



GUIDANCE NOTE

Approvals for Owners Corporations

Owners corporations (**OCs**) will be required to make decisions during the Cladding Rectification Program (**Program**). Decisions might include entering an agreement to receive funding, and appointing consultants, surveyors, and builders. In some cases, OCs will need to make decisions to fund additional works which are not eligible for CSV funding.

OCs must comply with the law and any OC special rules when making decisions. This will ensure that all private lot owners can contribute to decisions during the Program.

This guidance note suggests an approach to decision-making which OCs may wish to consider when planning their involvement in the Program. This approach will support timely rectification of this important safety issue.

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Introduction

OCs have obligations under the *Owners Corporations Act 2006 (Vic)* (**OC Act**), *Owners Corporations Regulations 2018 (Vic)* (**Regulations**) and OC special rules (if applicable).

This guidance note is designed to assist an OC to meet the requirements of the OC Act and Regulations by identifying the points in the Program at which the OC and private lot owners need to make decisions.

An OC's rules may contain additional requirements which the OC must observe throughout the Program. The guidance contained in this document is subject to the validly constituted OC rules. Nothing in this document should be taken as guidance on *how* to act within the OC rules.

CSV suggests that the approach provided in this guidance note will support rectification of the building in the most efficient way possible. This will help the OC to address this important occupant safety issue and the regulatory requirements imposed by the Municipal Building Surveyor (**MBS**) in the appropriate time frame.

The tasks listed in this document are those generally required of all OCs involved in the Program. However, some OCs may need to perform additional functions and obtain additional approvals.

Please contact your Customer Liaison Officer (**CLO**) at CSV if you require further guidance.

OC's role in cladding rectification

Construction is complex and requires careful preparation – this is especially the case for cladding rectification on apartment buildings.

As the owner of the common property where the cladding is usually located, the OC will need to make decisions in a timely manner. This will ensure that the cladding gets fixed and will also reduce the risk of the OC being exposed to unnecessary delays and costs, or further regulatory action.

The OC decision-making process involves private lot owners considering resolutions at meeting or by ballot. Passing the necessary resolutions will support the OC to ensure that all private lot owners can contribute to this important project.

Key OC decisions during the Cladding Rectification Program

To help the OC understand the points at which the OC will need to make decisions, CSV has developed the 10 key steps for cladding rectification as follows.

	Step	Suggested decision	Options for making the decision	Outcome
Phase 1 – preparation	1 – Referral to CSV	-Nil OC decision required. The MBS refers buildings to CSV.	-	-
	2 – OC Registration	The OC decides to register for potential financial assistance from CSV.	The OC assigns responsibility for registration to an individual or group.	The OC indicates its interest in potential financial assistance from CSV and provides all necessary information and documents.
		<p>The OC delegates power to an individual or group to do all things required to rectify the external cladding, including the authority to execute documents.</p> <p>The OC expressly authorises the use of the common seal on the:</p> <ul style="list-style-type: none"> a. Deeds b. Funding Agreement; and c. Any agreements required to prepare and finalise the scope of works. 	<p>Instrument or Ordinary resolutions (>50%)</p> <p>.</p>	<p>The delegate will be able to carry out those tasks which are required for the delivery of the Program.</p> <p>Some examples include:</p> <ul style="list-style-type: none"> i. Registering the OC with ATO for GST purposes. ii. Granting a licence to CSV and contractors to enter onto, inspect and take samples from common property, as necessary. iii. Appointing any surveyor or consultant as required to prepare for rectification works. iv. Providing all information and reasonable assistance to CSV and the Independent Project Manager (IPM). v. Ensuring ongoing compliance with the OC's obligations under all agreements executed for the delivery of the Program. vi. Facilitating communication between CSV and individual lot owners/occupiers. vii. Facilitating consultation between the IPM and lot owners regarding the scope of works.

