

Willsmere Insurance Information Night

Wednesday 28 July 2021

Owners Corporations and Other Acts Amendment Act (Vic) 2021:

Summary of Changes to Insurance after 1 December 2021 for:

- **Willsmere Owners Corporation**
- **Lot Owners**
- **Lessees (Tenants) and**
- **Guests**

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Owners Corporation Insurance v Lot Owners Insurance

What Is Covered by the Willsmere Owners Corporation Insurance Policy?

The Chubb Owners Corporation Building Insurance Policy for Willsmere covers the common property which includes the “Building” as shown below:

Building

means buildings at the Insured Location as defined by the *Strata Schemes Management Act*, the *Strata Titles Act*, the *Community Land Management Act*, the *Owners Corporation Act* or similar legislation where the Named Insured’s Building is situated, including:

1. outbuildings;
2. fixtures and fittings (including floorboards fixed permanently to the building structure but excluding Apartment Owners Floating Floors and other temporary fixtures and fittings as defined by the relevant legislation as described above);
3. in-ground swimming pools, spas and tennis courts;
4. services to the buildings;
5. awnings, external blinds, signs and retaining walls;
6. satellite dishes, radio, television and other antennas including their wiring, masts, footings, foundations, moorings and towers;
7. structural improvements at the Insured Location including roads, paths, fences and gates;

owned by or for which the Named Insured has responsibility for.

In addition to the definition of “Building”, the policy also provides cover for “Apartment Owners Improvements” defined as “fixtures permanently annexed to the Building by, and for the exclusive use of, an Apartment owner that thereby legally becomes part of the Building”.

Permanent fixtures & structural improvements include items such as walls, ceiling, doors, windows, fitted kitchens, built-in ducted air conditioners/heating or built in reverse heating AC units, fixed intercom systems, stoves, ovens, hotplates, and hot water services could be considered to be part of the building under the above definition if part of the original build and could therefore be covered under the Chubb Owners Corporation Building Insurance Policy.

What Is Not Covered by the Willsmere Owners Corporation Insurance Policy?

The following four types of insurance cover are the lot owner's responsibility:

1. Insurance for individual lot owners

Individual lot owners need to take out their own private insurance cover regarding the destruction of or damage to the interior of their lot from the interior paint surface. While replacement of standard fixtures and fittings that were part of the original build would be covered under the owners corporation insurance, other items such as personal contents or chattels, carpets, furniture, curtains or blinds, appliances, air conditioning units, light fittings and valuables must be covered by the lot owners' insurance.

Section 54 of the *Owners Corporation Act 2006* specifically excludes carpets and temporary floors, walls, ceiling coverings and fixtures removable by a lessee at the end of a lease, and anything prescribed as not forming part of a building as being excluded from the owners corporation insurance.

Owner residents need to take out contents or chattels insurance and investors need to take out landlord's insurance.

Please note the following definition of fixture vs. chattel.

- **Fixtures:**

Items that are part of land or original structure and were installed as part of the original build (such as mirrors glued to walls). Removal of these items would require repair work and are covered by the owners corporation insurance.

- **Contents or Chattels:**

Items that are the personal property of the owners or occupants (such as lessees/tenants) and are moveable (such as mirrors hung on hooks). These items would be covered by the contents or chattels insurance of the owners or occupants. Please note that private insurance policies define floating floorboards, blinds, carpets and light fittings as contents or chattels.

Note that if fixtures have been installed to benefit the unit owners or if the owners corporation's consent was not obtained, then those fixtures may not be covered by the owners corporation insurance. Check the policy guide of the owners corporation insurance policy to see what items that may or may not be covered and cross-reference these items with the private contents or chattels insurance policy to be clear on what is and what is not insured.

For instance, the following items *would not* be considered "fixtures" and "fittings" and would therefore *not be covered* under the Willsmere Owners Corporation Strata Insurance policy. Apartment owners need to insure these items under their own private separate contents insurance policies.

- Carpets
- Clothes dryers
- Dishwashers
- Blinds and Curtains
- Furniture owned by the lot owners (such as couches, dining tables, chairs, beds and etc.)

- Electrical appliances not wired into the premises which are owned by the lot owners (such as fridges, washing machines, dryers, dishwashers and etc.)
- Floating floorboards: Note that floorboards fixed permanently to the building structure would be covered under the definition of “Building”. However, floating floors are not fixed and are therefore considered to be part of the “contents”.

