

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC969/2022

CATCHWORDS

Annual general meeting – whether agenda gave adequate notice of proposed resolutions – *Owners Corporations Act 2006* (Vic) (‘the Act’) s 71, s 80(2).

Election of committee – whether a vote “against” a nominee is permissible – the Act s 89A, s 97.

“Maintenance fund” – committee authorised to decide on how a fund is to be spent – no maintenance plan – no “maintenance fund” strictly so called – the Act s 38, s 40, ss 43–45.

APPLICANT	Ton Tran-Cong
RESPONDENT	Owners Corporation RP12053
WHERE HELD	Melbourne
BEFORE	A Vassie, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	22 June 2023
DATE OF ORDER	22 June 2023
DATE OF REASONS	25 July 2023
CITATION	Tran-Cong v Owners Corporation RP12053 (Owners Corporations) [2023] VCAT 866

ORDER

1. Although recording that it has not heard evidence from Michael Sweet in answer to the applicant’s allegations about Mr Sweet’s email to the applicant dated 12 January 2022 (pages 40-41 in the applicant’s folder of documents), the Tribunal expresses its view that the tone of that email was deplorable.
2. The proceeding is dismissed.

A Vassie
Senior Member

APPEARANCES:

For Applicant

In person

For Respondent

Mr T Graham, solicitor

REASONS

- 1 On 6 April 2022, the annual general meeting for the respondent Owners Corporation RP 12053 ('the OC') took place by video conference. The applicant Ton Tran-Cong, who owns four lots in the subdivision affected by the OC, attending the meeting by joining the video conference. During the meeting there was an election of committee members. Mr Tran-Cong nominated for membership of the committee. He was not elected. Other lot owners were elected.
- 2 Resolutions passed during the meeting were interim resolutions only, because there was no quorum. They became resolutions once 29 days elapsed without a notice of a special general meeting having been given: *Owners Corporations Act 2006* (Vic) ('the Act'), s 78(4). References to sections in these reasons are to sections of the Act unless I indicate otherwise.
- 3 In this proceeding Mr Tran-Cong challenged the validity of the resolutions passed during the meeting and challenged the validity of election committee members. He also sought other orders.
- 4 I heard the proceeding on 22 June 2023. I dismissed it and gave oral reasons for the decision. By an email to the VCAT registry dated 7 July 2023, Mr Tran-Cong requested written reasons. Although he made this request outside (by one day) the 14-day period during which a party is entitled to request written reasons,¹ this is a case in which it is appropriate to give them.
- 5 Aaron Grigo from the OC's manager Alliance Corporation Management had sent to the members of the OC a notice and agenda for the annual general meeting. According to the minutes of the meeting that he subsequently prepared, he was appointed as the 'facilitator of the meeting'. He virtually acted as the chairperson. Mr Tran-Cong has alleged that one paragraph in the minutes was 'fictitious' and that the minutes therefore did not accurately reflect what happened at the meeting.
- 6 By leave, Mr Graham, solicitor, represented the OC at the hearing. Mr Tran-Cong was alleging non-compliance with several sections of the Act. I thought it fair in those circumstances to allow the OC to be represented by a professional advocate. Mr Tran-Cong was self-represented. Although, I assume, English is not his first language, he argued his case with considerable ability. He told me that he had worked for the Department of Defence for 15 years.
- 7 Mr Tran-Cong was the only person who gave evidence. He spoke to the Points of Claim that he had filed, paragraph by paragraph.² He had also filed a Tribunal book of relevant documents, including the notice of annual general meeting that set out the agenda, and the minutes of the meeting.

¹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117(2).

² There were some paragraphs in the Points of Claim about which Mr Tran-Cong gave little or no evidence. See paragraph 42 below.

