

30 May 2016

By email: consumerpropertylawreview@justice.vic.gov.au

Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

Dear Sir/Madam,

Submission to Consumer Property Law Review: Issue Paper 2 – Owners corporations

Consumer Action Law Centre (**Consumer Action**) is pleased to make this submission to Consumer Affairs Victoria's (**CAV**) review of Victoria's consumer property laws on *Issue Paper 2: Owners corporations (Issues Paper)*.

This submission is focused on two areas of particular importance to us, and which we encounter regularly in our casework and advocacy.

First, our submission calls for a more flexible and responsible approach to financial hardship by owners corporations when pursuing outstanding owners corporation fees. Over many years, Consumer Action has advised hundreds of consumers with complaints about the debt recovery practices of owners' corporations and managers. We raised this concern in a previous submission, and have restated our concerns here.¹

Second, our submission is framed with a particular focus on section 12 – *Owners corporations in retirement villages*. As identified by the Issues Paper, the overlap of owner's corporations with retirement villages presents particular challenges. In our view, the underlying solution to those challenges is to approach the owners corporation/retirement village as a community first, and a property investment second. Allocation of decision making power on the basis of dominant property ownership within the community does a disservice to residents. Our experience is that retirement village residents have a highly varied capacity to engage with disputes, tend to avoid conflict, and are often vulnerable to bullying behaviour by retirement village managers and owners corporation managers. Residents' right to quiet enjoyment

¹ See Consumer Action submission to *Review of the regulation of owners' corporation managers – Issues Paper* (27 November 2013)

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should be balanced against the rights that accrue with property ownership, and the varying capacity of residents to assert their rights needs to be taken into account.

In relation to the intersection between owners corporations and retirement villages, we are also conscious that this area will be considered by the forthcoming Victorian parliamentary inquiry into retirement housing. Accordingly, we have kept this submission brief. We will expand on these points in more detail through the inquiry process.

While we recognise many other issues do arise in relation to owners corporations, they generally sit outside of our key policy priorities and we have therefore been relatively selective in the Issues Paper questions that we have chosen to respond to.

Finally, we are also conscious that *Issues Paper 1 - Conduct and institutional arrangements for estate agents, conveyancers and owners corporation managers* does overlap to some extent with some of the issues raised in this paper, and have sought not to repeat points already made in our submission to that paper.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Functions and powers of owners corporations

1. Are the current constraints on owners corporations' power to commence legal proceedings appropriate?

Please note, our interest in relation to this question is confined to legal proceedings undertaken to pursue outstanding owners corporation fees.

In Consumer Action's view, the requirement for an owners corporation to pass a special resolution to take legal action to pursue outstanding fees from a lot owner at the Magistrates Court should also be extended to VCAT applications. We do not support the removal of procedural hurdles for debt recovery action. While we recognise it can be difficult to pass special resolutions (and they can be blocked by a minority of lot owners), we are wary of encouraging adversarial and costly legal action as the default means by which fee disputes are resolved. Maintaining—and potentially extending the special resolution requirement to VCAT—provides a barrier to over-zealous fee recovery action which may otherwise be initiated by the owners corporation manager.

We have formed this view based on the weight of inquiries we receive from consumers who are being pursued for outstanding owners corporation fees, and the debt recovery approaches that are sometimes taken. Consumer Action has assisted some owners' corporation members

in legal proceedings when more flexible options may well have been taken. Legal action to recover outstanding fees is often pursued from the base assumption that the payee is wilfully recalcitrant, without adequately considering the lot owner's genuine capacity to pay. This is particularly true for retirees in owners corporations. Given the low, often fixed income of many retirees, defaults on owners corporation fees are far more likely to arise from a genuine difficulty to pay than they are from wilfully "delinquent" payment. It is also worth noting that owners corporations do have security over outstanding levies, as these can ultimately be recovered through the sale of the unit.

In our view, owners corporations should be required to adopt financial hardship policies, and if legal action is to be taken (whether it requires a special resolution or otherwise), it should only be taken once the hardship option has been exhausted.

As highlighted in our 2013 submission to CAV's issues paper reviewing the regulation of owners corporation manager's, a more flexible approach to financial hardship would have the following potential benefits:

- a reduction in the number of vulnerable owners' corporation members being sued for unpaid levies and fees;
- encouragement of owners' corporations and managers to proactively identify and assist owners' corporations members who may be experiencing difficulty paying levies, before taking debt collection or legal proceedings;
- promotion of early access to legal and financial counselling help for people experiencing financial hardship;
- encouragement of more ethical debt collection practices by owners' corporation managers;
- reduction in court proceedings and associated court and legal costs being added to owners' corporation levies arrears;
- reduction in debt recovery costs for owners' corporations.

