Ethical Concerns for Owners Corporation Managers who Informally Mediate in Owners Corporation Disputes: The Need for a Community of Practice

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An owners corporation is the legal entity in Victoria that holds jointly owned assets in housing developments such as apartments, medium density townhouses and master planned estates. In Victoria, the legislation governing these entities is the Owners Corporations Act 2006 and specific sections of the Subdivision Act 1988. Conflicts in owners corporations are not uncommon and the owners corporation or strata managers may informally mediate disputes. This article will outline research into the experience of conflict in owners corporations from the perspective of strata managers and discuss mediator ethics in this context. Managers, as informal 'insider' mediators, may experience a number of ethical dilemmas, most notably the issue of impartiality/ neutrality. They are part of a growing group of mediators that operate outside of the National Mediation Accreditation System. The article suggests the need for a community of practice of managers who informally mediate so that ethical concerns in their specific context can be shared and debated.

I INTRODUCTION

Ethics in mediation has long been recognised as important in the practice of both court connected and community mediation.¹ Mediation is difficult to define as it is a fluid process that essentially involves an impartial third party facilitating conflict with the aim of resolution.² As a result of the introduction in 2008 of the Australian voluntary National Mediation

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1 See, for example, Ellen Waldman, 'Values, Models and Codes' in Ellen Waldman (ed), *Mediation Ethics* (Wiley, 2011) 1, 9-14; Sid Wellik, 'Ethical Standards for Mediation: Embracing Philosophical Method' (1999) *Australasian Dispute Resolution Journal* 257; Mary Anne Noone and Lola Akin Ojelabi, 'Ethical Challenges for Mediators around the Globe: An Australian Perspective' (2014) 45 *Washington University Journal of Law and Policy* 145, 160-161; Rachael Field, 'Ethics for a Mediation Profession: An Answer to the Neutrality Dilemma' (2007) 10(2) *ADR Bulletin* 23.

2 Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 5th ed, 2016) 76.

Accreditation System (NMAS) and accompanying standards, there is now a framework for the conduct of mediations that is used widely in the industry.³ The NMAS provides a broad definition of mediation⁴ that covers many areas of practice. The NMAS also gives detailed guidance about ethical mediation practice and outlines the required training for those who participate in the scheme.⁵ However, although the NMAS provides guidance in relation to ethics, it cannot cover all ethical dilemmas that face those who mediate.⁶ Context will play an important role in ethical decision making in mediation where there may be competing ethical objectives.⁷ Education will be crucial to ensure those who mediate have an understanding of the nuances of ethical behaviour such as the contested nature of impartiality/neutrality in mediation.⁸ In addition, different theoretical frameworks may be adopted by mediators in an attempt to make sense of how best to ethically mediate.⁹

But what of those mediators who operate in a more informal way? Those who mediate informally may not necessarily engage with the NMAS.¹⁰ The practice of mediators is not limited to mediation as occurs in court-connected contexts. Mediation has always included community mediation that may be informal in nature.¹¹ This type of mediation usually operates outside of the NMAS. It can occur in a number of contexts, such as mediation in Indigenous communities and neighbourhood disputes.¹² One example of informal mediation that is not covered by the NMAS is the informal dispute resolution that occurs in housing developments. In the recent past most Australians have lived in detached homes.¹³ However,

3 Mediator Standards Board, *National Mediator Accreditation System (NMAS)* (July 2015) <www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>.

4 The definition of mediation provided by the NMAS is: 'Mediation is a process that promotes the self determination of participants in which participants, with the support of the mediator (a) communicate with each other, exchange information and seek understanding (b) identify, clarify and explore interests, issues and underlying needs (c) consider their alternatives (d) generate and evaluate options (e) negotiate with each other and (f) reach and make their own decisions.' Ibid, 2.

5 Ibid 4. NMAS training requirements are under s 2.3-2.4.

6 Waldman, above n 1, 14.

7 Ibid 15-17.

8 Susan Douglas and Kathy Douglas, 'Re-imagining Legal Education: Mediation and the Concept of Neutrality' (2014) 7(1&2) *Journal of Australasian Law Teachers* 1, 3-4.

9 Samantha Hardy and Olivia Rundle, 'Applying the Inclusive Model of Ethical Decision Making to Mediation' (2012) 19 *James Cook University Law Review* 70, 75-79.

10 Research has identified informal mediation practice not linked to the NMAS where other ethical codes might apply: see Mary Anne Noone and Lola Akin Ojelabi, in this issue.

11 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (Lexis Nexis, 2nd ed, 2002) Ch 1.

12 Ibid.

13 Bill Randolph, 'The Changing Australian City: New Patterns, New Policies and New Research Needs' (2004) 22 *Urban Policy and Research* 481, 489.

apartment living is on the rise in Australia with the number of owners, occupiers, and privately owned flats, units and apartments increasing.¹⁴ In Greater Melbourne, for instance, there was an increase from 178,087 to 240,695, between 2001 and 2011.¹⁵ This increase mirrors international trends, where apartment-style developments, often called condominiums in North America and Europe, are growing in countries that traditionally favoured detached housing.¹⁶

Housing of this kind requires different ownership arrangements to detached housing.¹⁷ Developments require multi-titled legal structures that allow for shared assets, including infrastructure.¹⁸ Often referred to as strata title these structures allow for ownership of a building or collection of buildings where individuals have title to, or can own, a portion known as a 'lot', and share access to and responsibility for the maintenance of common property.¹⁹ Strata developments must have a legal entity to hold shared assets often known as an owners corporation (OC).²⁰ Managers operate as agents of the OC and their relationship with the OC is regulated by legislation and contract.²¹

The legislative regime that regulates OCs in Victoria, the *Owners Corporations Act 2006* (Vic) ('OC Act'), encourages early conflict engagement through the requirement of an internal dispute resolution for the OC.²² Conflict can occur about the management of the assets and the