Landlord’s Insurance:

Landlord’s insurance covers strata property owners who rent out their apartments to tenants to cover accidental loss or damage to contents in the rented unit from events such as fire, flood or storms. It covers items such as carpets, light fittings, curtains, blinds and washing machines as well as loss of rent if the unit is unfit to be occupied. Additionally, it covers landlords and the investment property for malicious damage to contents/buildings caused by tenants and/or their guests. It also covers landlords if tenants fail to pay rent. Insurance cover can include *Contents, Loss of Rent, Tenant Default, Legal Expenses, Liability, Professional Costs, and Audit Costs*.

Contents or Chattels Insurance:

Contents or chattels insurance covers household and personal possessions such as clothing, jewellery, furniture, TV, computers, internal carpets, blinds and electrical appliances belonging to you and your family for the costs of repairing or replacing household and personal possessions in the event of loss or damage. Insurance cover usually only includes contents.

2. Storage cage insurance

Despite storage cages being located in what may be deemed to be common areas, storage cage contents are nevertheless the personal property of the lot owners or lessees/tenants. Lot owners need to take out insurance policies to protect against accidental loss or damage to their contents placed within storage cages. For comprehensive cover, the policy should be for both defined events (events that are listed in the policy) as well as for accidental damage.

Example:

A truck hit a fire sprinkler in the car park of an owners corporation complex and set off all sprinklers in the car park causing severe water damage to contents inside the storage cages. Unfortunately, many of the residents were not insured for damage to their contents under incorrect belief that owners corporation insurance policy covered the damage and loss.

3. Vehicle damage on common property

Private property such as motor vehicles and the personal contents or chattels kept inside are not covered by the owners corporation insurance policy even if the loss or damage occurred on the common property. Personal car insurance needs to be taken out to cover damage and theft. Do not to leave valuables and access devices such as remotes in cars as thieves will then be able to access the building and the owners corporation may need to reprogram all access devices which can be a costly exercise. Note that garage basements are being increasingly targeted by organised crime because of the increased use of storage cages.

4. Loss of rent

If buildings suffer major incidents caused by events that are not related to any culpable or wilful acts or the gross negligence of owners or lessees/tenants and lessees/tenants are unable to occupy the apartment, then the owners corporation insurance cover may potentially cover the landlord's loss of rent. However, if tenants/lessees have caused the damage by, for example, flooding the apartment, then the landlord's insurance policy needs to cover any property damage.

Summary: Different Insurance Covers Required

Cover needed for:	Body Corporate	Owners/Landlords	Tenants
<i>Building structure/ complex (e.g. exterior walls, wiring, water and sewerage pipes, balconies, ceilings, floors, windows, lifts, stairways)</i>	✓	✗	✗
<i>Shared/common areas (e.g. pools, tennis courts, gyms, communal laundries, lobby/foyer, communal BBQs, common entries and exits, car parks, gardens)</i>	✓	✗	✗
<i>Shared/common property (e.g. lobby carpet, foyer artwork, gym equipment, loungers by the pool)</i>	✓	✗	✗
<i>Permanent fixtures in each unit (e.g. doors, tiling, built-in ovens, stovetops, ducted air-conditioning, kitchen cupboards, baths, showers) Note: Check the strata policy as changes to the original building e.g. a replacement kitchen or bathroom, may not be covered.</i>	✓	✗	✗
<i>Furniture, fittings (e.g. carpets, lino, blinds, curtains, light fittings, paint, wallpaper) and fixtures (e.g. appliances not wired in, washing machines, stoves, dishwashers or in-unit only air-conditioners, heaters etc.) within unit owned by landlord</i>	✗	✓	✗
<i>Furniture, soft furnishings, appliances and all personal possessions (e.g. clothing, jewellery, electronics, bikes, pot plants) owned by the tenant</i>	✗	✗	✓
<i>Tenant-related issues including damage, loss of rent, or legal costs associated with taking action against the tenant</i>	✗	✓	✗
<i>Legal liability in common area/on common property</i>	✓	✗	✗
<i>Legal liability within the unit</i>	✗	✓	✓

Owners Corporations: Common Property and Legislation

What Is Common Property?

- Common property is what the plan of subdivision states it is, and may include gardens, passages, walls, stairwells, pathways, driveways, lifts, foyers and fences.
- Owners Corporations are responsible for the common property. The *Owners Corporations Act 2006* states that owners corporations must, among other things, manage, administer, repair and maintain the common property.
- Common Property (“an insurable building”) includes:
 - Buildings
 - Fixed plant, machinery and underground services
 - Shared water pipes, sewerage pipes and electrical conduits
 - Pools
 - Gyms
 - Recreational areas
 - Shared area appliances, equipment, furniture, fittings, BBQs
 - Carpets in hallways
 - Steps and pathways
- A building includes:
 - A structure and any part of a building or structure
 - Any improvements and fixtures forming part of the building
 - Walls, out-buildings, service installations and other things attached to the main structure of the building
 - Any shared services including any pipes or cables used to provide services including water, electricity, gas and telecommunications to the building that are shared with a person other than the owners corporation or any of its members
 - A boat or a pontoon permanently moored or fixed to land
- However, a “building” does not include:
 - Carpet and temporary floor, wall and ceiling coverings
 - Fixtures removable by a lessees (tenant) at the end of a lease
 - Anything prescribed as not forming part of a building