We further note that it is important to consider the issue in with regard to the power imbalance that exists in many owners corporations where older residents are living. Through our casework, and in our advocacy work with Residents of Retirement Villages Victoria (**RRVV**), the Council of the Ageing (**COTA**) and Housing for the Aged Action Group (**HAAG**), we have been alerted to recurrent bullying and intimidation by owners corporation managers of older residents. Given the potential for harm, the requirement to utilise a hardship policy and seek a special resolution before pursuing an adversarial solution is particularly important.

4. Are there any other issues relating to the power of owners corporations to acquire and dispose of personal property?

Section 16(3) of the *Owners Corporations Act 2006 (Act)* entitles the owners corporation to "*dispose of personal property*".

While it is not defined in the Act, we take "personal property" to have the legal meaning of "anything besides land that may be subject to ownership" (i.e. essentially, movable property). If this view is correct, we see no issue and regard it as a necessary power for owners corporations.

6. Do the requirements for a common seal still serve a useful and legitimate purpose? If not, who should be able to sign contracts on behalf of the owners corporation, after the necessary resolutions and procedural steps have occurred?

While the common seal does seem administratively onerous for owners corporations, Consumer Action recommends that the requirement be retained—for the reason that it does promote the notion of the owners corporation as a common community, and this is important—particularly in a retirement village context.

Ceding authority to the owners corporation manager to sign off on behalf of the owners corporation, or even granting that authority to a select group of owners committee members, could exacerbate the sense of disenfranchisement that is felt by many lot owners—particularly in circumstances where the relationship between the lot owners and management has broken down.

Financial management of owners corporations

8. Should an owners corporation be able to recover debt collection costs from defaulting lot owners where a matter does not proceed to a VCAT or court application, or for any costs incurred before an application is made?

Consumer Action does not support the recovery of debt collection costs from defaulting lot owners, especially before a matter proceeds to court or VCAT. We note that section 52 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) generally provides that enforcement expenses are not recoverable for collection of (non-credit contract) consumer debts even where a contract purports to make them recoverable. We believe that the same protection should be afforded to lot owners in owners corporation.

If any costs are to be recoverable, then in our view they should be subject to strict regulatory caps.

As noted in response to question 1, we also submit the legislation needs to allow for hardship variations for retirees who may be struggling to pay their owners corporation fees. Please refer to our submission in relation to question 1 above for more information on this point.

10. Should owners corporations be able to apply a discount for the timely payment of fees and charges?

The implied assumption with timely payment discounts, which are often applied in the energy industry, is that all payees are capable of payment but can be tardy in doing so. Therefore, timely payment discounts are offered to incentivise payees to pay early, or on time.

Unfortunately, this implied assumption ignores that fact that for some payees, payment is genuinely difficult—for those payees, there is simply not enough money available to pay early or right on time. Seen from that perspective, timely payment discounts operate as a penalty for those who are unable to access them.

On that basis, Consumer Action does not support timely payment discounts.

11. Should the internal dispute resolution process be completed before an owners corporation can send a final fee notice, or proceed to VCAT or a court?

Yes.

There is little point in having an internal dispute resolution process if it is not required to be completed before proceedings are launched in an external forum. Furthermore, hardship arrangements should be an essential tool of every owners corporation internal dispute resolution process. Please see our submission in relation to question 1 above for more information on this point.

Maintenance

25. Should lot owners be able to ‘opt out’ of the insurance policy taken out by the owners corporation when they take out their own insurance (and not, therefore, pay their portion of the owners corporation’s policy)?

No.

All lot owners should be adequately insured, and the best way to ensure that this occurs is for lot owners to be covered by, and contribute to, the joint insurance policy. This reflects the notion of the owners corporation as a community, and eliminates the risk that insurance levels may wane over time, leaving residents under- or uninsured.

26. What are your views about lot owners’ responsibilities for any excesses or increased premium payable by the owners corporation?

The Issues Paper highlights New South Wales’ owners corporation legislation, which allows for reasonably applied differential insurance levies in the event that a lot owner’s particular use of their lot increases the insurance premium payable by the owners corporation.

Consumer Action does not support the adoption of similar provisions in Victoria. Unless it can be unequivocally established that the lot owners particular use was wilfully negligent, then differential insurance levies are an unfairly punitive measure applied where there may be no genuine fault. The whole concept underlying an owners corporation joint insurance policy is that the cost of the premium is borne by the owners corporation community, and defrayed equally to insure against the potential misfortune that may affect any one of its members. Applying differential levies due to no fault claims that may arise during the course of that policy undercuts that principle, and on that basis we recommend against it.