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- 14 Bob Birrell and Ernest Healy, *Melbourne's High Rise Apartment Boom* (Research Report, Centre for Population and Urban Research, September 2013) 4.
 - 15 Australian Bureau of Statistics *Greater Melbourne: Tenure and Land Type by Dwelling Structure* (2011).
 - 16 Sarah Blandy, Ann Dupuis and Jennifer Dixon, 'Introduction' in Sarah Blandy, Ann Dupuis and Jennifer Dixon, *Multi Owned Housing: Law Power and Practice* (Ashgate, 2010) 1.
 - 17 Strata title allows for multi-owned property: Hazel Easthope et al, 'How Property Title Impacts Urban Consolidation: A Life Cycle Examination of Multi-title Developments' (2014) 32 *Urban Policy and Research* 289, 290.
 - 18 Commercial and industrial developments may also be subject to an owners corporation arrangement. The test is whether the lots share common property. See *Subdivision Act 1988* (Vic) s 27A. See also Cathy Sherry, 'The Fundamentals of High Rise Buildings and Master Planned Estates: Ownership, Governance and Living in Multi-Owned Housing with a Case Study on Children's Play' (2008) 16 *Australian Property Law Journal* 1.
 - 19 Simon Libbis, 'Avoiding the Lot Knots' (2012) 86(6) *Law Institute Journal* 46, 46.
 - 20 Sherry, above n 18, 4-6.
 - 21 Kathy Douglas, Rebecca Leshinsky and Peter Condliffe, 'Conflict in Strata Title Developments: The Need for Differentiated Dispute Resolution Rules' (2016) 37 *Adelaide Law Review* 163, 168-169.
 - 22 *Owners Corporations Act 2006* (Vic) s 153(3): An owners corporation must not take action under this Part or apply to VCAT for an order in relation to an alleged breach unless –
 - (a) the dispute resolution process required by the rules has first been followed; and
 - (b) the owners corporation is satisfied that the matter has not been resolved through that process.

fees that are required to maintain them.²³ Also, living in close proximity can cause disputes. A large study in New South Wales on conflict in OCs found that disputes related to parking (61%), breaking of by-laws (59%) and noise (50%)²⁴ were prominent. The research found that informal dispute resolution was common in developments in New South Wales; involving personal discussion and negotiation by the manager and the management committee with residents.²⁵ In Victoria the *OC Act* includes a three-tiered (or step) dispute resolution scheme that may include mediation and conciliation²⁶ through the adoption of rules that include detailed dispute resolution options.²⁷ Key to both options is the fact that the third party facilitating the conflict has no right to make a binding decision in relation to a dispute between parties and will attempt to reach consensus. Like their contemporaries in NSW, managers of OCs in Victoria will sometimes negotiate and mediate disputes amongst residents.²⁸ These practices, although not formal mediation in the sense that parties employ a mediator under a contract or engage in mediation with a mediator in a court connected context, affect parties' experience of dispute resolution. Disputes under the *OC Act* represent a 'growth' area of mediation that is not presently regulated and managers who informally practice mediation are not subject to standards such as the NMAS. Managers experience unique ethical dilemmas when informally mediating due to their context of practice. They can be described as 'insider' mediators²⁹ as they are undertaking a range of duties in an OC other than dispute resolution.

23 Easthope et al, above n 17.

24 Easthope H, Randolph B and Judd S, *Governing the Compact City: The Role and Effectiveness of Strata Management* (City Futures Research Centre, May 2012) 87. Areas of conflict also included rubbish (41%), repairs and maintenance of common property (39%), renovations within individual owners' lot (38%), use of common property (36%), pets (35%), financial costs to the owners corporation/owners (33%), actions of the strata manager (strata managing agent) (28%), access to common property (24%), laundry displayed on balconies (24%), smells (including smoking complaints) (22%), setting of levies (20%), short term letting (11%), actions of the building manager or caretaker (10%), other disputes over common property (11%), other (26%).

25 Ibid 91-92.

26 One possible definition of conciliation is as follows: 'Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator) identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestion for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.' National Alternative Advisory Council, *Dispute Resolution Terms* (2003) 5.

27 Rebecca Leshinsky, Kathy Douglas, Peter Condliffe and Robin Goodman, 'Dispute Resolution under the Owners Corporation Act 2006 (Vic): Engaging with Conflict in Communal Living' (2012) 2 *Property Law Review* 39, 40-41.

28 Ibid.

29 Lisa Bingham, Gregory Chesemore, Yuseok, and Lisa Napoli, 'Mediating Employment Disputes at the United States Postal Service: A Comparison of

Insider mediators are mediators who informally mediate from inside an organisation. They may be perceived as less neutral and impartial than outsider professional mediators and this may impact on the satisfaction of the parties with the process.³⁰ Arguably, practice in these informal mediations should be grounded in the wider ethical debates that occur in the mediation industry.

This article concerns the conflict in multi-owned housing in Victoria and the ethical issues that may arise for managers who mediate disputes. Although focused on the context of conflict under the *OC Act* the discussion that follows is applicable to other 'informal' areas of mediation practice, particularly in the context of neighbourhood disputes. Firstly, the relevant provisions regarding dispute resolution under the Act are outlined. Secondly, ethical concerns regarding dispute resolution in this context are discussed. Next, the methodology and results of a study into the experience of conflict in OCs from the perspective of managers are analysed. Finally, it is argued that this area requires the development of a community of practice to deal with ethical concerns in mediation in this context.

II DISPUTE RESOLUTION UNDER THE OWNERS CORPORATIONS ACT

In an OC, due to the nature of multi-titled housing, individuals purchase and own their own lot and lot owners have an interest in shared assets, including infrastructure.³¹ Legislative governance arrangements require a committee of management to manage shared assets. The functions of this committee are to manage and administer common property, carry out maintenance on the common property, ensure adequate insurance, keep a register, and provide certificates regarding the OC when requested.³² The OC must carry out its functions and exercise its powers honestly and diligently.³³ The OC appoints the manager through an instrument or contract of appointment and that manager must be registered to receive a fee or reward.³⁴ As noted, the *OC Act* provides a method to deal with disputes that allows for a three-tiered approach. Under the first tier, if a lot owner or the manager of the OC believes that there has been a breach

In-house and Outside Neutral Mediator Models' (2000) 20 *Review of Public Personnel Administration* 5.