Owners Corporations: Examples of Legislation and Regulations

The Willsmere Owners Corporation is bound by a number of different pieces of Victorian and Commonwealth legislation and regulations, including the *Insurance Contracts Act* (1983) (Cth), the *Insurance Contracts Regulations* (2017) (Cth), the *Fair Work Act 2009* (Cth) and the changes brought about by the *Owners Corporations and Other Acts Amendment Act 2021* (as from 1 December 2021)

Examples of some of the legislation and regulations affecting owners corporations are as follows:

<ul style="list-style-type: none"> • The <i>Owners Corporations Act 2006</i> (Vic) • The <i>Owners Corporations Regulations 2018</i> (Vic) • The <i>Owners Corporations and Other Acts Amendment Act 2021</i> (as from 1 December 2021) (Vic) • The <i>Subdivision Act 1988</i> (Vic) • The <i>Subdivision (Procedures) Regulations 2000</i> (Vic) • The <i>Subdivision (Permit and Certification Fees) Regulations 2000</i> (Vic) 	<ul style="list-style-type: none"> • The <i>Subdivision (Registrar's Fees) Regulations 2004</i> (Vic) • The <i>Fair Work Act 2009</i> (Cth) • The <i>Occupational Health and Safety Act 2004</i> (Vic) • The <i>Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters Act 2019</i> (Vic) • The <i>Insurance Contracts Act 1983</i> (Cth) • The <i>Insurance Contracts Regulations 2017</i> (Cth)
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What Are the Changes to the Owners Corporation Insurance Cover?

Insurance Costs and Fee Levies

Owners corporations can pass on the costs of any insurance excess to individual lot owners to reduce owners corporation insurance premiums and other inequities between lot owners by creating separate levies payable by these individual lot owners to cover:

- The costs of building insurance premiums based on lot entitlement and differential risk; and
- Excess amounts on insurance claims and increased premiums if claims result from culpable or wilful acts or the gross negligence of:
 - Lot owners; or
 - Lessees of lot owners; or
 - Guests of lot owners or guests of lessees of lot owners.
- Damage to common property caused by individual lot owners or their lessees where either:
 - The damage is not covered by the owners corporation insurance; or
 - The costs of repairing the damage would be less than the excess amount otherwise payable on the insurance claim in relation to the damage.

Public Liability Insurance

Owners corporations will need \$20,000,000 in public liability insurance for any one claim to protect those injured through negligently maintained common property.

Legal Costs and Owners Corporation Insurance

Some owners corporations have legal costs as part of their insurance cover.

For instance, owners corporations sued by lot owners, contractors or other parties normally expect their insurer to pay their legal costs up to the policy cap (subject to payment of any insurance excess). This ensures that owners corporations would not be out of pocket too much for being involved in legal proceedings.

However, note that owners corporation insurers must first approve of the proper basis for any proposed litigation or defence, and will also choose the legal representatives to represent owners corporations before approving any cover for legal costs.

Breaches of Owners Corporation Rules: Occupiers, Tenants and Guests

Owners corporations can hold occupiers and lessees (tenants) responsible for the behaviour of their guests and must ensure that their guests comply with the owners corporation rules.

If guests breach the rules, then lot occupiers as well as their guests can be held jointly and severally liable to pay penalties or compensation.

However, lot occupiers will not be liable for breaches by their guests if lot occupiers prove they gave their guests a copy of the owners corporation rules shortly after arrival.

Short Stay Arrangements

Note that as from 1 February 2019 lot owners and occupiers who host Airbnb guests can be held liable for damage, noise or loss of amenity caused by their Airbnb guests.

Lot owners can also be held individually liable for extra charges including repairs which result from the way they use their apartments.

Water Damage Claims

Whether or not there are claims under the *Water Act* 1989, any water that falls onto common property is deemed to be part of the common property. Lot owners will be able to take action against owners corporations for loss and damage caused by water flows from common property.

Lot owners will no longer need to prove that “unreasonable” flows have occurred. Instead, water flowing from common property that causes damage because the flows are not properly directed into storm water drains make it easier for lot owners to take action against owners corporations for any damage caused.

Also note that insurance companies (both for owners corporation insurance cover and for private lot owner cover) are forming a view on how to deal with increasing water damage claims caused by water flowing from the common property onto private lots and also from water damage claims associated with aging and/or defective plumbing that was part of the original build. This also includes the increase in water damage claims caused by flexi-hoses in bathrooms, kitchens and laundries that fail and rupture.