The Agenda

- 8 Section 71 of the Act requires the person convening an annual general meeting to prepare an agenda meeting setting out the matters to be dealt with at the annual general meeting. Section 71(2) lists matters that the agenda must include. One of those matters is the consideration of the proposed annual budget of the owners corporation (s 71(2)(f)).
- 9 Mr Tran-Cong alleged that the agenda was inadequate in two respects. First, the agenda should have given notice of what became resolutions about the procedure for voting at the meeting. Secondly, the agenda should have given notice of what became lengthy resolutions about how repairs to and maintenance of common property were to be done and paid for. Failure to include in the notice of meeting adequately expressed agenda items led, he argued, to the invalidity of all resolutions passed.
- 10 *Procedure for voting.* The minutes recorded in paragraphs 2.2 and 12.2 resolutions about voting procedure. Paragraph 2.2, under the heading, '2. Quorum', was as follows:

2.2 Aaron Grigo was authorized to take the minutes. It was resolved that voting will be by verbal indication, and to set a procedure for voting at this meeting whereby voters who are silent on a motion will be considered to have cast their vote in agreement with those voters who have verbalised their vote, but only where all votes verbalised for a motion are in agreement with one another. Aaron noted that if anyone is not in agreement with the other members who state their vote in relation to any particular motion, to make sure they verbalise their vote at the same time so that their alternative vote can be recorded.

Moved by: All, Against: 0, Motion Carried

Paragraphs 12.2 and 12.2 under the heading '12. Appointment of Management Committee', were as follows:

12.1 Nominations for the committee are as follows:

- Ton Tran-Cong, Lot 1, 13, 16, 18
- Thong Nguyen, Lot 7, 25
- Michael Sweet, Lot 10 & 11
- Vicki Clarke, Lot 22
- David Davies, Lot 23
- Katherine Clark, lot 28

Moved by: 1, 6, 10, 11, 13, 18, 22, 23 & 31, Against: 0, Motion Carried

12.2 It was resolved that rather than following the voting procedure set at pet [sic] item 2.2, the Owners Corporation will vote on which of the committees nominee's (set out in item 12.1) will be elected by temporarily moving each nominee into the Zoom Waiting Room while

the other members are casting their vote on whether to elect that nominee as a member of the committee, so that votes can be cast by those members without any direct or perceived influence by way of the nominee being present during their vote. Voting will be via verbal indication.

Moved by: 1, 6, 13, 18, 22, 23 & 31, Against: 0, Motion Carried

- 11 Mr Tran-Cong argued that the agenda items in the notice of general meeting ought to have included some information about the voting procedure proposed, and the failure to include such information led to invalidity of all resolutions. I rejected the argument.
- 12 Section 80(2) of the Act provides that, subject to the Act and to regulations made under it, the procedure at a general meeting is in the discretion of the owners corporation. Consistently with s 80(2), s 71 does not require an agenda to include anything about procedure for voting at the meeting. The members present at the meeting were entitled to decide, then and there, how voting was to occur. That is what they did; after first resolving to adopt (I infer it was Mr Grigo's suggestion) a procedure whereby silence was to be taken as an affirmative vote, the members later decided upon a different procedure, as was recorded in paragraph 12.2. In my orally given reasons I remarked that the procedure set out in paragraph 12.2 was unwise because it lent itself to dispute about what each member's intention was if the member remained silent; but if there was anything to object to about the procedure set out in paragraph 12.2 the members, including Mr Tran-Cong, dealt with it by adopting the procedure set out in paragraph 12.2. Mr Tran-Cong did not call into question the accuracy of those paragraphs. He complained only of the absence of any prior notice of their subject-matter.
- 13 *Repairs and maintenance.* The agenda set out in the notice for the annual general meeting included the following, under a heading '7. Motions To Be Resolved':
7. Confirmation of any maintenance required for the Owners Corporation common property
 8. Confirmation of the Financial Statements presented for the current financial year
 9. Confirmation that the proposed budget is accepted or varied and levies are raised as determined under Section 23 of the Owners Corporations Act for the next financial year
- 14 As the minutes of the meeting showed, the members made resolutions about matters that would involve, or might involve, considerable expenditure on repairs to or maintenance of common property.
- (a) First, there was a resolution to engage a project manager to prepare a scope of work for tender for a new driveway and associated stormwater system; the resolution noted that the members discussed a possible cost of between \$200,000.00 and

\$500,000.00. There was also a resolution for the committee to investigate obtaining a loan for the cost.³

- (b) Secondly, there was a resolution 'to proceed with' a quotation for \$27,268.00 for repairing a walkway. The resolution, as recorded in the minutes, was:

8. It was resolved to proceed with the Avello quote (approximate cost \$27,268 accepting that there may be GST to be added on top of the stated cost) once the Chairperson has sent the quote to the rest of the committee, and should the committee not decide otherwise within 7 days of receiving it. It was resolved to pay for this out of the existing Maintenance Funds.