30 Ibid 7-9. In international peace processes 'insider' mediators are effective due to a closeness in culture and normative values to parties to a conflict: Simon Mason, *Insider Mediators: Exploring their Key Role in Informal Peace Processes* (Berghof Foundation for Peace Support, Germany, 2009) 4.

31 Kimberly Everton-Moore K, Allan Ardill, Chris Guilding and Jan Warnken, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 12 *Australian Property Law Journal* 1.

32 *Owners Corporations Act 2006* (Vic) s 4.

33 Ibid s 5; See also Neil McPhee, 'Big Changes for the World of Communal Living' (2008) 82 *Law Institute Journal* 38.

34 *Owners Corporations Act 2006* (Vic) s 119.

of the *OC Act*, *Owners Corporations Regulations 2007* (Vic) (Regulations) or rules, then they may make a complaint.³⁵ After making a complaint the legislation requires that parties participate in dispute resolution: the internal dispute resolution process. Under the Regulations, the grievance procedure applies to disputes involving a lot owner, manager, an occupier, or the OC. If an owners corporation does not make its own internal dispute management rules then the default model rules provided for under the *OC Act* will apply. This is provided for in s 139 of the *OC Act*.

139 Model rules

- (1) The regulations may prescribe model rules in relation to any matter in respect of which rules can be made.
- (2) If the owners corporation does not make any rules or revokes all of its rules, then the model rules apply to it.
- (3) If the model rules provide for a matter and the rules of the owners corporation do not provide for that matter, the model rules relating to that matter are deemed to be included in the rules of the owners corporation.

The Model Rules provide as follows:

Rule 6 Dispute Resolution

- (1) The grievance procedure set out in this rule applies to disputes involving a lot owner, manager, or an occupier or the owners corporation.
- (2) The party making the complaint must prepare a written statement in the approved form.
- (3) If there is a grievance committee of the owners corporation, it must be notified of the dispute by the complainant.
- (4) If there is no grievance committee, the owners corporation must be notified of any dispute by the complainant, regardless of whether the owners corporation is an immediate party to the dispute.
- (5) The parties to the dispute must meet and discuss the matter in dispute, along with either the grievance committee or the owners corporation, within 14 working days after the dispute comes to the attention of all the parties.
- (6) A party to the dispute may appoint a person to act or appear on his or her behalf at the meeting.
- (7) If the dispute is not resolved, the grievance committee or owner corporation must notify each party of his or her right to take further action under Part 10 of the *Owners Corporations Act 2006*.

Unless adopted in the rules by an OC, the *OC Act* does not specify that mediation should occur in the first tier of the dispute resolution scheme. An OC has the option of doing so by crafting a dispute resolution design that includes mediation and then registering additional rules with the Registrar of Titles at the Land Titles Office (Land Victoria). There are benefits to including mediation in a dispute resolution design, particularly where the relationships are ongoing as is the case between neighbours in OCs.³⁶ Mediation offers the opportunity for parties to collaboratively problem solve issues and come to solutions that are mutually beneficial to parties.³⁷ It

³⁵ Ibid s 152(2).

³⁶ Sourdin, above n 2, 547.

³⁷ Ibid 81-82.

provides the opportunity for disputants to tell the story of their conflict, express emotion and reach consensus as to an outcome.³⁸ Due to the ongoing nature of neighbourhood relationships,³⁹ it may be especially important for an OC to deal with a dispute in a holistic fashion that engages with interpersonal issues, as well as with the historical context.

In the second tier of the process, if the attempt at internal dispute resolution is unsuccessful then a party may apply to the Director of Consumer Affairs to have the dispute mediated or conciliated by a Consumer Affairs employee.⁴⁰ In this tier, mediation and conciliation are specifically referred to but are not defined in the *OC Act*. In the third tier of dispute resolution, a party may apply to the Victorian Civil and Administrative Tribunal (VCAT) which ultimately has the jurisdiction to make a determination.⁴¹ Under s 153(3) of the *OC Act*, the opportunity to go to VCAT is only available to the OC when it has exhausted the internal dispute resolution scheme.⁴²

The first tier of the dispute resolution system aims to encourage personal responsibility for dispute resolution.⁴³ This interpretation of the *OC Act* was recently affirmed by Bell J in the decision *Shearman v Owners Corporation No 1*.⁴⁴ In his judgment, Bell J noted that a critical provision of the *OC Act* that gives effect to this approach is the mandatory requirement that the OC engage in internal dispute resolution prior to going to VCAT. However, Bell J stated that this requirement was limited to circumstances where a lot owner has made a complaint. Thus the internal dispute resolution process allows for conflict to be engaged with at the lowest possible level, that is, within the community of the OC. Notably, there is no indication in the legislation of the role of the OC manager in this internal dispute resolution.

OC managers are under a duty to act honestly and in good faith, to exercise due diligence, and not to make improper use of their position.⁴⁵ At all times, managers must engage in fair trading practices, make full disclosures and not engage in unconscionable, misleading or deceptive conduct.⁴⁶ Accordingly, managers are expected to be honest and make full disclosure to the owners corporation, committee, or lot owners regarding

38 Kathy Douglas and Clare Coburn, 'Attitude and Response to Emotion in Dispute Resolution: The Experience of Mediators' (2014) 16 *Flinders Law Journal* 111.

39 Lynda Cheshire and Robin Fitzgerald, 'From Private Nuisance to Criminal Behaviour: Neighbour Problems and Neighbourhood Context in an Australian City' (2015) 30 *Housing Studies* 100.