What Do the Changes Mean for Lot Owners?

Fee Recovery and Payment Plans

Owners corporations are able to recover reasonable pre-litigation costs from defaulting lot owners and to adopt payment plans in hardship cases to reduce inequities for non-defaulting lot owners.

These include:

- The ability to levy additional annual fees on lot owners where owners corporations have incurred additional costs because of the lot owner’s actions.

- The ability to levy annual fees on lots other than in accordance with lot liability if owners corporations have incurred additional costs because of the particular use of a lot and if the lot's liability does not adequately take account of those additional costs;
- Where insurance claims from Airbnb parties cause higher insurance premiums, then the cost of the increase can be passed on to Airbnb lot owners.
- There may also be a need to pay for additional security where properties are available for short-term rentals, the costs of which would be passed onto the lot owners.

The Benefit Principle

The "Benefit Principle" states that lot owners who benefit should more pay more and applies principally to two sections of the Act:

1. First, s 24 of the *Owners Corporations Act 2006* provides that owners corporations may levy special fees and charges to cover extraordinary expenditure items. Fees for such extraordinary expenditure items relate to repairs, maintenance or other works undertaken wholly or substantially to benefit some or one, but not all, lots affected by owners corporations on the basis that a particular lot owner who benefits more should pay more.
2. Second, s 49 of the *Owners Corporations Act 2006* provides that owners corporations may recover as a debt the cost of repairs, maintenance or other works undertaken wholly or substantially for the benefit of one or some, but not all, lots affected by owners corporations from lot owners.

In some cases, it may be necessary to obtain legal advice to ensure that owners corporations correctly apply the Benefit Principle when assessing payment amounts. Therefore, owners corporations must carefully review and apply the legal requirements when deciding how to apply "Benefit Principle".

The VCAT case of *Owners Corporation PS407621Y v Grundl (Owners Corporations)* [2017] VCAT 1550 ("the *Grundl Assessment*") sets out how the Benefit Principle is to be applied.

The law requires an owners corporation to act as follows when it sets special fees to cover extraordinary items of expenditure relating to repairs, maintenance or other works.

1. It must first turn its collective mind to the question of whether all lots benefit substantially from the works or whether some lots substantially benefit more than others.
2. If, acting in good faith and exercising due care and diligence, as s.5 of the Act obliges it to do, it decides that all lots substantially benefit, it must set fees in accordance with lot liability. There will be no legal error in the decision, and the Tribunal will not interfere with it on the application of an aggrieved lot owner, unless the decision was one which no members of an owners corporation, acting honestly and reasonably, could have made.
3. Failure to turn the collective mind to the question is a legal error. The error is unlikely to lead the Tribunal to interfere, on the application of an aggrieved lot owner, with a decision to set fees in accordance with lot liability if in reality all the lots benefit substantially from the works. Otherwise, the legal error exposes the owners corporation to the risk that the Tribunal will declare the resolution invalid.
4. If the owners corporation decides that the works are substantially for the benefit of some, but not all, of the lots, it must set fees not in accordance with lot liability but in accordance with the benefit principle, so that the owner of the lot that benefits more pays more.
5. The owners corporation must decide the extent to which the various lots benefit and

apportion the fees accordingly. In making the decision it must act in good faith and with due care and diligence. If it does, there will be no legal error in the decision, and the Tribunal will not interfere with it on the application of an aggrieved lot owner, unless the decision was outside the range of reasonableness so that it was one which no members of an owners corporation, acting honestly and reasonably, could have made, or unless there has been some other legal error.

6. However, if the lot owners cannot decide which principle to adopt or cannot decide upon the proper apportionment, and ask the Tribunal to decide, the Tribunal may do so.
7. Except in a case of urgency, there must be a special resolution for levying the amount of the extraordinary expenditure if it is more than twice the amount of the current annual fees.

The changes to the *Owners Corporations Act 2006* do not affect the *Grundl Assessment* or the application of the Benefit Principle under s 24 and s 49.

Before 1 December 2021, Owners corporations can only apply the Benefit Principle to those fees levied under s 24 and s 49 of the *Owners Corporations Act* but not to annual fees.

However, as from 1 December 2021 owners corporations will be able to on-charge annual fees to individual lot owners by applying the Benefit Principle as follows:

- (a) Where additional costs arising from the particular use of the lot by the lot owner have been incurred; and
- (b) Where annual fees set on the basis of the lot liability of the lot owner would not adequately take account of those additional costs.
- (c) To cover premiums from individual lot owners for reinstatement and replacement of insurance or for excess amounts required under insurance claims.