Meetings and decisions of owners corporations

27. What are your views about the appropriate obligations for developers who control owners corporations, including the:

- * obligations concerning any contracts they cause the owners corporation to enter into**
- * interests they must consider, and whether there are any matters they should be prohibited from voting upon, and**
- * duration of their obligation?**

Consumer Action’s concern is that the owners corporations should be governed for the benefit of the resident community. Developer and resident interests do not always align and, for that

reason, we believe that developer control of the owners corporations should be constrained by similar protections to those in Queensland and New South Wales.

The New South Wales protections are strong, require full disclosure of potentially conflicting interests and create a ten year 'developer free' period, during which developers or those connected to them cannot be appointed as a manager until ten years after the registration of the strata scheme. In cases where a developer with more than two-thirds of voting rights is able to appoint a 'non-connected' manager, the appointment must then be tested at the first annual general meeting following the appointment.

The Queensland notion of a 'control period' is also a useful one, and would address the point raised by the Issues Paper in relation to the extended time-frames over which developers sometimes exert control over owners corporations.

Essentially, the obligation of developers to act honestly and in good faith and with due care and diligence in the interests of the owners corporation should extend for as long as the developer exerts control over the owners corporation—and should not be based on an arbitrary time period. The current five year period is inadequate, and should be replaced with the Queensland concept of the 'control period'. This concept does not exclude application of New South Wales style protections as well, and there is no reason they could not work together to ensure that owners corporations are not captured and controlled by developer interests.

30. Should there be restrictions placed on the appointment of proxies, and if yes, in what circumstances?

'Proxy farming', as identified in the Issues Paper, should be prohibited.

Consumer Action is also of the view that owners corporation managers should be prohibited from acting as a proxy for a lot owner, as this is a means by which managers are able to exert an in appropriate level of control on the owners committee. This is a particularly undesirable outcome in a retirement village context, where we have been advised of recurrent bullying behaviour by managers in an environment where the resident community can be particularly vulnerable.

Rules of the owners corporation

46. What are your views about owners corporation rules that prevent lot owners installing 'sustainability' items in or on their units?

In Consumer Action's view, there should be no rules to prevent lot owners from installing sustainability items in or on their own units, provided those items do not infringe access or practical use of property by other lot owners. Aesthetic considerations alone are not sufficient justification to prohibit lot owners from installing sustainability items, as those items may well act as a significant cost saving measure for the relevant lot owner over time—and their right to make that saving should not be impeded.

On a macro level, sustainability items are needed as the economy shifts to more sustainable energy use in an effort to address climate change. Policies that restrict the use of sustainability items are out-dated, and do not meet the current or future needs of the community at large. The Queensland legislation highlighted in the Issues Paper reflects this, and similar provisions ought to be adopted in Victoria.

47. What are your views about civil penalties for breaches of owners corporation rules?

Consumer Action is wary of following the South Australian example and allowing owners corporations to impose their own penalties. The burden of appealing a penalty to the Magistrates Court is significant and would deter many residents—including older residents—who may be disinclined to engage with a legal, adversarial process.

Consumer Action believes that increasing the current \$250 penalty rate, would place undue financial pressure on low-income earners, and those without a limited fixed income – such as retirees. In our view, the New South Wales penalties of \$1,100 for a first breach and \$2,200 for subsequent breaches are excessive, and should not be viewed as a model to aspire to. We also believe an instalment approach to the payment of penalties for low-income earners should form part of the hardship policy of each owners corporation, which is discussed in our response to question 1 of this Issues Paper.

There is some argument for penalties to be paid directly to the owners corporation as they are in New South Wales – as recompense for the rule breach in that community. The danger with this is that it may need to overly litigious owners corporations, taking a heavy handed approach rule breaches. Provided penalties are kept low, and that they must be decided at VCAT – this should be enough to guard against abuse by owners corporations seeking to impose unfair or unwarranted penalties.

Dispute resolution

53. What are your views about recourse to the dispute resolution process when an owners corporation is acting on its own initiative in pursuing a breach?

The first recourse for any dispute resolution should always be the internal dispute resolution procedure of the owners corporation, irrespective of the nature or circumstances of the breach. The challenges that some lot owners face in engaging with an adversarial forum such as VCAT should not be underestimated. This is particularly true of vulnerable consumers, including some retirees. A consistent theme of Consumer Action's casework with retirees is that the VCAT process is stressful and intimidating, and does not deliver timely, just or equitable results.

Internal dispute resolution, and effective ombudsman schemes are preferable to formalised, adversarial forums, which are not suitable for vulnerable individuals. Beyond imposing an onus to seek advice and commit resources to the hearing, adversarial processes often create undue emotional distress in the lives of vulnerable clients—not only because of the subject matter of the complaint, but also because of the very nature of the process itself.

Applications to VCAT

55. What factors should VCAT consider in determining disputes about the validity of an owners corporation rule?

In Consumer Action's view VCAT should have the ability to consider whether a rule is oppressive and/or unfairly prejudiced or discriminatory against a lot owner or occupier.