40 *Owners Corporation Act 2006* (Vic) s 161.

41 *Ibid* s 62.

42 *Ibid* s 153(3).

43 Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 20 July 2006 (Rob Hulls, Attorney-General).

44 [2016] VSC 551.

45 *Owners Corporations Act 2006* (Vic) s 122.

46 Owners Corporation managers operating in Victoria must comply with the *Australian Consumer Law and Fair Trading Act 2012* (Vic) and the *Owners Corporations Act 2006* (Vic), as well as meeting contractual obligations.

issues and potential conflicts.⁴⁷ They need to know their legal obligations and those of the OC. Without delay, they must inform the OC about issues so lot owners can make decisions and act on them. Managers must assist the OC to comply with its legal obligations and provide professional advice or more information when in doubt. At all times, they must act in the interests of the OC, committee and the lot owners. The various obligations that the manager is under do not preclude the conduct of informal mediations. However, due to the fact that they owe a duty to the OC, committee and lot owners when informally mediating, managers will need to understand the concept of impartiality in attempting to facilitate a resolution of a dispute.

Currently managers have few educational requirements, but in Victoria the legislative provisions under the *OC Act* governing managers are being reviewed.⁴⁸ Managers will be required to undertake training as part of proposed licensing requirements, rather than being merely registered.⁴⁹ Licensing will include vocational educational requirements.⁵⁰ These are likely to include a module on managing conflict and disputes in the property industry.⁵¹ These more onerous education requirements for managers recognise the important role that they play in OC communities when dealing with conflict.⁵² Arguably, such education should include ethical issues that managers face when informally mediating and when it is prudent to engage the services of a professional mediator.

47 *Owners Corporations Act 2006* (Vic) ss 119 and 120.

48 The licensing of owners corporation managers is currently being reviewed as part of the consumer property law review. See Consumer Affairs Victoria, *Victorian Consumer Property Acts Review* <www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/consumer-property-law-review/issues-paper-2-owners-corporations>. See also 'Consumer Property Acts Review Issues Paper 2' (2016), which canvasses issues for review in the *Owners Corporations Act 2006* (Vic) and the *Subdivision Act 1998* (Vic) that relate to common property and owners corporations.

49 Consumer Property Acts Review Issues Paper No 1, *Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers* (2016), 30 <www.consumer.vic.gov.au/resources-and-education/legislation/public-consultations-and-reviews/consumer-property-law-review/issues-paper-1-conduct-and-institutional-arrangements>.

50 The draft training detail is available at the Construction and Property Services Industry Skills Council <www.cpsisc.com.au/projects/Prop_Projects/Redesign_PDMS_>.

51 Part of a Certificate IV course in Strata Community Management. There is also a proposed Diploma of Strata Community Management.

52 In the Diploma of Strata Community Management there is a course entitled *Negotiate to Achieve Goals and Manage Disputes* that does not include ethics: <training.gov.au/Training/Details/FNSORG601>. Another course in the Diploma, *Apply Conflict Resolution Strategies*, does not specify ethics as part of the module, but does briefly mention a code of conduct. <training.gov.au/Training/Details/LGACOMP008A>. Both seem insufficient to prepare strata managers for their possible dispute resolution roles.

III ETHICS, MEDIATION AND OWNERS CORPORATIONS

Ethics in mediation can be more problematic than lawyers' ethics in court due to the private nature of the process.⁵³ Mediation allows a great deal of discretion around the practice and intervention choices of the mediator that, unlike a public hearing, are behind closed doors.⁵⁴ One of the first ethical issues is the requirement under NMAS, s 8 dealing with 'Ethical Conduct and Professional Relations,' a mediator must be competent: 's 8.1 A mediator must mediate only where they have the competence to do so.'⁵⁵

This requirement might seem self-evident, but it should be acknowledged that along with the diversity of areas that mediation is practiced is the diversity of expertise of the mediators. Managers of OCs may have little training in dispute resolution such as in negotiation, conciliation and mediation and may struggle to understand how to mediate conflict.⁵⁶ They may also not perceive the need to be impartial/neutral, as part of their role is to be an insider who deals with a range of OC operations and duties. The kinds of disputes that they deal with may raise strongly felt emotions, as neighbourhood disputes can be high conflict.⁵⁷

It is generally accepted that mediation should be a fair process that is impartially facilitated by a third party, although mediators' conceptions of fairness may differ.⁵⁸ For instance in the NMAS, under the heading relating to 'Procedural Fairness and Impartiality' there is the requirement that: '7.1. A mediator must conduct the mediation in a fair, equitable and impartial way, without favouritism or bias in act or omission.'⁵⁹

Additionally, under s 10.1(c) relating to 'Ethical Principles' there is the requirement under (vi) of 'impartiality including the avoidance of conflicts of interest'. However, ethical requirements and assumptions can be affected by context and the parties engaging in mediation.⁶⁰ According to Julie Macfarlane ethics in mediation is:

The choice between two or more competing courses of action, where one choice, made on the basis of a particular principle or value, will be morally superior to the other. Mediators must constantly choose which types of

53 Julie Macfarlane, 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40 *Osgoode Hall Law Journal* 49, 50.

54 Ibid 52.

55 NMAS, above n 3, 12.

56 Kathy Douglas and Rebecca Leshinsky, 'Pre-action Dispute Resolution under the Owners Corporation Act 2006 (Vic): Teaching Conflict Resolution Strategies' (2012) 20 *Australian Property Law Journal* 224, 232.

57 Carole Kayrooz, Ceilidh Dalton, Filomena Colvecchio and Carole Hibberson, 'Barking Dogs, Noisy Neighbours and Broken Fences: Neighbourhood Dispute Mediation' (2003) 14 *Australasian Dispute Resolution Journal* 71.

58 Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice in Mediation within the Civil Justice System' (2014) 40 *Monash University Law Review* 528, 535-540.

