



16 December 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: Options for reform of the *Owners Corporations Act 2006*

The Consumer Action Law Centre (**Consumer Action**) is pleased to make this submission to Consumer Affairs Victoria's (**CAV**) comprehensive review of Victoria's consumer property laws, specifically on *Options for reform of the Owners Corporations Act 2006* (**Options Paper**).

While we do not deal extensively with owners corporations or have extensive expertise in relation to the *Owners Corporation Act 2006*, the Options Paper does address two key areas of concern for us. Accordingly, our submission is brief and focused on those two areas.

First, we are concerned with the 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 have raised those concerns in previous submissions¹, and are do so again in addressing chapter 6.1 of the Options Paper—defaulting lot owners.

Second, we have undertaken extensive policy and campaign work in relation to retirement housing, so have an interest in the intersection between the *Owners Corporation Act 2006* and the *Retirement Villages Act 1986*. Accordingly, the other focus of our submission is chapter 8 of the Options Paper – Retirement villages with owners corporations.

Our comments are detailed more fully below.

¹ See: Consumer Action submission to *Review of the regulation of owners' corporation managers – Issues Paper* (27 November 2013), Consumer Action submission to *Consumer Property Law Review: Issues paper 2 – Owners Corporations* (30 May 2016).

Consumer Action Law Centre

Level 6, 179 Queen Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

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

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.

6.1 – Defaulting lot owners

Stand-alone options for debt recovery

1. Option 15A – Require lot owners to lodge bonds for unpaid fees

Consumer Action regards Option A as an excessive measure. As noted in the Options Paper, this option would create a financial imposition for lot owners, particularly those who find it difficult to pay lump sums, and those who never default. On the basis that this measure would both disproportionately affect low-income consumers and inequitably penalise lot owners who pay their fees, we cannot support the proposal.

Further, we are sceptical that the proposal would have the desired effect. It is possible that such a bond system would simply result in higher default rates, as lot owners choose for payment to be drawn from their bond rather than making a new payment. The proposed system for the bond to be maintained at the set level in the event of draw-down could simply turn the bond into a transactional tool, and create an unnecessary level of administrative complexity in the payment of owners corporation fees. The proposed bond system would not solve the problem of owners corporation fee defaults. At best it would temporarily defer the issue as lot owners experiencing genuine financial hardship find themselves unable to replenish the bond and therefore fall into default at a later point.

2. Option 15B – Permit owners corporations to adopt payment plans in ‘hardship’ cases

Consumer Action is strongly supportive of option 15B, although we believe it should go further than merely permitting owners corporations to institute hardship variations. Consistent with best practice in other areas of commerce, such as the banking sector, hardship policies should be required of all owners corporations, and if legal action for debt recovery is to be taken (whether it requires a special resolution or otherwise), it should only be taken once the hardship option has been exhausted. This would mean that there should be a statutory right for an owner to seek hardship assistance if they are unable to meet their obligations due to unemployment, illness, family breakdown or other reasonable cause. Options available should include one or any combination of:

- postponing the due date of a payment or payments;
- reducing the amount required to be paid for a period of time;
- a payment plan to catch up on unpaid or postpone levies;
- waiving or reducing penalty interest and enforcement expenses; or
- any other arrangement that will enable the owner to meet their levy obligations in the future.

We do accept that to ensure hardship policies are not exploited, some form of committee endorsement should be required to approve individual arrangements—although measures should be taken to ensure such endorsement is not unreasonably withheld. For example, an owner should be able to have a decision of an owners corporation to be reconsidered by VCAT on the basis of whether it is a fair and reasonable decision.

We have formed our 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 would have been possible and preferable. 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.

As highlighted in our 2013 submission to CAV's issues paper reviewing the regulation of owners corporation managers, 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 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 Victoria (**COTA Vic**) 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.

Accordingly, while Option 15B proposes not to require hardship policies of owners corporations, we respectfully submit that they should be a mandatory requirement for all owners corporations. As outlined in the Options Paper, no additional fees or charges (such as penalty interest) should be permitted under a financial hardship arrangement. If a lot owner does default on a payment plan, then it is not unreasonable for the full amount of remaining debt to then become immediately payable—although any immediate application to VCAT debt recovery should

require a special resolution, in the same way that such applications to the Magistrates Court currently do.

3. Option 15C – Permit owners corporations to recover pre-litigation debt collection costs from lot owners

Consumer Action is not supportive of Option 15C, as we agree with the statement in the Options Paper that it could reduce the incentive for owners corporations to resolve disputes before taking debt recovery action and could generate further disputes about the reasonableness of the costs sought to be recovered. Further, 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 corporations.