	Step	Suggested decision	Options for making the decision	Outcome
				viii. Appointing an individual (for example, an OCM) to affix, and witnesses to witness the affixation of, the OC's common seal to documents where execution has been approved by resolution.
	3 – Due Diligence Report	The OC (and private owners and occupiers if required) consent to providing access to CSV to the common property and some private property.	If authorised above.	Due diligence activities mean that CSV can review the cladding and identify potential solutions and determine an appropriate amount of funding.
	4 – Investment Committee Decision	Nil OC decision required. CSV will use the above information to determine the amount of funding for the OC. The OC may contribute additional funds for additional works.	-	-
	5 – IPM Appointment	Whilst CSV will appoint the IPM for the OC, the OC must execute a Direct Deed between the OC, CSV and the IPM permitting the IPM to commence works.	If authorised above.	The IPM has authority to act on behalf of the OC, to access common property and to engage all non-builder contractors/consultants.
	6 – Execute OC Funding Agreement	The OC must understand and execute the Funding Agreement with CSV. Funding will not be granted until the conditions precedent in the Funding Agreement are met.	Instrument or Ordinary resolutions (>50%)	The Funding Agreement sets out the terms with which the OC must comply to receive funding for rectification. The OC must comply with the conditions precedent. Note: CSV will finalise the maximum amount of the grant, and the milestone payment schedule, at the conclusion of the tender period.
<i>IPM conducts the tender process to select a builder – approximately 7 weeks</i>				

	Step	Suggested decision	Options for making the decision	Outcome
Phase 2 – construction works	7 – Execute Design & Construct Contract (Building Contract)	<p>The OC endorses the final scope of works to be carried out under the contract.</p> <p>The OC authorises the OC representative to execute the Building Contract and the Construction Deed between the OC, CSV and the Builder.</p> <p>The OC and private lot owners need to understand their rights and obligations under these agreements.</p> <p>The OC delegates power to an individual or group to do all things required to administer the contract to rectify the cladding.</p>	Instrument or Ordinary resolutions (>50%)	<p>The final scope of works forms the basis of the Principal's Project Requirements for the builder to implement under the Building Contract.</p> <p>It is preferable that a specific resolution is passed to endorse the final scope of works as agreed with the builder before the building contract is executed.</p> <p>CSV also suggests a specific delegation for execution of the Building Contract and the Construction Deed between the OC, CSV and the Builder.</p> <p>Finally, the OC representative should be delegated authority to manage the contract, including:</p> <ul style="list-style-type: none"> i. Approving mid-construction milestone payments and addressing contract variations, including extensions of time and changes to the scope of works which may arise from the identification of latent conditions which will not be funded by CSV. This authority may be made subject to conditions, such as the representative providing timely information to the OC and private lot owners about possible delays and costs. ii. Confirming that the scope of works has been carried out. iii. Identifying any defects which the builder may be liable to rectify during the Defect Liability Period (DLP).
	8 – Contract Management and Administration	The OC and the IPM address variations as they arise during construction.	If authorised above.	The OC representative should promptly communicate with the OC and private lot owners as agreed in the Instrument of Delegation or resolution, particularly regarding additional costs and latent conditions (which will not be funded by CSV).
	9 – Contract Completion	The OC and the IPM confirm that the scope of works has been carried out by the builder.	If authorised above.	The OC is required to confirm that the builder has discharged their requirements under the Building Contract.
	10 – Program Acquittal	The OC and the IPM identify defects during DLP.	If authorised above.	The builder may be liable to rectify certain defects identified during DLP. The OC will need to confirm completion at the end of DLP.

Phase 1 – Preparation

CSV suggests that OCs delegate most of the decision-making functions required to carry out the Program to a single decision-maker.

Some OCs will prefer to delegate all necessary authorities for the entire Program to a decision-maker during Phase 1. Others will delegate separate authorities for Phases 1 and 2.

The OC may ask the delegate to report back to the OC about progress or issues which arise.

Although the OC may already have delegated a general authority to act on the OC's behalf, CSV suggests authorising a separate delegation (or delegations) specific to this Program.

The OC's representative can then engage professionals and provide information to CSV and its advisors in preparation for the cladding rectification works.

Most importantly, during Phase 1, CSV will work closely with the OC's representative and an IPM to prepare a scope of proposed works. The IPM will be engaged by CSV but their primary role is to provide professional support to OCs during this complex project.

The Funding Agreement is one of the key documents in the Program. The Funding Agreement is distributed to the OC and private lot owners early during Phase 1. This will allow time for people to ask questions, to ensure they fully understand their rights and obligations in the Program.

CSV suggest that the OC delegates authority to an individual to execute the Funding Agreement during Phase 1.

Phase 2 – Works

During the tender process, builders will review the scope of works prepared by the IPM. The IPM will then support the OC and CSV by preparing an evaluation report.