59 NMAS, above n 3, 11. For a discussion of the deletion of the term neutrality in the 2015 version of the NMAS see Susan Douglas, in this issue.

60 Ibid 14.

intervention techniques and strategies they will use, raising issues well beyond those commonly understood as ethical dilemmas in mediation.⁶¹

One issue that is complex for practitioners is the issue of neutrality. Rachael Field states that 'neutrality has long been acknowledged as a key ethical concept in the process of mediation'.⁶² She argues that neutrality is a difficult conceptual concern for mediators because they are unclear about its meaning and the interventions that they can ethically choose.⁶³ Neutrality is sometimes distinguished from impartiality; the former can refer to the fair and evenhanded conduct of the mediator during the mediation, whereas the latter can refer to issues such as the avoidance of conflicts of interest.⁶⁴ Field states that there is little substantive difference between impartiality in mediation and neutrality.⁶⁵ She points out that the public views the terms as interchangeable, so distinctions are not necessarily meaningful for parties in a mediation.⁶⁶ Consequently, she uses neutrality broadly to encompass impartiality.⁶⁷ Nonetheless, the idea of neutrality remains contested in the mediation literature.⁶⁸ This makes it difficult for practitioners to understand this construct.

Historically, in definitions of mediation the mediator is categorised as a neutral third party who facilitates agreement, controlling the process but not the content of the mediation.⁶⁹ In this approach the mediator refrains from interventions to address issues of fairness and equality.⁷⁰ The ways that participants and mediators construct their worldview and the impact these views have on the unfolding story of the mediation⁷¹ are critical professional practice concerns for the mediation profession.⁷² If OC managers who act as mediators are unaware of the impact of their worldview on the mediation then the parties may not have the opportunity to discuss all the issues that are relevant to them. Managers may silence concerns or fail to give priority to issues that are important to the

61 Macfarlane, above n 53, 57.

62 Rachael Field, 'Mediation Ethics in Australia – A Case for Rethinking the Foundational Paradigm' (2012) 19 *James Cook University Law Review* 41, 46.

63 Ibid 55-57.

64 Ibid 50-53.

65 Ibid 53-54.

66 Ibid 54.

67 Ibid.

68 Susan Douglas, 'Neutrality, Self Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19, 23-24.

69 Ibid; Astor and Chinkin, above n 11, 221-225.

70 Rachael Field, 'The Theory and Practice of Neutrality in Mediation' (2003) 22 *The Arbitrator and Mediator* 79, 82-85. See also Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice-Part Two' (2000) 11 *Australasian Dispute Resolution Journal* 145.

71 Donald Saposnek, 'The Dynamics of Power in Child Custody Mediation' in Margaret Hermann (ed), *The Blackwell Handbook of Mediation* (Blackwell Publishing, 2006) Ch 12.

72 Neil Katz, 'Enhancing Mediator Artistry: Multiple Frames and Reflection in Action' in Margaret Hermann (ed), *The Blackwell Handbook of Mediation* (Blackwell Publishing, 2006) Ch 18.

parties.⁷³ If the managers perceive that the wider issues of the community are of more concern than the parties to the dispute, then they may privilege the interests of the community. They may steer the negotiation to a result that benefits the community, rather than the parties and their underlying interests and concerns.

In addition, mediation can reinforce power imbalances in the process, negatively impacting on the disadvantaged in society. Mediators often will not intervene to address power imbalances due to the philosophy that the third party should be neutral in the process.⁷⁴ Power imbalances in mediation can mean that parties are unable to negotiate a fair agreement as one party is at a disadvantage.⁷⁵ This may be due to a number of factors including financial, information, institutional, cognitive impairment, and a range of other factors that can cause lack of capacity.⁷⁶ Mediators may be unaware of their own power in the mediation, or be unwilling to acknowledge its significance. In the context of OC disputes there may be managers who frame residents as problematic. They may see those who complain as difficult. Indeed, because managers owe a duty to the OC as well as to the residents, managers may not be clear of their role in conflict resolution.

It is thus necessary to re-conceptualise the concept of neutrality in mediation so that parties can be assisted to reach fair agreements, aided by the efforts of the mediator.⁷⁷ Crowe argues that a model of ethical judgement for mediators can provide an alternative to mediator neutrality.⁷⁸ Mediator ethics focuses on party empowerment while embracing the changing and situational nature of ethical judgements.⁷⁹ By consciously seeking to ensure party empowerment and control, through practice mediators will develop strategies for recognising patterns and dealing with them in different mediation contexts.⁸⁰ Such an approach is superior to following abstract principles like mediator neutrality because it allows mediator practice to be informed by the other-oriented nature of mediation as a process, while catering for the diverse needs of parties. Mediation thus becomes community-oriented,

73 Dale Bagshaw, 'Language, Power and Mediation' (2002) 13 *Australasian Dispute Resolution Journal* 130; Astor and Chinkin, above n 11, 35.

74 Carol Izaumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Journal of Law and Policy* 71. Mediators can be biased against cultural groups in mediation, such as Asian Americans, 109. See also Gary LaFree and Christine Rack, 'The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases' (1996) 30 *Law and Society Review* 767.

75 Leah Wing, 'Mediation and Inequality Reconsidered' (2009) 26 *Conflict Resolution Quarterly* 383.

76 Toran Hansen, 'Critical Conflict Resolution Theory and Practice' (2008) 25 *Conflict Resolution Quarterly* 403.

77 Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 *Social & Legal Studies* 221.

