

11 March 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 1 – Conduct and institutional arrangements for estate agents, conveyancers and owners corporation managers

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 1: Conduct and institutional arrangements for estate agents, conveyancers and owners corporation managers*.

This submission is focused on issues that Consumer Action has observed through our casework in the areas of retirement housing and vendor finance/rent-to-buy schemes in the residential property market.

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.

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Summary of recommendations

Part A – Estate Agents and Conveyancers

1. Licensing of estate agents and conveyancers

- Any persons selling land or options in land banking schemes, or acting for another person to sell property on vendor terms or to lease property in a rent-to-buy arrangement, should fall within the definition of 'estate agent' in s 4 of the *Estate Agents Act 1980* (Vic) (**Estate Agents Act**).

2. Conduct of estate agents

- In addition to the requirements for brokers to be licensed real estate agents, joint venture agreements between a property owner and an estate agent in relation to dealings with the owner's property should be expressly banned under legislation.

3. Conduct of conveyancers

- Consumer testing and research into what is effective when it comes to disclosure should be undertaken.

4. Compliance measures

- The range of measures and penalties available under the Estate Agents Act and the *Conveyancers Act 2006* (Vic) (**Conveyancers Act**) should be expanded to reflect those of the ACL, and CAV should be empowered to apply those penalties directly.
- Applying a 'demerit point' system through the VCAT inquiry system would be cumbersome, inefficient and ineffective.
- Establishing different tiers of misconduct for which different levels of enforcement would apply would create flexibility in enforcement whilst retaining a degree of certainty and consistency for both consumers and licence holders.
- A tiered penalty model could be adopted whether the VCAT inquiry system is retained, or whether it is replaced with a more direct regulation model—which would be the preferred outcome.
- Penalties under the Estate Agents Act should be reviewed.

5. Trust accounting

- In vendor terms schemes: anything paid by a purchaser, including but not limited to deposits, instalments and other payments, should be held on trust for the purchaser.
- In rent-to-buy schemes: in addition to protections under the *Residential Tenancies Act 1997* (Vic) (**Residential Tenancies Act**), anything paid by a tenant aside from market rent, including but not limited to option fees, should be held on trust for the purchaser.

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Part B – Conduct of owners corporation managers

10. Registration and unsuitable managers

- A licensing regime should be established for owners' corporation managers, which should include minimum training requirements, financial and personal probity requirements, maintenance (and strengthening) of the current requirement for professional indemnity insurance, and ongoing professional development.
- Owners' corporation managers should be required to adopt financial hardship policies when recovering owners' corporation fees or levies from individual unit holders.
- Owners' corporation managers should be subject to a separate licensing regime to that of estate agents.
- An industry ombudsman scheme should be established for owners' corporation managers.
- A licensing regime for owners' corporation managers should provide for disqualification (or ineligibility) if a person has committed a criminal offence that would make them unsuitable for the financial and administrative responsibilities of a manager.
- In the event that no licensing regime is established, a person who has committed a criminal offence that would make them unsuitable for the financial and administrative responsibilities of a manager should not be able to operate as an owners' corporation manager under the Owners Corporations Act.
- Consumer Action sees no reason why this measure should not be introduced in relation to owners' corporation managers—not just because it exists in the Estate Agents Act, but because it is a sensible measure to maintain high standards of management in owners' corporations. It is not inappropriate to extend the regulatory regime in this manner—rather, the current lack of such a sanction represents a regulatory oversight.
- Owners' corporation managers should be explicitly required to hold professional indemnity insurance.

12. Unfair terms in management contracts

- Applying the unfair contract terms provisions of the ACL to owners' corporation management agreements, through a relevant deeming provision in the *Owners Corporation Act 2006 (Vic)* (**Owners Corporation Act**), could address many concerns regarding unfair contract terms in management contracts.
- Owners' corporation management contracts should be brought under the ACL.