Once the successful builder has been selected from the tender, CSV will finalise the maximum amount of the grant payable to the OC for cladding rectification and issue the schedule of milestone payments to the OC.

The OC will be required to formally approve the scope of works and delegate authority to execute the Building Contract.

Once the Building Contract has been executed, rectification works can begin.

If serious issues arise during the works, the OC's representative may need to communicate with the OC and private lot owners. However, this communication must not delay works continuing or additional costs may be incurred by the OC, payable to the builder.

To minimise the risk of excess costs being incurred by the OC during construction, the OC's representative should be authorised to:

- assist the IPM as requested to approve milestone payments to the builder; and
- address mid-construction variations such as extensions of time, or changes to the scope of works arising from the identification of latent conditions, which will not be funded by CSV.

Lastly, the OC's representative will need to work with the IPM to confirm that the works are completed by the builder, and will also need to ensure that any defects are identified and addressed during the relevant time frame.

How does an OC pass a resolution?

To minimise disruption to lot owners, CSV suggests that OCs convene one meeting or ballot per Phase, to pass the necessary resolutions.

It is important that OCs comply with the procedural requirements when passing resolutions. Non-compliance with the rules set out in the OC Act may result in resolutions being challenged and cause delays to the delivery of the Program which may result in delay costs against the OC.

The OC Act provides that only the chairperson, secretary, manager, or, in certain cases, a lot owner, may convene a ballot, or a general meeting that is not an annual general meeting. The person convening the meeting or ballot must do the following:

General meeting

- Give written notice to each lot owner at least **14 days** before the meeting.
- The notice must include:
 - the date, time, and place of the meeting
 - the agenda for the meeting
 - the text of any special or unanimous resolution to be moved at the meeting; and
 - a statement that the lot owner has the right to appoint a proxy.
- Prepare an agenda setting out the matters to be dealt with at the meeting.

Ballot

- Give written notice to each lot owner at least **14 days** before the closing date of the ballot.
- The notice must include:
 - the closing date for the ballot
 - the ballot document containing the motion, including the text of any resolution to be voted on in the ballot; and
 - a statement that the lot owner has the right to appoint a proxy.

Remote voting

Remote meetings are permitted under the OC Act, and lot owners may participate in a general meeting by teleconference and by proxy. At the meeting, lot owners may vote on resolutions by a show of hands or in another prescribed manner. This means remote voting may be conducted via:

- a show of hands over videoconference; or
- in another remote manner as resolved by a show of hands over videoconference at the meeting (e.g. via an online voting platform or submitting votes via email during the remote meeting).

The OC Act also allows for ballots to be conducted electronically.

Consumer Affairs Victoria provides [guidelines for OCs](#) on how to conduct a vote at a meeting or by ballot, including sample instructions and voting cards.

Quorum required

A quorum must be present at the meeting for a resolution to be passed. This means that:

- at least 50% of the total votes must be present; or
- at least 50% of the total lot entitlement must be present.

If the vote is being conducted by ballot, the number of votes returned by the closing date must also meet these conditions.

If there is no quorum, all resolutions passed are interim resolutions which only become final in accordance with the provisions of the OC Act.

Why does an OC need to pass a resolution to execute a document?

Under the OC Act, an OC may authorise a document be executed:

- by at least two lot owners of separate lots executing the document; or
- by use of the common seal.

Both of these options must be authorised by a resolution of the OC (unless otherwise authorised by the OC Act or the Regulations).

If the document is to be executed by at least two lot owners of separate lots, the owners must ensure that they:

- sign the document; and
- print on the document –
 - each lot owner's full name and address; and
 - a statement that each lot owner is a lot owner or a director of a body corporate that is a lot owner.

What can and cannot be done remotely?

Legislation

The *Electronic Transactions (Victoria) Act 2000 (ETA)* provides the requirements for signing documents electronically and witnessing the signing of documents via audio visual link.

Signing documents electronically

If a resolution has been passed that allows the document to be signed by two lot owners of separate lots, the lot owners may choose to sign the document electronically. There is no one way to electronically sign a document. For example, parties could:

- sign a PDF on a tablet, smartphone or laptop using a stylus or finger
- physically sign a hardcopy document and scan the document; or
- confirm their agreement by electronically selecting an option indicating agreement.