Ultimately VCAT remains a forum for individuals to seek relief where internal dispute resolution or other mediation efforts have failed. While VCAT is not always a satisfactory forum for owners corporation matters, it should have the ability to consider as many factors as possible in order

to arrive at a decision that fairly balances the needs of both parties, and offers the opportunity for an individual in an owners corporation to advocate in their own best interests.

56. Are there any other issues relating to applications to VCAT?

VCAT is sometimes an inappropriate forum for owners corporation matters, and can be a particularly difficult forum for vulnerable clients. Please see our response to question 53 above.

In relation to older residents, Consumer Action is currently advocating for the establishment of a retirement housing ombudsman to resolve retirement housing matters, due to the evidence that VCAT is not a fair forum for those disputes to be heard.

Owners corporations in retirement villages

57. What are your views about how annual meetings under the Owners Corporations Act and under the Retirement Villages Act should be conducted in retirement villages with an owners corporation?

Under s 3 of the RVA, the current system stipulates that if there is an owners corporation in the retirement village then the annual general meeting of the owners corporation should stand as the annual general meeting of the retirement village.

There is an issue with this, especially if not all residents of the village are in the owners corporation—but even if they are, owners corporations can be dominated by the retirement village operator, if they own sufficient lots. Safeguards need to be implemented to ensure that retirement village operators are not able to circumvent the fee increase restrictions of the Retirement Village Act, by increasing owners corporation fees under the Owners Corporation Act instead. Where this occurs, the residents are effectively denied the protection offered by the Retirement Village Act, which is intended to shield pensioners from excessive increases in their living costs.

However the system is determined, there is a need to ensure that annual meetings of owners corporations retirement villages take into account the views and needs of all residents (whether lot owning or not), and that residents are protected from unjustified and excessive fee increases.

As a minimum, Consumer Action recommends that the meeting should be run as a residents meeting, and that provision should be made to stipulate that if an owners corporation is also effectively operating as a Retirement Village, then the fee increase limitations of the Retirement Village should apply.

This is a complex issue requiring significant investigation, and we do expect that this issue will be raised during the forthcoming parliamentary inquiry into retirement housing. While we do not have a detailed proposal for legislative reform, we do believe that reform should be driven by the underlying principles of fair representation based on residency rather than ownership, and that special consideration should be given to owners corporations in retirement villages—essentially that fee increases should be constrained due to the fixed and generally low income of the resident population.

58. What are your views about the role of the retirement village operator in owners corporation meetings and in retirement village meetings?

Consumer Action has been advised of many instances of conflict and intimidation between retirement village management and residents, and we believe there is a need for extensive training and a qualification and registration system for retirement village managers.

Retirement village residents, whether they are owners corporations or not, need to be afforded the opportunity to assert as much self-determination as is reasonable within a community living environment. The dominant presence of village operators at owners corporation meetings, and retirement village meetings does not support this outcome. Ultimately, there is a need to shift the conduct of meetings towards the concept of a community of residents having a conversation amongst themselves about how they wish to live, as opposed to a dominant investor advising that community how they are to live—to the best advantage of that investor's proprietary interests. Harmonious communal residential living arrangements require giving residents an opportunity to participate and be heard, to the extent that they wish to do so—as members of a common community.

In short, consideration needs to be given to safeguards to ensure that retirement villages are not run as fiefdoms by the people that own them, but as communities by the people that live in them.

59. How can the views of retirement village residents who do not own their units be taken into account in managing common property within the owners corporation?

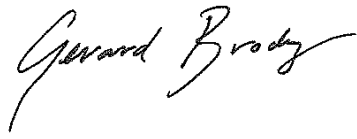
While we do not have a detailed proposal for legislative reform, Consumer Action takes the view that where the above situation arises, non-lot owning residents should be permitted to participate in certain decisions that affect them. We take this view on the basis that all effort should be made to legislate for retirement villages as communities first, and property investments second. At the same time, there is obvious need for lot owners to be able to legitimately protect their interests and not be restricted by those who do not have property at risk. This is particularly true if the issue at hand represents a safety concern, or is likely to result in unnecessary property damage if not addressed. It may be a matter of defining certain decisions over which non-lot owners are not permitted to participate, and then allowing them to participate in all others.

Another approach could be to base the criteria for participation of non-lot owners on the potential cost to the resident, arising from the owners corporation decision. Creating a cost threshold for participation would be conceptually consistent with the fee increase restrictions that apply through the Retirement Village Act, and would be equally justified on the basis that the residents are generally pensioners with low and fixed incomes. Again, Consumer Action does not have a detailed proposal for this reform—but we do believe that the notion should be explored.

Please contact Zac Gillam on 03 8554 6912 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

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