78 Jonathon Crowe, 'Ethics and the Mediation Community' (2015) 26 *Australasian Dispute Resolution Journal* 20, 24.

79 Ibid.

80 Ibid 23-25.

rather than individualistic.⁸¹ According to Crowe, dual processing models of ethical judgement see cognition as having two parts; one type involves fast, intuitive snap judgements, while the other involves self-conscious, reflective deliberation.⁸² Neither is entirely separate from the other, and both form the basis of an ethical judgement. Pre-reflective judgements are formed partially from repetitive experience.⁸³ Experienced mediators will therefore develop a sense of what is fair and equitable, making pre-reflective judgements.⁸⁴ These judgements are not arbitrary, but based on experience. They are developed by reflective deliberation, with pre-reflective judgements providing the raw material.⁸⁵ The issue of impartiality/neutrality affects managers as mediators. Managers are not impartial outsiders when informally mediating, but rather part of the community of the OC. Because they are so intimately engaged with the running of an OC, they may have prejudices that they may not realise that they hold, particularly concerning the wider interests of the community and the smooth operation of the OC. Indeed, bias may affect the way that the mediation is run by the managers, which impacts on the fairness of the process. Managers with little education or formal training in mediation are unlikely to adhere to the need to conduct the mediation in a fair, equitable and impartial manner, nor think of power imbalances that might impact on fairness and equity. They may not realise that their own view of the conflict can impact on the unfolding story of the mediation. The occurrence of these problems is unsurprising, as the OC Act regulates disputes but does not provide guidance to managers. This is shown in the data gathered for the research into the experiences of managers discussed below.

IV METHODOLOGY

The research on conflict in OCs in Victoria was funded in 2011 by a grant from the Legal Services Board, Victoria. Data was obtained from three sources: a survey of managers, semi-structured interviews with OC committees and a content analysis of websites dealing with OCs or like entities disputes. In this article we focus on the data from managers. Data was collected via a survey instrument that included a Likert scale of forced choice questions and the opportunity for open-ended responses. There were 34 survey responses returned. At the time of collecting data there were approximately 350 managers in Victoria. The survey included 30 questions, some dealing with participant demographic information and the bulk of the questions enquiring about the OC internal dispute experience.

81 Ibid 24.

82 Ibid 20.

83 Ibid 21.

84 Ibid 22.

85 Ibid 21-22.

V FINDINGS

The research showed that there were a number of areas of conflict that managers experienced including financial issues (73.5%), lifestyle concerns (79.4%) and maintenance issues (67.6%). Our study found that managers were largely dissatisfied with the dispute resolution process in Victoria and one third of disputes of respondents indicated that they instead used informal rules of dispute resolution. In the study 41.2% of managers gave a negative response to question 8 ‘Are you comfortable with the amount of time you need to spend on resolving these disputes between owners and/or occupiers?’ (see Table 1 below).

Table 1: Comfortable with time spent on dealing with disputes of owners/occupiers

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	Yes	8	23.5	23.5	23.5
	Neither comfortable, nor uncomfortable	10	29.4	29.4	52.9
	No	14	41.2	41.2	94.1
	Don't know	2	5.9	5.9	100.0
	Total	34	100.0	100.0	

Part of the survey asked managers for open ended responses. Analysis of the open ended responses to question 8 shows that the many managers saw informal dispute resolution as part of their role, but often found the parties to disputes difficult to deal with and the process time consuming. Thus managers’ impartiality when informally mediating these disputes may be compromised due to the fact that they resent the task of dealing with disputes. Many of the comments that the surveyed managers provided indicate frustration with their role and a view that residents are ‘difficult’ when engaging with conflict. For example, managers stated:

I try to mediate and not let issues escalate unless there is no alternative (Manager R 27).

It’s always desirable to minimise dispute resolution time, however its occurrence is unavoidable and simply needs to be dealt with (Manager R 6).

[C]an be time consuming and in some cases people can be simply inflexible in the resolution process (Manager R 16).

Lack of understanding of the processes, leads to misunderstandings. Selfishness is prominent, owners only see it from their individual perspective. They don’t see the ramifications or impact on the overall Owners Corporation. The rules are in place for the good of the collective, sometimes, this means single owners do not get their own way (Manager R 9).

Residents won’t talk to each other in an effort to resolve a dispute and expect the OC Manager to be policeman and peacemaker (Manager R 22).

Importantly, for this discussion our research found that many managers dealt with disputes informally rather than using formal outside mediators. The data in this study showed that most managers do not outsource disputes to legal practitioners or mediators. Rather, 20 out of 34 dealt with the disputes themselves (see Table 2).

Table 2: Managers undertake dispute resolution

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	Yes	20	58.8	58.8	58.8
	No	14	41.2	41.2	100.0
	Total	34	100.0	100.0	

This reluctance to outsource dispute resolution may be due to the potential cost of employing a mediator or a lawyer. Also, potentially managers may understand the benefits of dealing with conflict at the local, 'personal responsibility' level as envisaged under the Act. However, as discussed early in this article, managers are not trained in mediation and some managers in this study regarded taking on the role of informal mediator and the need to show impartiality as a challenge. As one manager noted:

It takes a lot of time and it's hard to mediate whilst being impartial (Manager R 17).

Table 3 indicates that the majority of managers felt that they needed training in conflict resolution, which could include informal mediation. Training could provide managers with an understanding of the theory and practice of mediation, including ethical issues such as impartiality/ neutrality. The provision of training may assist managers to understand the role of an 'insider' mediator and to consider when to bring in 'outsider' mediators.

Table 3: Managers and their perceived need for more training in conflict resolution

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	Yes	20	58.8	64.5	64.5
	No	7	20.6	22.6	87.1
	Don't know	4	11.8	12.9	100.0
	Total	31	91.2	100.0	
Missing		3	8.8		
Total		34	100.0		

Table 4 shows the open-ended responses to question 18 relating to the managers' perception of what skills the managers use to deal with conflict. The open-ended responses show that the majority of the managers employ generic listening and communication skills to engage with disputes.

The managers show that they draw on their professional experience to engage with conflict and some have attended training. They use informal processes such as writing to residents, communicating by telephone or face to face and possibly mediating. None of the managers' comments framed their concerns regarding dispute resolution as including ethical concerns, although one, in answer to this question, did indicate the need to stay neutral in any process.

Table 4: Q18. What skills do you use to manage conflict?