The ETA also clarifies that not all signatures are required to appear on one copy of the document.

Please note, the ETA does not permit an OC to affix its common seal remotely or electronically.

Witnessing the signing of documents remotely

Under the ETA, the use of the common seal or the signing of the document by at least two lot owners of separate lots can be witnessed via an audio-visual link (like Microsoft Teams, Zoom or Skype).

Parties who wish to witness the signing of documents via this method must meet the following requirements:

- ensure that all parties involved in the signing of the document are connected through an audio-visual link
- if the document requires the witnessing of a signature, the witness must see this take place through the audio-visual link
- the witness must be reasonably satisfied that the document they sign is the same document or copy of the document signed by the parties
- ensure that all requirements for witnessing by audio visual link must take place on the same day; and
- ensure that the document contains a statement that confirms that all requirements for the witnessing via an audio-visual link have been met.

A witness does not need to be physically located in Victoria, unless otherwise required by law. Both parties and witnesses must ensure that they meet any other prescribed requirements for the documents they are signing.

OCs must maintain good document management and keep accurate records of documents which have been executed and witnessed remotely.

CSV also produced a guidance note about the remote execution of documents, which is available from your CLO. CSV suggest that document is read carefully and advice is sought for any questions.

Will the OC require additional funding?

CSV is only responsible for funding the rectification of cladding on privately-owned apartment buildings. CSV's funding does not extend to work that is outside the scope for combustible cladding removal and replacement. The scope of funding is detailed in CSV's Funding Guidelines [here](#).

Responsibility for the building, including its condition and safety, remains the responsibility of the OC and individual lot owners.

For example, the OC might be subject to a regulatory requirement to address issues beyond the cladding – and these issues might need to be dealt with before, after, or at the same time as, the cladding rectification works.

If non-cladding related defects are present on the building, including any discovered during the cladding rectification process, it is the OC's responsibility to address them. As a condition of CSV funding, to ensure the project continues on schedule, the OC must have access to funds to cover these potential works. It is a requirement of the Funding Agreement between CSV and the OC, that the OC has 10% of the funded amount available to access in the event defects are discovered. This is to ensure that the rectification project is not delayed, and works can be paid for in a timely manner.

The OC Act provides several mechanisms for an OC to raise funds. The OC will need to consider the approach which is most suitable in the circumstances.

Funding options generally require the OC to make decisions by passing resolutions. Please note that these resolutions are outside the scope of this guidance note and should be considered by OCs separately.

The MBS for the building, along with CSV and the IPM assigned to the building, will be able to discuss this issue in more detail after CSV has reviewed the condition of the building during the due diligence phase.

What about latent conditions?

CSV will not fund rectification of latent conditions as defined in the Building Contract.

A latent condition is one which becomes apparent during construction, and which needs to be addressed but which could not have been identified by the builder during the tender process.

For example, a builder may remove cladding and uncover structural defects which were not identified during the tender period.

The OC and the IPM will have a chance to review and comment on the defect, and the relevant building surveyor might exercise their statutory powers to require the issue to be addressed as part of the works.

The OC will have to fund rectification of the defects if it is decided that the builder could not have been expected to identify the defects during the tender process.

All parties, including the OC, need to address mid-construction issues such as latent conditions, promptly. This will reduce the risk of further delay costs being incurred by the OC.

CSV suggests the OC delegate authority to an individual to address mid-construction issues on behalf of the OC. The OC may wish to provide this authority subject to conditions, such as the delegate informing the OC and private lot owners of the potential for cost over-runs.

As a condition of funding, the OC must demonstrate to CSV that the OC has access to funds to pay for latent conditions which may be discovered throughout the cladding rectification process.

Access during project

The OC must ensure that CSV, the IPM and the builder have access to the common property and private property for the completion of the cladding rectification works. This may require the OC issuing a licence to CSV, the IPM and the builder to perform their functions. The OC should ensure that it follows the requirements set out in the *Owners Corporation Act 2006 (Vic)* for granting a licence where it is required to do so.

The IPM will work with the builder and the OC to develop a schedule for accessing private lots where necessary.

Private lot owners, residential lease holders, and the OC, will be expected to fully cooperate with the IPM and the builder at all stages. The OC may be responsible for delay costs if the builder cannot access private lots to undertake works as required.