

27 November 2013

By email: cav.consultations@justice.vic.gov.au

Owners Corporations Act Review
Regulation and Policy Division
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

Dear Sir/Madam

Review of the regulation of owners' corporation managers—Issues Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *Review of the regulation of owners' corporation managers Issues Paper*.

Our submission makes two primary recommendations:

- that the unfair contract term provisions of the Australian Consumer Law be applied to owners' corporation management agreements; and
- that owners' corporation managers be required to develop and comply with hardship policies.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Unfair terms in managers agreements

The consultation paper notes that the unfair terms provisions in the Australian Consumer Law (**ACL**) (Schedule 2 to the *Competition and Consumer Act 2010* (Cth) and applying in Victoria by virtue of the *Australian Consumer Law and Fair Trading Act 2012* (Vic)) do not apply to the conduct of owners' corporation managers, as a management agreement is not a consumer contract 'to an individual' (section 23). Instead, the management agreement is a contract 'to a body corporate'.

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

Consumer Action submits that a number of the concerns identified in the issues paper, and the fairness of management contracts generally, could be addressed by applying the unfair contract term provisions of the ACL to owners' corporation management agreements, through a relevant deeming provision in the *Owners Corporation Act 2006* (Cth).

When proposing the introduction of a uniform national consumer law, the Productivity Commission noted the benefits of such a law applying to all aspects of the economy and all consumer contracts. It also stated:

The biggest concerns arise for standard-form contracts—typically used in the supply of a broad range of services including air travel, telecommunications, energy, consumer credit, car hire, holiday packages, home improvements and software sales. Such non-negotiated contracts have advantages for consumers—in particular, in competitive markets, lower business costs will be passed on to consumers as lower prices. **But, by their very nature, these contract terms are offered on a 'take it or leave it' basis, are often complex and apparently mostly not read. The concern is that businesses sometimes use unfair terms against consumers and the public generally.** (emphasis added)¹

Owners' corporation management agreements share many of the same features of contracts that were identified by the Productivity Commission, in that such agreements are standard-form and often complex. We are also aware that owners' corporations that have attempted to negotiate the terms of management agreements have been faced with opposition—agreements, particularly where the manager uses the industry body's standard form agreement, are provided on a 'take it or leave it' basis.

While management agreements are between two corporate entities (a manager and a body corporate), in reality an owners' corporation is made up of individual unit holders who share much in common with consumers generally. For example, most owners' corporation members (at least those living in residential complexes) are contracting in an inherently personal and domestic capacity, and not in a business capacity. As such, owners' corporation members are very unlikely to be in a position to seek legal advice before signing a management agreement. We note that Consumer Affairs Ministers recently affirmed their agreement to consider an extension of the unfair contract terms provisions of the ACL to small business, recognising that such businesses are often in a vulnerable negotiating position.² We submit that owners' corporations are in a very similar position.

Section 23 of the ACL states that an unfair term of a standard-form consumer contract is unfair, while section 24 provides that a term of a consumer contract is unfair if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

¹ Productivity Commission, *Review of Australia's Consumer Policy Framework volume 2*, April 2008, page 149.

² Consumer Affairs Forum, communiqué, 7 November 2013, available at: <http://www.consumerlaw.gov.au/content/Content.aspx?doc=caf/meetings/005.htm>

Below we identify two terms in the Strata Community Australia (Vic) Standard Contract of Appointment that we believe may represent unfair terms—the terms result in a significant imbalance in rights and obligations in favour of the manager; the terms do not protect the manager's legitimate interests; and they cause detriment to the owners' corporation. There may well be other terms that are unfair, including those related to termination.

Insurance agency fees and conditions (clause 1.3.1.2 of agreement)

This clause appears to oblige the owners' corporation to be liable for an additional fee representing up to 15% of an insurance premium, where the commission payable to the manager is less than 15% of an insurance premium.

This clause may discourage the manager and the owners' corporation from seeking a competitive insurance premium. Where a commission is not paid to the manager (perhaps where the insurance premium quote is cheaper), the manager will be guaranteed a fee as compensation. Further, the owners' corporation will remain liable for an amount representing the lost commission, reducing the value of any competitive insurance premium.

We acknowledge that the insurance premium commission may be considered to reduce the upfront fee paid by the owners' corporation for managerial services. However, it would be more transparent for the fee to be included upfront and, in that way, owners' corporations can make appropriate decisions about management expenses in a simple way. Having the total cost of management services upfront will also engender competitive pressure into the market for owners' corporation managerial services, by making it easier for owners' corporations to understand the full price of particular agreements.