13. Ending long-term management contracts

- The Owners Corporation Act should be amended to provide owners' corporation with the clear statutory authority to terminate a management contract on the basis of poor performance.
- Some form of review process should be required, at least every five years—requiring an owners' corporation manager and owners' corporation to mutually agree to enter into a new agreement.

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15. Financial transparency

- Owners' corporation managers should be required to keep separate owners' corporation funds in separate funds.

Part A – Estate Agents and Conveyancers

1. Licensing of estate agents and conveyancers

1.1 Definitions

1.1.1 What is an estate agent?

Consumer Action currently has a focus on persons brokering high-risk vendor finance and rent-to-buy schemes in the residential property market, having acted for a number of clients who have entered into these schemes.¹ Vendor finance and rent-to-buy (lease-plus-option) schemes can target vulnerable purchasers locked out of the traditional mortgage market, as well as property owners experiencing financial difficulties.

Through our casework and a review of online advertising, Consumer Action has seen these deals brokered by both licensed estate agents and unlicensed people representing themselves as home owners, 'private investors' or similar. These unlicensed people are potentially seeking to avoid the licensing regime under estate agents legislation. We also note CAV's recent regulatory action against an unlicensed person who falsely represented that he was a licensed real estate agent.² This type of misleading conduct has been seen through our casework and is one means by which brokers build an impression of legitimacy with prospective vendors and purchasers.

Additionally, land banking schemes, particularly the purchase of options through self-managed superannuation funds, are now a significant and growing consumer concern in Victoria. These schemes share some similar risks with vendor terms schemes and option fees, due to their complex legal structures, and can fall outside regulatory regimes, including the estate agents licensing regime. Consumer Action has not received complaints from investors in these types of schemes, both because we do not provide legal advice about investment disputes and also, as acknowledged by the recent Senate Economics References Committee report, because many investors may not realise that their investments are at risk. Nevertheless, Consumer Action endorses the recent committee recommendation that property investment advice be federally regulated.³

¹ See more on these schemes and risks at <http://consumeraction.org.au/vendor-terms-rent-buy-schemes/>.

² Consumer Affairs Victoria, *Benjamin David Chislett - Court action*, 28 October 2015, <https://www.consumer.vic.gov.au/news-and-events/news-updates/benjamin-david-chislett-court-action>.

³ Senate Economics References Committee, *Scrutiny of Financial Advice: Part 1 – Land banking: a ticking time bomb*, February 2016, p 67, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice/Report.

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It is Consumer Action's view that any persons selling land or options in land banking schemes, or acting for another person to sell property on vendor terms or to lease property in a rent-to-buy arrangement, should fall within the definition of 'estate agent' in s 4 of the Estate Agents Act.

2. Conduct of estate agents

2.1 Roles and responsibilities of estate agents

Clearer obligations of estate agents to prospective tenants and purchasers are an important consumer protection. This is particularly true in relation to property sale price information.

Consumer Action has recently observed properties advertised for sale on vendor terms or in rent-to-buy deals where only a total purchase price or only a weekly price is quoted, without details of whether that price includes other outgoings (such as rates and insurance). These advertisements appear to be highly misleading as to the true price of an advertised property. This has also been the experience of Consumer Action's clients and can lead to severe financial difficulties.

We therefore welcome the recent announcement of reforms to curb underquoting of property sale prices in Victoria, which were developed in response to the broader problem of underquoting.⁴ We anticipate that the intended reforms would be a significant improvement for consumers compared with the current guidelines for agents.⁵ These laws could be improved if there was a stronger obligation for sellers to inform their agents of a reserve price, and for agents not to be allowed to advertise a property below that reserve price.

2.3 Financial benefit to estate agents

While Consumer Action commonly sees detriment to hopeful purchasers in vendor terms and rent-to-buy schemes, there can also be high risks for the property owners.