Manager Respondent	Comment
2	Common sense and willingness to listen and seek other understanding of the laws and rules. The most difficult cases are where the owners do not seek to understand the rules or laws, choose ignorance or do not get legal advice.
3	Process as per Part 10.
4	Write to or ring the parties involved.
5	Attend training sessions on handling difficult issues/refer to professional (solicitor etc) if possible/arrange dispute committee at the property (not suitable for small blocks).
6	Negotiation, listening and expressing empathy. Attempt clear communication (written where possible to maintain an audit trail).
7	My skills developed in life and in owners corporation management over the last 20 years. Far from adequate.
8	The first response is to listen to the complaint carefully – make sure you fully understand what is happening and what the person wants to happen. Apply common sense to the situation, have the two parties talked to each other? Perhaps it could be easily resolved if they just communicated? If unwilling to talk to the other party advise of the complaint procedure. Empathise and let the person know you take their issue seriously. Be proactive in getting the dispute resolved as quickly as possible.
9	All of my professional skills and competencies, along with referencing to life experiences.
10	Good communication skills, listening, detailing issues, aim to resolve concerns, occasionally independent mediation.
11	I have many years of people management experience.
12	The skills that have been built up over the years in other jobs.
14	Have meeting, have everything in writing. Communication is very important.
16	Experience and reference to decisions in similar circumstances made at VCAT.
17	I try and talk to people, write letters, liaise with all parties involved.
20	Try to use a personal approach. Try to see matters objectively (often discussing with others before acting/speaking). Try to let other person 'get it all out' before doing or saying anything.
22	Negotiating skills, fairness principles, privacy principles, strong legislative acumen.

ETHICAL CONCERNS FOR OWNERS CORPORATION MANAGERS

Manager Respondent	Comment
23	Management skills, respect all parties, attempt to compromise, find some common ground etc.
24	Patience, listening, providing logical information where applicable and possible.
25	Talking – trying to get parties to talk to each other. Employ 3rd party.
26	When two parties are ‘face to face’ it is easier to reach a conclusion.
27	Communication/negotiation /parental skill when owners act like children.
28	Common sense in being able to calmly mediate is usually a successful process.
29	[Show] understanding of the problem, – Options achievable, – Mediation process ...
30	Listening to other parties and patiently providing relevant information on rules, the act, etc.
31	Empathy/logic – common sense/knowledge of OC Act.
32	Listening, negotiation.
33	Conflict resolution skills – dealing with people, legislative awareness and aptitude, the ability to stay neutral, equitable consideration for each party, etc.
34	Empathy, good listening skills, acknowledgement of concern, focus on compromise and sensible logical outcomes. Trying to get dispute party buy-in and ownership of the outcomes. Brainstorming for possible solutions.

A related question asked of managers was whether they would like more skills to deal with conflict. The majority of respondents agreed and provided open ended responses. Again, managers highlighted communication skills and some managers nominated debriefing of stressful situations where parties to the dispute are acting in a combative manner. Ethical issues were not nominated as something that managers believed that they needed training to address. This is likely due to the fact that managers are relatively new to the role of mediator and may not consider or understand ethical concerns. The majority of managers appear to be trying their best to deal with conflict, drawing on their professional skills but largely unaware of nuanced ethical issues such as impartiality/neutrality. This can be explained by the emerging nature of the professional role of managers. With the prospect of new requirements in education brought about by the review of the legislation it will be important that managers recognise that when practising informal mediation they will need to maintain impartiality/neutrality.

Table 5: Q19. Would you like more skills to manage conflict?

Response	Manager Respondent	Comment
Yes	5	Managers are often 'the messenger' and don't like being shot ...
	6	One can always improve on conflict resolution skills. Perhaps role-playing workshops sponsored by OCV.
	7	They are needed.
	9	Use of behavioural models, terminology, something that works in other industries or with a majority of personalities.
	10	It is always good to review techniques used and update skills.
	14	I find it difficult to approach people and to talk to them about things. I am better at communicating in writing than in person as I tend to get muddled.
	17	Sometimes conflicts can be particularly difficult to deal with and very stressful.
	23	A more definitive process in the Act would help, something that can be actioned promptly without being a drawn out process.
	24	It's a challenge dealing with people who are self-seeking, illogical and emotional.
	27	You can never know everything.
	28	Should the committee be empowered to preside over disputes and issue orders it would assist in many disputes.
	29	Question not more skills but to enhance current skills. Always able to learn more.
	30	You can never know enough – any future help is much appreciated.
	34	We can never know it all – personal skill development is always useful. Possibly include role-play.
No	2	This is not my role. Some should go and get help to understand the law and find out they are wrong then shut-up. Others would find mediation good. And for the majority that complain about tenants to get tenants to be considerate of their neighbours is arduous.
	4	I do not have a problem with resolving issues, and no one has seen fit to submit a formal complaint.
	8	Through previous job roles I've had evidence and done courses on handling conflict. The OCV offer regular courses and if I felt I needed to learn more at any stage I'm confident the resources would be available to me.
	33	It is not a role that a Manager wants in the first instance. Again as stated above, Dispute Resolution should be handled by the Committee or a Sub-Committee – not the Manager.
Don't know	16	I believe we have the skills currently necessary, however that does not mean there might be a better way
	22	Unsure what may be available. Have looked a number of uni[versity] courses early in the piece but none were strictly applicable to OCs.

Participants were asked whether they would like training in conflict resolution. Training might include the theory and practice of mediation using the pedagogy of role-plays.⁸⁶ Some managers expressed a preference for training in skill development and dealing with difficult people. However again, as with earlier questions, none of the managers mentioned ethics (see Table 6).

Table 6: Q21. Would you like to have training in conflict resolution?

