the OC Act is included in the 'total annual fee', the contract makes no specific reference to a charge for preparing a final fee notice in the section dealing with "additional services". It does, however, state under the heading 'dispute resolution and debt recovery' at cl 2.2.4.4 that the OC manager can charge the owners corporation at its hourly rate (being $150) for instructing debt collectors and/or solicitors, to '*prepare documentation'* and/or generally supervise or attend any legal proceedings or hearing affecting the owners corporation. The amici submitted that in the absence of evidence that there is an agreement by the owners corporation and/or its members to incur the charge, the Tribunal may not be able to conclude the fee was reasonably incurred.[142] The submission was put that it was unreasonable for the applicant owners corporation to have paid even this 'modest amount' that it may not have had any express, or at least proven, contractual obligation to pay.

222. The Tribunal does not accept this submission on the evidence in *this* case. While the contract is not precise, we consider that on a proper reading it was the objective intention of the parties, by the words with which they selected to express their contractual agreement, that the issuing of a 'final fee notice' for *debt recovery* under this particular contract, when viewed in the context of the whole of the contract between these parties, that the OC manager had a legal entitlement to charge the applicant owners corporation for a final fee

[142] Outline of submissions of the amici curiae para 128.

notice at the hourly rate. Taking into consideration the Tribunal's obligations pursuant to s 98 of the VCAT Act, and the absence of any contradictory evidence, as we have said the Tribunal is satisfied on the basis of the Summary of Proofs declared on 9 November 2021 and the affidavit of Mr Young, and the terms of the contract of appointment to which we have referred, that the charge has been *incurred* by the owners corporation. We make the observation that it is the management contract (not the published guide to debt recovery) which creates a legal obligation upon the owners corporation to pay to its manager the amount charged for the issuing of a final fee notice. We also observe that the contract of appointment in this case purports to authorise the OC manager to 'charge' costs of fee recovery to a 'delinquent lot owner'. For the reasons we have expressed earlier it is not lawfully possible for an owners corporation to either levy or charge costs of fee recovery to lot owners, and so, such a purported authorisation is unlawful. The provisions of the contract which purport to confer this authority on an agent for collection, such as an OC manager, are not lawful. Even if it were not unlawful, it is a contractual impossibility for a contract between two parties to impose a contractual obligation on a person who is not privy to the contract.

223. The affidavit of Mr Young satisfies the Tribunal that the charge incurred is reasonable, stating that $16.50 represents one unit of time charged using the hourly rate of $165 per hour. The Tribunal is also satisfied based on the Summary of Proofs and affidavit material that the sums of $62.50 for the OC manager liaising with lawyers; and $264 costs for pre-litigation legal fees have been both incurred by the owners corporation applicant and are reasonable. It is reasonable for the applicant to incur costs for the OC manager liaising with the legal representative, including the handover of the file, and the pre-litigation attempts at resolving the dispute, including a letter of demand, and the preparation of a payment plan. In the exercise of its discretion and taking into consideration the relevant considerations contained in s 167 of the OC Act, the Tribunal will allow a sum which it considers to be reasonable and fair in all of the circumstances of this particular proceeding and order that the respondent pay the applicant reasonable costs pursuant to s 165(1)(ca) in the amounts of $16.50, $62.50 and $264.00, being a total of $343.00.[143]

OC1889/2021

224. The applicant in this proceeding claims $1,900 as reasonable costs incurred pursuant to s 165(1)(ca) for the issuing of 19 final fee notices involving two owners corporations and multiple lots owned by the same lot owner for the recovery of some $9,699.06 in total outstanding levies plus interest and legal costs.

[143] We note there was an error in the additions made by the applicant in its Summary of Proofs which claimed a total amount of $373.

225. This claim is one that has a level of complexity that is greater than the other claims considered in the test case and one which raises the separate questions of how are considerations of reasonableness and proportionality, and ultimately fairness, to be applied in such a case.

226. Each owners corporation is a separate legal entity. It has potential economies of savings by using a single OC manager for fee recovery. Each lot owned by a lot owner gives rise to a distinct and separate substantive legal obligation to pay fees levied against each lot. In a given case, all levies for all lots might be in arrears. In another case, some levies might be in arrears. In another case some lots might be paid and some partially in arrears. In another case one owners corporation might have been paid in part by the lot owner while for the other owners corporation all levies might remain in arrears. There may be underlying issues that affect one owners corporation and not the other and inform the reason why there are arrears in the payment of amounts due to the owners corporation.