It should also be noted if the value of any commission was included in the upfront cost of the contract, and the ACL provisions applied, such a fee could not be assessed for unfairness pursuant to clause 26 of the ACL which excludes terms that relate to upfront price.

Indemnities by the Owners Corporation and Liability of Manager (clause 7.2)

This clause appears to oblige the owners' corporation to release and indemnify the manager from any cause of action including negligence (except to the extent that such loss is caused by or contributed to by the manager's dishonesty or fraud).

We note that under the *Owners Corporation Act 2007* (Vic) and regulation 7 of the *Owners Corporation Regulations 2007* (Vic), managers are required to hold professional indemnity insurance that is sufficient to meet claims up to \$1.5 million in any one year.

As such, the manager should not require such a wide indemnity (including in relation to negligence) from the owners' corporation given its risk is insured. It appears that this clause would enable a professional indemnity insurer to seek compensation from the owners' corporation, a right which may be applied in a harsh and oppressive manner. Given the requirement for professional indemnity insurance, it is clear that there is no legitimate interest being protected (rather it is the interest of the insurer).

Role of the regulator in unfair terms

One of the primary benefits of the unfair terms provisions in the ACL is that they allow the regulator to take proactive action to address the inclusion or use of an unfair term in a standard-form contract in use in the marketplace, and do not merely bestow legal rights on the individual consumers affected by a contract term to take legal action.

This can mean that regulators can undertake 'compliance assistance' by helping identify potential unfair terms and working with businesses to redraft terms that better balance the rights and obligations of the parties. In our view, this has been used to good effect both by Consumer Affairs Victoria³ and the Australian Competition and Consumer Commission.⁴

Such an approach is also an efficient use of resources, meaning that there is likely to be less opportunity for costly and timely disputes between owners' corporations and managers.

Hardship and debt recovery

From 1 December 2012 to date, Consumer Action has received 138 consumer inquiries or complaints about owners' corporations and managers. One of the common areas of consumer complaint to both our legal advice service and our telephone financial counselling service (MoneyHelp) is about the debt recovery practices of owners' corporations and managers.

We submit that owners' corporation managers could be encouraged or even mandated to adopt financial hardship policies, particularly when they are recovering owners' corporation fees or levies from individual unit holders. We have assisted some owners' corporation members in relation to legal proceedings for debt recovery, when it appears that there may well have been more flexible options that could be taken. We note that owners' corporations generally will have security over levies as these will be recovered should the unit be sold.

A more flexible and responsible approach to financial hardship may have the following outcomes:

- it may reduce the number of vulnerable owners' corporation members being sued for unpaid fees and levies;
- it may encourage owners' corporations and managers to more consistently and proactively identify and assist owners' corporation members who may be experiencing difficulty paying levies due to personal or financial hardship, in advance of undertaking debt collection or legal proceedings;
- it may promote early access to legal and financial counselling help for people experiencing financial hardship;

³ See, eg, CAV, *Report to the Minister for Consumer Affairs for the year ended 30 June 2007*, November 2007, pp 20-24; Minister for Consumer Affairs media releases: 'Telcos warned again over unfair contract terms' (18 October 2004); 'Victoria drives hire car contract reform' (22 April 2005); 'Victoria continues charge for fairer contracts' (16 August 2005); 'Foxtel revises digital pay TV contracts' (4 May 2006); 'VCAT disconnects unfair mobile phone contracts' (2 August 2006); 'Victorian consumers protected on loyalty contracts' (4 October 2006). See, also, CAV, *Annual Report 2007-2008*, October 2008, pp 10-12 in relation to negotiated outcomes in the areas of window and floor coverings, car hire, health and fitness centres, pay TV, cruise ships and racing clubs.

⁴ ACCC, *Unfair Contract Terms: Industry Review Outcomes*, 14 March 2013: <http://www.accc.gov.au/publications/unfair-contract-terms>

- it may encourage consistent and ethical debt collection practices by owners' corporation managers;
- it may reduce court administration costs by identifying more appropriate ways for owners' corporations to seek payment of levies arrears;
- it may reduce court proceedings and associated court and legal costs being added to owners' corporation levies arrears.
- it may reduce debt recovery costs for owners' corporations.

We would welcome working with Consumer Affairs Victoria or the owners' corporation industry in improving debt recovery and hardship practices.

Please contact me on 03 9670 5088 or via email to info@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

Gerard Brody
Chief Executive Officer