Response	Manager Respondent	Comment
Yes	6	Skill development is always helpful.
	8	You can always learn new ways to handle things.
	9	How to put out fires – the conflicts where there is potential for it to escalate quickly and or become to some overtly personal and could lead to being physical.
	17	This would be very helpful.
	20	Always a need no matter how experienced a person is.
	29	Further training or upgrade would assist.
	30	Any assistance would be appreciated.
	31	How to deal with difficult people.
	34	Benefits gained in personal development.
No	2	This is not my role. Usually this is too late the conflict is too far done the track before the OC is involved. But I am eager to learn.
	11	I have had training in conflict resolution over the years.
	16	Whilst I may not want training that does not mean I would object to staff attending such meetings
	22	Been there, done that and have not found it very helpful in our specific industry.
	32	Would prefer to stay out of these issues.
	33	For all the reasons stated above. Besides which, an OC is usually not wanting or expecting to reimburse the Manager for their time spent on conflict resolution so that these efforts go unfunded.
Don't know	5	Have done some work on this – but would prefer professionals were to handle this – it should not be our role.
	14	Fear [training].

As noted earlier in this article there is the possibility of required conflict resolution training through new business licensing arrangements for managers. Such legislative requirements are one way to address the need to educate managers in the theory and practice of mediation. The training, likely to be offered at certificate or diploma level, could include engagement with ethics. This training could be modelled on the ethical requirements of the NMAS. Another way that managers could gain insights about

⁸⁶ Douglas and Leshinsky, above n 56, 235-236.

ethical issues is through their professional body. In the data there was a clear preference evidenced by managers to use their professional body for updates on OC law and issues. The majority of managers noted that they relied on their professional body, Owners Corporation Victoria (OCV)⁸⁷ to keep their knowledge current (see Table 7). That is, 31 out of 34 prefer to keep up to date via OCV. This body, because of its professional links with managers, could facilitate the discussion of ethical concerns and assist managers to collectively gain insights about ethical dilemmas.

Table 7: Manager would prefer OCV as resource to keep up to date with OC law

		Frequency	Per cent	Valid Per cent	Cumulative Per cent
Valid	Yes	31	91.2	91.2	91.2
	No	3	8.8	8.8	100.0
	Total	34	100.0	100.0	

In terms of managers keeping up to date with OC law, some managers had the following to say:

OCV advise of changes and ‘best practice’ approach. Legal advisor assists with recent decisions and ‘least cost’ options (Manager R 26).

It is difficult to find one source of current legal determinations in regards to owners corporations – we find it best to use both the OCV and also periodic newsletters/email advice from legal firms (Manager R 33).

VI DISCUSSION

In order to raise awareness of ethics in mediation practice in the owners corporation context it would be valuable for mediators to engage in training and also in a community of practice facilitated by their professional body. Firstly, training could ensure competency to mediate. Further, in training managers, they could be made aware of ethical issues such as impartiality/neutrality and the importance of party self-determination. Managers could become more aware of the need to curtail community issues if these are at odds with the interests of parties in a mediation. They could be educated through short course training in mediation along the lines of NMAS requirements and engage in role-plays around conflicts that they regularly experience. These role-plays could include addressing ethical dilemmas. Managers may even develop their own standards of practice that could be informed by the NMAS, but differ where needed to accommodate the needs of OCs.

Jean Lave and Etienne Wenger⁸⁸ analysed learning in apprenticeships and traced the development of understanding from the ‘novice’ to the

87 Now known as Strata Community Australia (Vic) <www.vic.stratacommunity.org.au/>.

88 Jean Lave and Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press, 1991).

‘expert’ through engagement with situated⁸⁹ activities and mentoring from a ‘master’. They highlight the benefits of learning from membership of a community and the peripheral learning that results from immersion in the culture of an activity. The authors argue that:

[L]egitimate peripheral participation is not itself an educational form, much less a pedagogical strategy or a teaching technique. It is an analytical viewpoint on learning, a way of understanding learning.⁹⁰

There are many kinds of communities of practice that assist learning and an individual may be simultaneously a member of a number of such communities, for example in an organisation and also in a family.⁹¹ Communities of practice can shape our identity as we engage in activities and reflect on them. Wenger argues that learning is:

[T]he vehicle for the evolution of practices and the inclusion of newcomers while also (and through the same process) the vehicle for the development and transformation of identities.⁹²

In order to provide ongoing support to managers there should be a community of practice that provides guidance on informal mediation, including ethical dilemmas. Such a community of practice could mentor the more inexperienced managers and develop strategies to address ethical concerns. Potentially organized by their professional body, such a community of practice could arrange ongoing professional development and support to assist with mediation practice in the OC context.

VII CONCLUSION

Currently, the area of OC mediators lacks a community of practice to support their endeavours. Mediation ethics depend on the sharing of principles and guidelines throughout the mediation community. For OC managers, it is important that there is professional dialogue among practitioners. This would make full use of the store of knowledge reflected in the diverse experiences of managers about conflict. Additionally, it is important that reflexivity – the ability to recognise one’s subjectivity and viewpoint when assessing a situation – is taught as part of OC manager education. Otherwise they will not be aware of the need to guard against bias and conflicts of interest when dealing with owners and residents in developments.

The strategy of a community of practice may provide the opportunity for the collegial sharing of ideas and resources for addressing ethical issues in OCs, and this could be supported by improved training for these kinds of mediators. With the more formalised training requirements for

89 John Seely Brown, Allan Collins and Paul Duguid, ‘Situated Cognition and the Culture of Learning’ (1989) 18 *Educational Researcher* 32.

90 Lave and Wenger, above n 88, 40.

91 Etienne Wenger, *Communities of Practice: Learning, Meaning and Identity* (Cambridge University Press, 1998) 6.

92 Ibid 13.

managers likely to be legislated in the future, the modules on conflict must include ethics. Managers could engage with ethics in the curriculum and then be supported by a community of practice. As noted, more experienced managers could be recruited to mentor beginner mediating managers. The particular ethical issues of OCs should be part of continuing professional development for managers. The managers professional association would be an ideal advocate for a community of practice to assist with engaging successfully regarding conflict in these kinds of developments.