227. The other feature of this case is that 19 final fee notices for two owners corporations equates to 9 for one applicant and 10 for the other across the five different lots owned by the respondent.

228. In respect of this claim the affidavit of Emily Stefano affirmed 20 January 2022 establishes to the Tribunal's satisfaction that the OC manager:

    a. Issued final fee notices on 30 April 2021 and again on 3 August 2021 on behalf of owners corporations 1 and 3 (**OC 1** and **OC 3**).

    b. On 30 April 2021 a final fee notice was issued:

        i. on behalf of OC 1 to the respondent in relation to lots 101, 106, 203 and 208, and

        ii. on behalf of OC 3 in relation to lots 101, 106, 107, 203 and 208.

    c. OC 1 and OC 3 *were charged* $100 for the issuing of each of these notices and paid McDonald Strata on 3 May 2021 in relation to these charges.

    d. On 3 August 2021 final fee notices were issued:

        i. on behalf of OC 1 to the respondent in relation to lots 101, 106, 107, 203 and 208, and

        ii. on behalf of OC 3 in relation to lots 101, 106, 107, 203 and 208.

    e. OC 1 and OC3 *were charged* $100 for the issuing of each of these notices and paid McDonald Strata on 5 August 2021.

229. The Tribunal is satisfied that the costs have been *incurred* by the owners corporations as they have been paid by the owners corporation applicants.[144]

230. The issue in this case is whether the costs claimed to have been reasonably incurred, are reasonable in amount and whether it is 'fair' to award them in the exercise of the Tribunal's discretion under s 165(1)(ca) taking into account the considerations in s 167.

Legal basis for the fees

231. The first issue to consider is the legal basis upon which the owners corporations are liable to the OC manager for the services that have been charged and, specifically, whether it has been proved that there was a contractual obligation to pay them.

232. The Summary of Proofs declared by Emily Stefano on 16 December 2021 states the following:

> Under Schedule of Fees in the Contract of Appointment between the Applicant and the Owners Corporation Manager is entitled to charge a fixed fee for a debt recovery letter issued to a debtor in circumstances where the Lot owner's account has fallen more than 28 days in arrears and after a Reminder Notice has been issued to that Lot owner.
>
> The Owners Corporation incurred the reasonable costs set out in (3) of the orders sought above by issuing a Final Fee Notice to the Respondent. These costs are for the time and any disbursement costs payable to the Owners Corporation Manager in carrying out this service.
>
> At the AGM the members of the Owners Corporation also resolved that the manager is authorised to charge the Owners Corporation $100.00 for each arrears matter that has reached stage 3 of the debt collection process (after expiry of the final fee notice).

233. The affidavit of Emily Stefano affirmed on 20 January 2022 states at para 3 that: (emphasis added)

> In addition to the rights conferred in the Contract of Appointment, on 19 November 2020 the Applicants held an Annual General Meeting where the Members discussed collection of amounts owing to the Owners Corporation and resolved as follows:
>
> > '*…that the Manager is authorised to charge the Owners Corporation an amount of $100.00, or such larger amount as disclosed on the contract of appointment, for each arrears matter that has reached stage 3 of the debt collection process…*

[144] As discussed earlier, in this case there is documentary evidence of payment as well as affidavit evidence that the charges had been paid by the owners corporation applicants. There also is no apparent dispute between any owners corporation and its OC manager that this has occurred and, as we have said, no dispute was raised to any part of the claim by the respondent.

> *...that all costs incurred by the Owners Corporation from McDonald Strata Pty Ltd and any other company involved in the collection of arrears is to be charged to and recoverable as a debt from the lot owner in default...'*

234. The affidavit of Emily Stefano further states at para 4 that:

> Stage 3 of the debt collection process is the issuing of a Final Fee Notice as per section 32 of the Owners Corporation[s] Act 2006 (though referred to in the 19 November 2020 Meeting Minutes in 'ES-2' above, as a 'Legal Notice').

235. The Tribunal also has before it documentary evidence that was tendered in support of the applicant owners corporations' claim for reasonable costs. In examining the Contract of Appointment dated 1 July 2019 under the heading '*2.2 Additional services paid by hourly rate or fixed fee*', a debt recovery letter is priced to the owners corporation at $55.00. But in the contract there is no line item for the service of issuing of a final fee notice.