Moved by: All, Against:0, Motion Carried

- (c) Thirdly, but much less importantly, there was a resolution to engage a contractor to remove graffiti from a wall.

15 Mr Tran-Cong argued that members ought to have been given notice, by way of items in the agenda, that there was going to be discussion of and resolutions about matters involving large amounts of money, and that the absence of such items in the agenda led to invalidity of the resolutions.

16 I rejected the argument. Unless a person who convenes a general meeting gets notice beforehand that a member is going to move a particular resolution the person cannot be expected to foresee what the members at the meeting will discuss or resolve upon. Items 7, 8 and 9 in the agenda indicated broad subject-matter and complied with s 71(2) of the Act, which lists broad subject-matter that an agenda must include. There was no evidence that Mr Tran-Cong or any other member of the OC was disadvantaged by not having been given a more detailed agenda. It is noteworthy that the resolution about expenditure on a driveway included a note that a special resolution of members would probably be required before the resolution passed at the annual general meeting could be acted upon.

17 The agenda complied with the Act and was adequate.

Election of Committee

18 Under the heading '12. Appointment of Management Committee' in the minutes, paragraph 12.4 recorded the result of the election conducted during the annual general meeting. In that paragraph, the lot number or numbers beside each name indicates the lot or lots that the member owned. Paragraph 12.4 was:

19 The 'supplement summary of votes' that accompanied the distributed minutes showed that the votes for each nominee were:

- (i) Mr Tran-Cong: 3 votes in favour and 4 votes against;

³ The resolutions were set out in paragraph 7.1 of the minutes.

- (ii) For David Davies: 6 votes in favour and 3 votes against;
 - (iii) For the other four, votes in favour and no votes against.
- 20 Mr Tran-Cong's argument that the election was invalid depended upon his submission that the Act does not empower a member to vote 'against' a nominee, that the OC was wrong in law to allow the election to be conducted in a fashion that allowed a member to vote 'against' a nominee, and that the election was invalid because it was conducted in that fashion. He argued that parliamentary elections in Australia did not allow a voter to vote 'against' a particular candidate, that the Act did not provide for how an election for an owners corporation committee should be conducted, and so the procedure for parliamentary elections should be followed.
- 21 The comparison with parliamentary elections breaks down. There are other statutory requirements for those elections. They are conducted under a preferential voting system: a valid vote in an election for a lower of two houses of parliament results from a voter numbering preferences in numerical order. That is why a voter does not, and cannot, vote 'against' a candidate who is not the voter's first preference.
- 22 It is true that the Act does not specify how an election for a committee is to be conducted. The Act does, however, contemplate, and give significance to, votes against a proposed resolution. Section 89A empowers a chairperson to have a casting vote on a resolution if 'the voting on the resolution is equal' and the chairperson is a lot owner or has another lot owner's authority to be a proxy. Voting cannot be equal unless there are votes cast against as well as votes cast for. Section 97 deals with a case where a matter requiring a special resolution has resulted in a vote in favour of at least 50% of the total votes for all lots and 'the vote against the resolution is not more than 25% of those votes'; the resolution is taken to be passed as an interim resolution.
- 23 Mr Graham for the OC submitted that an election of committee members should be treated as the equivalent to a vote upon a proposed special resolution. He said that there had been a Tribunal decision to that effect.⁴ Whether or not that is so, I accepted his submission because it seemed correct in principle. I cannot see how an election of committee members could be conducted fairly otherwise than by allowing votes for and votes against. What is a member to do who wishes a particular candidate not to be elected, if that member cannot cast a vote against? Mr Tran-Cong did not suggest any answer to this question.
- 24 The election had a valid outcome.