In particular, owners may enter into 'joint venture' agreements with brokers in relation to their properties. Typically under these agreements, the broker brings nothing but his or her 'expertise' and the property owner brings the property. The owner then grants the broker a power of attorney over the property, which means that the broker can deal with the property in any way. The broker will also often be entitled to a large portion of any deposit and ongoing payments received from a purchaser or tenant.

Consumer Action sees a clear conflict between the roles of:

⁴ Minister for Consumer Affairs, Gaming and Liquor Regulation, New Underquoting Laws For Victoria, 4 March 2016, <http://www.premier.vic.gov.au/new-underquoting-laws-for-victoria/>.

⁵ Consumer Affairs Victoria, *Guidelines for real estate sales people – price advertising and underquoting*, Reprint of RE-14-01-1043, November 2007, <https://www.consumer.vic.gov.au/library/publications/businesses/estate-agents/guidelines-for-real-estate-salespeople-price-advertising-and-underquoting.pdf>.

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- an estate agent in representing a property owner in the sale or lease of the property, and
- a party to a joint venture agreement, where equal resources are invested.

This conflict represents a high risk to people who enter into agreements to sell their properties on vendor terms or in a rent-to-buy deal. In addition, joint venture agreements by unlicensed brokers may be a deliberate attempt to avoid the licensing regime. These types of agreements would likely be unfair and not in the vendor's interests.

It is our view that, in addition to the requirements for brokers to be licensed real estate agents, joint venture agreements between a property owner and an estate agent in relation to dealings with the owner's property should be expressly banned under legislation.

Consumer Action has previously raised concerns about proposals to weaken regulations relating to estate agents (or their employee or relative) purchasing property where they have also been engaged to sell the property. Vendors can be vulnerable when it comes to real estate transactions, and they rely on the advice of their agent—this can include some level of assurance that a fair market value is obtained for the sale of the property. An agent that receives a commission generally has an incentive to achieve a price that benefits the vendor, as their interests are aligned. Where that agent proposes to purchase the property, or where the property is sold to an agent's employee or relative, however, the vendor's vulnerability is increased substantially. In this instance, there is a conflict of interest for the agent—between acting in the interests of the vendor, and acting in their own interests. Vendors that are in financial distress are likely to be more vulnerable in these circumstances, as they are often seeking a 'quick' sale to avoid foreclosure. The risk is that an agent will arrange a sale at a price significantly below market value.

We have previously provided more detailed views to CAV on this issue. Attached to this submission is a letter from July 2015 setting out our concerns and a suggestion for potential reform.

Consumer Action agrees that the provisions in the Estate Agents Act that prohibit agents from retaining certain rebates may not capture other indirect incentives. This issue of non-monetary or 'soft dollar' benefits has also been a concern in the regulation of financial advice. The Future of Financial Advice (**FOFA**) reforms made it clear that conflicted remuneration includes non-monetary benefits.⁶ We would support a similar approach taken in relation to benefits provided to estate agents that could drive inappropriate incentives.

⁶ *Corporations Act 2001* (Cth) s 963A.

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3. Conduct of conveyancers

3.1 Professional conduct rules

There is scope to improve the professional conduct rules for conveyancers to more effectively address the potential conflict arising in connection with repeat referrals of clients, for example from developers and estate agents.

3.2 Costs disclosure

In principle, the rules for costs disclosure for conveyancers should align with the rules for legal practitioners. Conveyancers and legal practitioners operate in the same market and each has the ability to engage in the practice of paying a fee to a referrer in return for repeat referrals. All work undertaken by a conveyancer could be undertaken by a lawyer (but not vice versa), therefore any regulation of the conveyancers' conduct in this space should be (and continue to be) consistent with that for lawyers.

However, rather than immediately adopting the approach taken with lawyers, it is Consumer Action's view that consumer testing and research into what is effective when it comes to disclosure should be undertaken (for example, by CAV jointly with the Legal Services Commissioner).