236. The Minutes of the Annual General Meeting dated 19 November 2020 state *inter alia* at para 8 that:

> 'It was resolved that the Manager is authorised to charge the Owners Corporation an amount of $100.00, or such larger amount as disclosed on the contract of appointment, for each arrears matter that has reached stage 3 of the debt collection process'.

237. This motion was referred to both in the statutory declaration in the Summary of Proofs and in the affidavit of Emily Stefano. But what was not referred to, and what is of significance to this decision, is the 'six (6) stage' debt recovery process set out above it in the Minutes of the AGM dated 19 November 2020. The process is recorded in the Minutes of the owners corporations as follows:

> **Debt Collection Process:**
>
> Members were advised that there are six (6) stages in the debt collection process as listed below:
>
> 1. Levy Notices are issued at least 28 days before the levy due date
> 2. Final Fee Notices are issued shortly after the due date of each levy amount
> 3. Legal Notices may be issued 3 to 4 weeks after the Final Fee Notice was issued (costs apply)
> 4. Any owners still in arrears 7 or more days after the Legal Notice was sent, may be referred to the Owners Corporation's solicitor;
> 5. If referred to the Owners Corporation's solicitor, a letter of demand will be issued to the lot owner (costs apply)
> 6. If payment is still not made following the letter of demand being issued, an application will be made to VCAT or the Magistrates Court (costs apply)

238. This six stage fee recovery process clearly shows that a 'legal notice' is different to a 'final fee notice', and that the issuing of a stage 3 'legal notice' occurs 3 to 4 weeks *after* the 'final fee notice' is issued in stage 2. It also makes clear that there are no costs for the stage 2 process, which is the issuing of a 'final fee notice' itself. This is in direct contradiction to the evidence of Ms Stefano at paragraph 4 of her affidavit which states that stage 3 of the debt recovery process is the issuing of a final fee notice. This evidence is unhelpful at best, and misleading at worst.

239. Matters such as the completeness and clarity and ultimate reliability of a witness's evidence – whether in a statutory declaration, an affidavit or by oral evidence – are not only matters that bear upon whether a fact that a party has an onus of proving is found to be proved. Where evidence is presented to the Tribunal that is unhelpful in support of a claim, as this evidence was, it is conduct under s 167 of the OC Act which the Tribunal can, and which will, be taken into account in the exercise of the Tribunal's discretion whether to award reasonable costs incurred pursuant to s 165(1)(ca). It is imperative that parties and those who perform functions on behalf of owners corporations (such as to collect arrears of fees) are aware of this, and the seriousness of a failure to fulfill the legal obligations which are owed by them to the Tribunal.

240. On the evidence before the Tribunal in this case, the best evidence on which the Tribunal can rely on the question of the *reasonableness* of the costs that were incurred by the owners corporation applicants is the documentary evidence. The Tribunal finds on that documentary evidence that there is nothing in the Contract of Appointment dated 1 July 2019 which authorises the OC manager to charge an additional fee for service for the issuing of a 'final fee notice'. In addition, the Minutes of the Annual General Meeting dated 19 November 2020 authorise a charge of $100 for each matter that has reached stage 3 of the debt recovery process. Stage 3 is the issuing of legal notices which may be issued 3-4 weeks 'after the Final Fee Notice was issued'.

241. Therefore, neither the Contract of Appointment nor the Minutes of the AGM create a contractual entitlement for the OC manager to charge its owners corporation clients, who are the applicants in this case, for the issuing of the nine final fee notices dated 30 April 2021, and the final fee notice in respect of OC 1 for lot 107 issued on 3 August 2021. The claim in respect of these notices are therefore dismissed in their entirety.

242. Had the Minutes of the AGM of 19 November 2020 in fact authorised the issuing of a final fee notice at $100, the costs claim in relation to the notices would have still have been dismissed by the Tribunal as being neither reasonable nor fair and the Tribunal would have declined to order their payment by the lot owner respondent. It is the written contract between the owners corporations and OC manager in this case that is the basis upon which their contractual rights and obligations arise. An owners corporation in