⁴ Mr Graham gave a citation for the case. I must have transcribed it wrongly, because I have not been able to find the case.

'Fictitious' Entry in the Minutes

- 25 Paragraph 12.4 in the minutes (set out in paragraph 18 above) recorded that Katherine Clark was elected as a committee member. However, paragraphs 12.5 and 12.6 followed:
- 12.5 Members who are in arrears are not eligible to be elected as a member of the committee, this includes Katherine Clark of lot 28, who therefore is not eligible to be elected as a member of the committee.
- 12.6 Therefore pursuant to Part 5 of the Owners Corporations Act 2006 and by resolution of the owners corporation the following members are elected as the committee:
- Thong Nguyen, Lot 7, 25
 - Michael Sweet, Lot 10 & 11
 - Vicki Clarke, Lot 22
 - David Davies, Lot 23
- 26 Mr Tran-Cong gave evidence that those paragraphs, 12.5 and 12.6, concerned matters that were not discussed at the meeting and were not the subject of any resolution of the members. He added that after the outcome of the election at the meeting was known Ms Clark gave an acceptance speech. He argued that she would hardly have done that had the fact (if it was a fact) of her being in arrears of payment of fees, and therefore ineligible to be a committee member,⁵ been ventilated at the meeting.
- 27 I accepted Mr Tran-Cong's evidence on this matter. It was not contradicted, and I regarded it as being consistent with the probabilities of the case. The content of paragraphs 12.5 and 12.6 in the minutes is consistent with Mr Grigo having realised after the meeting that Ms Clark was ineligible for election and having inserted those paragraphs into the minutes as an afterthought. Minutes of a meeting should not include afterthoughts; they should reflect accurately what happened at the meeting. It would have been better practice for Mr Grigo to have provided separately to the members a document that explained Ms Clark's ineligibility for election.
- 28 However, to my mind, the only person who could reasonably have taken issue with the insertion into the minutes of paragraphs 12.5 and 12.6 was Ms Clark. There was no evidence that she did object or that she challenged the statement that she had been ineligible for election. So I did not think it necessary or appropriate to make any ruling or order about the matter. The Tribunal's power to make, in a proceeding that concerns an owners corporation dispute, any order that it considers fair⁶ means that the Tribunal may make no order at all if it considers it fair in all the circumstances not to make an order.

⁵ *Owners Corporations Act 2006* (Vic) s 103(7).

⁶ *Ibid* s 165(1).

'Maintenance Fund'

29 Mr Tran-Cong has alleged that a resolution passed at the annual general meeting has put a maintenance fund of the OC at risk of being used in a manner that does not comply with provisions of the Act. Under a heading '9. Annual Budget for Period 1/10/2021 to 30/9/2022' the minutes recorded the following resolutions as having been 'Moved by: All, Against 0, Motion Carried':

- 9.1 It was resolved to accept that the Administration budget of \$44,365.00, inclusive of GST for the year.
- 9.2 It was resolved that the maintenance component of the Administrative Budget referred to as 'Minor Building Maintenance' is for expenditure that the committee in their discretion believe benefits the owners corporation by large.
- 9.3 It was resolved to accept the Maintenance budget of \$27,000.00, inclusive of GST for the year.
- 9.4 It was resolved not to approve a maintenance plan, but that the Owners Corporation or committee will decide how funds that are raised via the Maintenance budget are used.

30 Sections 36 to 45 (inclusive) of the Act are relevant to Mr Tran-Cong's allegations on this topic.

31 Section 36 provides:

36 Maintenance plan

- (1) A tier one owners corporation or a tier two owners corporation must prepare and approve a maintenance plan for the property for which it is responsible.
- (2) A tier three owners corporation, a tier four owners corporation or a tier five owners corporation may prepare and approve a maintenance plan for the property for which it is responsible.