Commissions that a conveyancer has paid or will pay in connection with the referral of the client can create conflicts, and consideration should be given to specific details of commissions being more clearly disclosed. Such disclosure could include the amount paid in fees or the basis for its calculation, the recipient and purpose of the payment and whether the payment for the referral is made as part of a repeat referral arrangement with the referrer.

Consumer Action acknowledges that disclosure of commissions is a complex area, and may in fact result in perverse outcomes—for example, consumers may become more trusting due to the fact of disclosure. Given this, we consider that policy should be focused on eliminating conflicts, and prohibiting the payment of commissions or referral fees where it affects the quality of advice or service. Any such prohibition should similarly prohibit non-monetary benefits or payments, to limit avoidance strategies.

We acknowledge that regulation of disclosure is complex, and may not have the intended effect of fully informing consumers.

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4. Compliance measures

4.1. VCAT inquiries and alternative approaches to address poor conduct

40. What are your views about, and experience of, the current VCAT inquiry system? What are the opportunities to improve the VCAT process?

Consumer Action's view is that the current Victorian Civil and Administrative Tribunal (**VCAT**) inquiry system is cumbersome, inefficient, and does not deliver the best outcome for consumers. It is concerning that the needs of the estate agent or conveyancer may take precedence over those of the consumer in VCAT decisions. Needless to say, the decision to cancel a licence should be made on the basis of the misconduct that is found to have occurred — not the need for the estate agent or conveyancer to earn a livelihood. Consumer protection measures are enacted for the purpose of protecting consumers from harmful commercial activity, and the ability to engage in that activity (particularly in a licensed regime, such as conveyancing or estate management) is conditional upon not breaching those protections. To take any other approach undercuts the systemic impact of the sanction, effectively defeating the purpose for which it exists.

While Consumer Action understands the principle that sits behind the VCAT inquiry system, we believe that a more effective and efficient regulatory approach would be to extend the ability of CAV to apply sanctions directly (including the ability to issue fines, and to cancel a licence, perhaps following an internal hearing), and to issue court proceedings for more serious matters (including criminal matters).

We note that the Australian Securities and Investments Commission (**ASIC**) has an internal, administrative hearings approach, which is used to ensure due process around licence cancellations.⁷ Adopting a similar approach through the Estate Agents Act and the Conveyancers Act would deliver greater efficiency and certainty than the VCAT inquiry system, and would empower CAV to exert direct regulation on the industry rather than delegating regulation to VCAT through the VCAT inquiry process.

41. Are the range of orders and penalties open to VCAT after conducting an inquiry sufficient and appropriate? If they are not, what changes would you recommend and why?

Following an inquiry, VCAT is currently empowered to make the following orders:⁸

- Reprimand
- Require compliance with an order of VCAT

⁷ ASIC, RG8 Hearings Manual (<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-8-hearings-practice-manual/>)

⁸ Estate Agents Act s 28A.

- Cancel the licence, and disqualify the person either permanently or for a specified time from holding a licence
- Suspend a licence for a up to a year
- Declare a person to be ineligible to hold a licence either permanently or temporarily
- Require a person to enter into an undertaking to perform, or not perform, certain tasks to be specified in the undertaking (i.e. an enforceable undertaking)
- Impose a fine of up to \$5000.

Under the Australian Consumer Law (**ACL**), regulators have a broader range of actions available to them. In addition to criminal prosecution for breaches of the law, regulators can require:

- Education, advice and influence good practice
- Voluntary industry self-regulation codes
- 'Without prejudice' discussions
- Dispute resolution
- Formal written warnings
- Infringement notices
- Enforceable undertakings
- Public warnings
- Court orders
- Injunctions
- Compensation orders
- Civil penalties, including fines and disqualification orders.

The ACL range of penalties is more nuanced and flexible than those currently available under the Estate Agents Act and the Conveyancers Act, and would enable CAV to engage in more positive and proactive industry regulation than is currently the case, without diminishing the capacity to apply more punitive penalties when required.