general meeting unilaterally passing a resolution to pay a higher fee to a service provider such as an OC manager does not alter those contractual terms. It is not a method by which a written contract between these two contracting parties is varied.[145] There is of course nothing to prevent an owners corporation from agreeing to pay to its OC manager something else in the course of a commercial arrangement. However, where the parties to a commercial contract fail to take steps to reflect that in their written contractual agreement, particularly one that affects other parties such as the lot owners of an owners corporation, this is a factor that bears on the question of reasonableness and fairness and a factor that also bears on the Tribunal's exercise of discretion under s 165(1)(ca). The absence of a clear and unequivocal legal obligation on the owners corporation to pay such charges to a service provider such as an OC Manager, whom an owners corporation appoints to be its agent for collection of outstanding fees payable by lot owners, will go to the very heart of the Tribunal's assessment of both whether it is reasonable and fair to order payment of such costs by a lot owner in the exercise of the Tribunal's discretion.

243. The Tribunal must now consider the claim for the issuing of nine, *second* final fee notices on 3 August 2021. As already indicated, the Tribunal does not accept that a resolution passed at an AGM by owners corporation members is sufficient to vary the legal rights and obligations between the owners corporations and the OC manager that arise pursuant to the Contract of Appointment. However, the Tribunal notes that the stage 3 process reference in the Minutes is as follows:

> Legal Notices may be issued 3 to 4 weeks after the Final Fee Notice was issued (costs apply)

244. The Contract of Appointment allows for the charging of $55 to the relevant owners corporation for the issuing of a 'debt recovery letter' by the OC manager. In circumstances where a final fee notice was issued on 30 April 2021, the Tribunal is satisfied that the *subsequent* final fee notices issued on 3 August 2021 are analogous to the issuing of a debt recovery letter following the issuing of the first final fee notice, and that $55 may not necessarily be unreasonable in its amount to charge for such a subsequent notice, subject to what we say below.

245. A further issue arises on the facts of this case as to whether it is reasonable to charge twice in circumstances where only one final fee notice is generated for both owners corporations?

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[145] In this regard we note too that Clause 11.1 of Contract of Appointment expressly states:
11.ENTIRE AGREEMENT
This document embodies the entire agreement between the parties and any previous or simultaneous negotiations, representations, arrangements and agreements are superseded by this Appointment. *No amendment or variation may be made to the terms of this Appointment other than in writing executed by each of the parties.*

246. What is apparent from the evidence in this case, including the final fee notices themselves, is that each of the single final fee notices has been sent on behalf of *both* owners corporations, both owners corporations being under the management of the same OC manager. Yet for each single notice to the lot owner for its lots that are in arrears there is a claim made for more than one 'legal notice' cost incurred by the owners corporation applicants.

247. Whilst the Tribunal would wish to encourage efficiency (and would be discouraged to see inefficiency) in the process of fee recovery, charging owners corporations in the same plan of subdivision a fee *twice* for the same single notice to the lot owner does raise a question about the reasonableness and the fairness of the charges incurred by the owners corporations when they are sought to be claimed against the lot owner in an application under s 165(1)(ca).

248. We accept there may be efficiency in a reduced number of notices. However, on the evidence there was no suggestion this *saved cost for the owners corporation*s under the fee recovery process it had engaged the OC manager to perform for the benefit of all lot owners. The evidence raised the spectre of unreasonableness as it resulted in additional cost being sought to be visited on a lot owner, a person who is not privy to the management contract between the owners corporation and its OC manager. This circumstance raises a question mark about which the Tribunal cannot be satisfied that it is reasonable and fair to make such an award for the amounts claimed as 'reasonable costs incurred' under s 165(1)(ca) for that full amount.

249. In these circumstances the Tribunal exercises its discretion to order what it considers both reasonable and fair. In lieu of awarding the full 'double' cost for each final fee notice, and so as to ensure that no particular applicant owners corporation would otherwise be treated differently from another, the Tribunal considers it 'fair' to award 80% of the amount of $55 for the 5 notices issued in respect of OC 3, being the sum of $220.

250. In respect of the four 'second' final fee notices issued in respect of OC1, the outstanding fees and interest are very minimal – in the vicinity of $45-$50 each.[146] To award 80% of $55 in those circumstances would be quite disproportionate to the amount of fees actually owed by the lot owner to OC1, and the Tribunal therefore awards a proportionate and reasonable amount of $20 each for those four notices, being a total of $80.

251. The total amount to be ordered by the Tribunal for the respondent to pay the applicant is therefore the sum of $300 (namely $220 to OC3 and $80 to OC1).