A tier three owners corporation is one that consists of 10 to 50 occupiable lots: s 7(4) of the Act.⁷

32 In his submissions about this topic Mr Graham asserted that this OC is a tier-three owners corporation. The plan of subdivision was not put into evidence. From the plan it would have been obvious to which tier this OC belongs. Nevertheless, there was some evidence that pointed to the assertion being correct. The minutes of the annual general meeting held on 6 April 2022 recorded the number of owners who attended or gave a proxy and recorded the lots that they owned. The lot numbers ranged from 1 to 36. Slight though that evidence was, I accepted that the OC consisted of 10 to 50 occupiable lots and so was a tier-three owners corporation. By virtue of s 36 it was not

⁷ And is not a services-only owners corporation: a concept not presently relevant and defined in s 3.

obliged to prepare and approve a maintenance plan but could do so if it chose to do so.

33 Section 37 sets out what a maintenance plan must contain. Section 38 provides that a maintenance plan does not have an effect until it is approved by the owners corporation. Section 39 requires an owners corporation to report to the annual general meeting in relation to the implementation of its approved maintenance plan.

34 Section 40 provides:

40 Maintenance plan

An owners corporation that has an approved maintenance plan must establish a maintenance fund in the name of the owners corporation.

35 Section 42 provides for what must be paid into an established maintenance fund.

36 The remaining sections 43, 44 and 45 provide that money may be paid out of the maintenance fund

- (a) in accordance with the approved maintenance plan (s 43), or
- (b) other than in accordance with the approved maintenance plan if the owners corporation by special resolution approves the payment (s 44), or
- (c) for an urgent matter (s 45, which sets out what urgent matters include).

37 As evidence that the OC had a maintenance fund, Mr Tran-Cong pointed to an entry in one of the financial statements given for the annual general meeting: 'Maintenance Fund – \$109,217.85'.⁸ He argued that resolution numbered 9.4 in the minutes of the annual general meeting, that the committee would decide how the funds raised in the maintenance budget were used, showed that the OC intended to use the 'maintenance fund' in a way that was not permitted by sections 43, 44 and 45 of the Act.

38 Mr Graham's submission in response was:

- (i) As a tier-three owners corporation, the OC was not obliged to have an approved maintenance plan, and did not have one.
- (ii) The sections of the Act that limit how money may be paid out of a maintenance fund apply only to a 'maintenance fund' strictly so called, that is to say, a maintenance fund that has been established following the approval of a maintenance plan.
- (iii) One cannot establish a maintenance fund, strictly so called, simply by entries in a financial statement. There needs to be first an approved maintenance plan, against which the propriety of any proposed payment out of the fund could be judged.

⁸ The relevant page is no. 62 in the Tribunal Book.

39 The resolution in paragraph 9.4 of the minutes was evidence that, as Mr Graham asserted, there was no approved maintenance plan for the OC. It showed that the members specifically resolved not to approve any maintenance plan. I accepted the logic of Mr Graham's submission. The OC had no maintenance fund, strictly so called, and so the resolution authorising the committee to decide how the funds were to be spent on maintenance did not infringe any section of the Act concerning maintenance funds.

Other Matters

40 Mr Tran-Cong had complaints about the conduct of committee members, especially Michael Sweet. He asked me to make a 'ruling' that they had 'not acted honestly and in good faith'.⁹ None of the committee members was a respondent named in the proceeding. None was a witness at the hearing. For me to make any ruling of the kind asked for would have been procedurally unfair to them. I refused to do so.

41 Nevertheless one document, an email that Mr Sweet sent to Mr Tran-Cong dated 12 January 2022,¹⁰ spoke for itself. Although I could not and did not make any findings otherwise about Mr Sweet, I thought that Mr Tran-Cong was at least entitled to my recording, in the order determining the proceeding, that the tone of the email was deplorable.

42 Quite deliberately, it seemed to me, Mr Tran-Cong did not offer any evidence about paragraphs 4 and 17 in his Points of Claim. They had the appearance of attempted re-agitation of matters that had been decided in other proceedings. He was wise not to pursue them at the hearing.

A Vassie
Senior Member

⁹ Paragraphs 8, 9, 13, 14 and 15 of the Points of Claim.

¹⁰ Tribunal Book pages 40–41.

AustLII AustLII

AustLII AustLII AustLII

AustLII AustLII AustLII AustLII AustLII

AustLII AustLII AustLII AustLII

AustLII AustLII AustLII AustLII