Consumer Action recommends expanding the range of measures and penalties available to reflect those of the ACL, and empowering CAV to apply those penalties directly.

42. What are the merits of the proposed approaches which could operate in conjunction with existing enforcement approaches?

In Consumer Action's view, the notion of a 'demerit point' system to be applied through the VCAT inquiry system would be cumbersome, inefficient and ineffective. It sends the wrong message and undermines the fundamental purpose of consumer protection, which is to minimise consumer harm. A demerit system would effectively give errant operators a 'free pass' for initial instances of misconduct, and would do nothing to redress the harm they may have caused to consumers in those instances. Holding a licence to trade should require the operator to conduct their business with utmost integrity, not allow them to repeatedly breach their professional obligations until they have done so sufficiently to eventually suffer a penalty.

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In our view, adopting such a system would risk operators relaxing their standards—knowing that if they are sanctioned, they will only suffer the loss of a few demerit points. Psychologically, they would only be required to improve their conduct once they had lost enough demerit points, to be close to losing their licence. From a consumer protection perspective, it would be a retrograde move.

Establishing different tiers of misconduct for which different levels of enforcement would apply has merit, and would create flexibility in enforcement whilst retaining a degree of certainty and consistency for both consumers and licence holders. At the same time, the effectiveness of such an approach would depend on exactly how those tiers are set, so it is difficult to provide further comment without greater detail. We note that a tiered penalty model could be adopted whether the VCAT inquiry system is retained, or whether it is replaced with a more direct regulation model—which would be the preferred outcome, in our view.

43. What additional suggestions do you have to address poor conduct?

If the full range of penalties and sanctions available under the ACL were to be incorporated into the Estate Agents Act and the Conveyancers Act, then that would be a sufficient range of measures to address poor conduct. Please see our response to question 41 above.

44. What factors should be considered as part of any review of penalties under the Estate Agents Act?

A penalty regime can only be effective if the penalties imposed are sufficiently onerous to outweigh the benefits of engaging in misconduct in the first place. To that end, the penalties available under the Estate Agents Act should be reviewed with an eye to the mischief they are intended to prevent, and the potential financial benefit of engaging in that conduct. Penalties should be set at a sufficiently high level to deter the conduct. Reviewing penalty levels in alternative jurisdictions may also be useful, but shouldn't be seen as a definitive guide.

Consumer Action agrees that penalties under the Estate Agents Act require a full review. As the Consultation Paper points out, the maximum available fine of \$5,000 has not been adjusted since 1998. In our view, the penalty is now significantly out of step with community expectations and is in all likelihood too low to deter poor conduct. For the same reason, penalty units applicable to statutory breaches also require review. The Consultation Paper highlights s 70T which applies 25 penalty units for failing to comply with a requirement from an inspector. At the current rate of \$151.67 per unit, this equates to \$3,791.75 and is arguably far too low to deter estate agents from refusing to comply with the reasonable request of an inspector, which may be made to effectively monitor their business.

5. Trust accounting

In vendor terms and rent-to-buy schemes, purchasers and tenants often pay large amounts of money towards purchasing or securing their property, without these funds being held on trust. This is a critical risk for purchasers and tenants, and the money paid will often not be

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recoverable if the deal fails. Through our casework we have seen hopeful purchasers lose huge sums, for example by being unable to make the high repayments required and being evicted, or even by the property being possessed by a mortgagee.

It is Consumer Action's view that:

- in vendor terms schemes: anything paid by a purchaser, including but not limited to deposits, instalments and other payments, should be held on trust for the purchaser, and
- in rent-to-buy schemes: in addition to protections under the Residential Tenancies Act, anything paid by a tenant aside from market rent, including but not limited to option fees, should be held on trust for the purchaser.