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[146] It was not made plain in the statutory declaration or sworn affidavit evidence filed in support of the claim for reasonable costs incurred that any of the amounts claimed as reasonable costs incurred for sending the five 'first' and four 'second' final fee notices for OC1 related such small amounts.

252. There was a final factor in this case given the practice we observed which quite independently would have caused the Tribunal to exercise its discretion to discount the very high amounts claimed by OC 1 and 3. It was not a practice that was peculiar to this case but in this case there was clear evidence before the Tribunal concerning how it occurs.

253. The OC Act does not authorise the practice and does not permit it – it has never done so. Parliament has not permitted it by its amendments to the OC Act that came into effect on 1 December 2021.

254. The minutes at the AGMs of OC1 and OC3 on 19 November 2020 recorded the statement (under the passage set out above) that lot owners were advised that:

> **COSTS** - All costs are recoverable from the defaulting lot owner; this includes charges from McDonald Strata Pty Ltd as well as the solicitor.

255. That statement is factually incorrect. At the time of the AGM in 2020, the only manner in which costs could have been recoverable was *if* legal proceedings were commenced and *only if* the Tribunal had exercised the discretion to make 'orders' for the payment of 'costs in the proceeding' under s 109 or sch 1 s 51ADA of the VCAT Act (as the case may be).

256. The minutes at the AGMs on 19 November 2020 also recorded that a motion was put, and resolution passed, to the following effect: (emphasis added)

> **IT WAS FURTHER RESOLVED** that all costs incurred by the Owners Corporation from McDonald Strata Ply Ltd and any other company involved in the collection of arrears *is to be charged to and recoverable as a debt from the lot owner in default* and that any penalty interest or costs charged to owners in arrears can only be waived or written off after approved by an ordinary resolution made at a general meeting.

257. Such a resolution is of *no lawful effect*. At the time, and now despite the introduction of s 165(1)(ca), there was and is no statutory or other lawful basis to charge the amount to the lot owner or to claim it as a 'debt'. To make a demand for payment of such costs against a lot owner on the basis of such an unlawful resolution is to make a wrongful and unlawful demand for payment of such costs.

258. In this case, there was evidence put to the Tribunal that the issuing of a second final fee notice before issuing proceedings was an efficient approach in the fee recovery process – by giving more time to pay can avoid the commencement of legal proceedings altogether; it can save costs being incurred quite apart from it being fair to allow the lot owner more time to pay.

259. However, it is impossible to rationally comprehend how an unlawful demand for a wrongful claim provides any clarity at all to a lot owner as to what is in truth legally due and payable by the lot owner as a debt to an owners

corporation. To the contrary, it creates uncertainty and confusion and complexity. Where this happens it creates room for dispute that can be avoided entirely by accurate statements of account in a final fee notice issued to lot owners.

260. Had we not already disallowed and discounted the claims of OC1 and OC3 in this particular case, the Tribunal would have exercised its discretion to disallow and discount those claims on the basis that each final fee *notice* for which $100 was charged contained a wrongful and unlawful demand (whether on behalf of OC1 and OC3 or both) that the lot owner pay those costs to discharge its purported legal obligations to its relevant owners corporation.

261. In future cases the Tribunal may not be inclined to allow any amount under s 165(1)(ca) if this practice is observed in the final fee notices relied on in evidence by owners corporations. In light of the legal obligations placed on owners corporations, committee members and OC managers to which we have referred earlier in these reasons, and in light of the provisions of the VCAT Act itself, including ss 97, 98 and 136, and of the obligations of parties and representatives to the Tribunal under Practice Note PNVCAT3 para 21 – 22, in a future case the Tribunal may also refuse to award costs it might otherwise have awarded under s 109 of the VCAT Act in favour of an otherwise successful applicant owners corporation or exercise its discretion to make an adverse costs order.[147]

R. Wilson	L. Warren	C. Price
Deputy President	**Acting Deputy President**	**Senior Member**

[147] See for example *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* [2006] FCA 83 in which a successful applicant was ordered to bear its own costs where it was found by the Court to have made demands 'well beyond [its] legal entitlement and beyond any reasonable or reliable estimate of that entitlement' and for 'remedies not know to the law', and as a result of which the Court held it to be 'appropriate that the Court express its disapproval of the conduct by refusing to make order for the payment by the respondents' of the applicant's costs of the proceeding: per Merkel J at [52], [56] - [58].