Part B – Conduct of owners corporation managers

10. Registration and unsuitable managers

64. Are there benefits in aligning the eligibility requirements for an owners' corporation manager to the extent practical with those of estate agents?

There is certainly benefit in establishing a licensing regime for owners corporation managers, which should include minimum training requirements, financial and personal probity requirements, maintenance (and strengthening) of the current requirement for professional indemnity insurance, and ongoing professional development. In Consumer Action's view, the current lack of a licensing regime for owners' corporation managers represents a significant regulatory oversight. This is particularly apparent when one considers the prevalence of owners' corporations as cited in the Consultation Paper (88,000 owners' corporations in Victoria, affecting 1.5 million Victorians, governing property to the total value of \$300 billion).

Consumer Action's primary concern lies with low-income and otherwise vulnerable consumers—including elderly people, who represent a growing proportion of the population. Owners' corporation managers (and those they employ) play a significant role in the life of those consumers, and regulators must act to prevent, root out and penalise poor or unethical management practices. A strong licensing regime is a proactive way to ensure that consumer's interests are protected.

In addition, Consumer Action has previously advocated for owners' corporation managers to adopt, or be required to adopt, financial hardship policies when 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 have been taken. We note that owners' corporations generally will have security over levies as these will be recovered should the unit be sold.

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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;
- it may encourage consistent and ethical debt collection practices by owners' corporation managers;
- it may reduce court proceedings and associated court and legal costs being added to owners' corporation levies arrears; and
- it may reduce debt recovery costs for owners' corporations.

65. What are your views on whether owners' corporation managers should be separately licensed or be part of an estate agent's licence?

In our view, owners' corporation managers should be subject to a separate licensing regime, as the role is distinct from that of an estate agent. While many of the requirements and standards required are similar (and a licensing regime for owners' corporation managers could certainly be modelled on that for estate agents), establishing owners' corporations managers as part of the estate agents licence regime would not give owners' corporation managers the priority required.

Again, we reiterate our previous comments, regarding the establishment of an industry ombudsman scheme. Licence conditions would then include the requirement for owners' corporation managers to be a member of the scheme. This is the current case with, for example, Australian consumer credit provider licence holders.

66. Is it appropriate to extend the current regulatory criteria to include serious criminal offences?

A licensing regime for owners' corporation managers should provide for disqualification (or ineligibility) if a person has committed a criminal offence that would make them unsuitable for the financial and administrative responsibilities of a manager. In the event that no licensing regime is established, this measure should still be introduced into the Owners Corporations Act as a means to disqualify or cancel registrants. Consumer Action sees no reason why this measure should not be introduced in relation to owners' corporation managers—not just because it exists in the Estate Agents Act, but because it is a sensible measure to maintain high standards of management in owners' corporations. It is not inappropriate to extend the regulatory regime in this manner—rather, the current lack of such a sanction represents a regulatory oversight.

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67. What would be the benefits and costs of placing requirements on owners' corporation managers to hold professional indemnity insurance as a condition of practise?

Owners' corporation managers are responsible for managing large amounts of other people's money and ensuring that the living environment of those people is properly maintained. To be registered as an owners' corporation manager with the Business Licensing Authority (BLA) owners' corporation managers are currently required to hold professional indemnity insurance, and to disclose the details of that coverage in their annual report at each annual general meeting. While continuing to hold professional indemnity insurance is not an explicit requirement of remaining registered, (and there is no requirement for managers to disclose professional indemnity insurance details to their owners' corporation prior to appointment or re-appointment), this would appear to be an oversight. In reality, it is likely that many owners' corporation managers do maintain professional indemnity insurance, purely by dint of requiring it at each annual general meeting. In Consumer Action's view, owners' corporation managers should be explicitly required to hold professional indemnity insurance at all times. This would ensure a degree of protection for consumers in the event of malpractice, and would not impose a significantly higher cost than that already being borne.

12. Unfair terms in management contracts

71. What are the main concerns about unfair contract terms in management contracts?

Consumer Action has previously raised its concern 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' (s 23). Instead, the management agreement is a contract to a body corporate.

Our view remains that many of the concerns regarding unfair contract terms in management contracts could be addressed by applying the unfair contract terms provisions of the ACL to owners' corporation management agreements, through a relevant deeming provision in the Owners Corporation Act.

While management agreements are between two corporate entities (a manager and 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 any 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 from 12 November 2016 the unfair contract terms provisions of the ACL will apply to small business, in effect recognising that small businesses are often in a vulnerable position. We submit that owners' corporations are in a very similar position.

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Section 23 of the ACL states that a term of a stand-form consumer contract is unfair, while s 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.

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.⁹

Owner's corporation management agreements share many of the same features of contracts that were identified by the Productivity Commission, in that such agreements are stand-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.

Rather than addressing potential unfair terms on a point-by-point basis, Consumer Action would prefer to see owners' corporation management contracts brought under the ACL, enabling claimants to avail themselves of the protection against unfair terms that is available through that legislation.

72. Are there other types of unfair terms that should be considered? If so, what are they and how common are they? Why might they be unfair?

As discussed in relation to question 71 above, the ‘take it or leave it’ power dynamic involved in owners' corporation management contracts makes them susceptible to unfair terms. Common types of unfair terms include:

⁹ Productivity Commission, *Review of Australia's Consumer Policy Framework volume 2*, April 2008, p 149.

- terms relating to insurance agency fees, particularly terms that distort clarity in pricing by recompensing owners' corporation managers through insurance commissions; and
- terms indemnifying owners' corporations from any causes of action, including negligence.

13. Ending long-term management contracts

74. What is your view as to contractual terms for the renewal of management contracts? For example, should there be any rules about terms such as automatic renewals or renewals at the prerogative of the manager only?

Consumer Action is aware of the issues raised in the Consultation Paper regarding the difficulties that owners' corporations can face in terminating the contract of an underperforming manager. The culture of long term management contracts, automatic renewals and and the contractually valid termination fees that can apply operate as significant barriers—and the Consultation Paper correctly identifies that for many consumers, there is no real 'choice' of manager at all.

In our view, the power imbalance between owners' corporations and managers ought to be addressed by an amendment to the Owners Corporation Act, providing owners' corporation with the clear statutory authority to terminate a management contract on the basis of poor performance. A management contract should be regarded as a commercial appointment for services made by the owners' corporation, and the owners' corporation should have the discretion to terminate the agreement and appoint a new manager without difficulty, should they choose to do so. Simply put, owners corporations should have the ability to 'hire and fire' managers based on performance and should not have to rely on a statutory breach or risk an expensive damages payout. This would improve service standards and redress the current power imbalance that exists between managers and owners' corporations.

If owners' corporations are empowered to 'hire and fire' managers based on performance, then automatic renewals do not present a problem—they just become administratively efficient. That being said, in Consumer Action's view some form of review process should be required, at least every five years—requiring the manager and owners' corporation to mutually agree to enter into a new agreement. This would have the natural effect of ensuring that managers remain conscious of their performance, and works against the complacency that arises in the current industry.

15. Financial transparency

77. How can concerns about fraudulent financial conduct be addressed? Would it be preferable in the context of financial transparency and accountability to require separate owners corporation funds to be kept in separate accounts?

Requiring owners' corporation managers to keep separate owners' corporation funds in separate funds would be a sensible and straightforward reform. While the criminal law remains

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the primary mechanism to address fraudulent conduct, Consumer Action agrees that the Owners Corporation Act can play a role—and we strongly support the proposed measure.

Please contact Susan Quinn on 03 9670 5088 or at susan@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

Attached: Consumer Action letter to Christine Nigro re Amendments to Section 55 of the Estate Agents Act 1980, 15 June 2015.

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