More fundamentally, we strongly advocate for mandatory owners corporation hardship policies as outlined above. Any debt collection activity should only occur on the basis that the hardship option has been exhausted. This would not only reduce levels of distress and disputation, but would also greatly reduce pre-litigation debt collection costs—thereby reducing the need to recover them.

4. Option 15D – permit VCAT to make default judgements

Consumer Action does not support Option 15D, as we do not believe the difficulties owners corporations face in recovering unpaid fees are sufficient to warrant such reform. Indeed, reform should be directed towards preventing owners corporations from moving too quickly to legal-based debt recovery, rather than providing further avenues to those which already exist. If hardship policies were required of all owners corporations, this would reduce the need for debt recovery actions and would provide cash flow benefits to owners corporations. Owners corporation fees are ‘chunky’ expenses, they are generally charged quarterly and constitute a significant expense – this can make them difficult to manage for low-income consumers. Smoothing payments by making them smaller and more regular, (for example, fortnightly or monthly) could reduce bad debts and therefore lessen the need for legal-based debt recovery. For consumers with regular social welfare payments, such payment plans could potentially be established through Centrepay.

We also believe that owners corporations should be required to provide more specific notice before any intention to recover unpaid levies. For example, the final notice referred to in section 32 of the *Owners Corporation Act 2006* (Vic) should include a statement that if the owner is experiencing financial hardship they may seek assistance from the National Debt Helpline by phoning 1800 007 007 or visiting www.ndh.org.au.²

Alternative options for litigation costs

5. Option 15E – Align VCAT’s costs power with those of the Magistrate’s Court

Consumer Action does not support Option 15E on the basis that, (as highlighted by the Options Paper), it may increase the incentive for owners corporations to use lawyers in VCAT—

² A similar requirement is provided in respect to consumer credit default notices: see *National Consumer Credit Protection Act*, regulation 86 and Form 12A.

provided they can secure approval to do so. This would increase costs and reduce VCAT's informality. We also believe the option could reduce the incentive for owners corporations to resolve disputes before taking legal action—although that potential could be negated if hardship policies were made mandatory, and if a VCAT application could only be lodged once the hardship policy had failed.

6. Option 15F – Empower VCAT and courts to award all reasonable costs

Consumer Action does not support Option 15F—for the same reasons that we do not support Option 15E.

8 – Retirement villages with owners corporations

Alternatives for reform

Option 22A – Require separate committees for owners corporations and retirement village residents

Or;

Option 22B – Require separate committees and annual general meetings for owners corporations and retirement village residents

Question 65: Which option, and why, better achieves the aim of ensuring that the operation of owners corporations in retirement villages conforms with both the Owners Corporation Act and the Retirement Villages Act?

Consumer Action is of the view that Option 22B is preferable to Option 22A, as it addresses the current power imbalance between residents and village operators, provides greater clarity for village residents and will reduce disputes. While some degree of convenience may be lost, we believe this an acceptable trade-off for the benefits that would arise from the reform.

While Option 22A separates owners corporation from village resident committee meetings, it does not necessarily do so for annual meetings (potentially leaving this to the discretion of the village operator), and the proposal to retain combined annual meetings with different voting entitlements for resolutions under each Act is likely to lead to confusion, disputation and administrative errors.

Option 22B has the virtue of simplicity, would prohibit village operators with a majority of lot entitlements in the owners corporation from voting on owners corporation fee levies, and would allow leasehold resident to vote on changes to owners corporations rules—but not village operators.

These measures are consistent with the principle that retirement village residents (whether they are lot owners or not) should be afforded the opportunity to assert as much self-determination as is reasonable within a community living environment. Option 22B would also uphold the policy intention of the *Retirement Village Act 1986* which seeks to shield pensioners from excessive increases in their living costs, yet currently fails to do so owing to section 3, which provides for combined annual general meetings which are inevitably dominated by village operators, as majority lot owners.

Harmonious, communal retirement village living arrangements require giving residents an opportunity to participate and be heard as members of a common community, and protect them from inordinate rises in their living costs, which may be dictated by village operators who maintain dominant lot ownership in the owners corporation. Option 22B meets those objectives, and accordingly we support it.

Question 66: If Option 22A, which sub-alternative, and why, better resolves the problems involved in combining annual meetings for owners corporations and retirement villages?

As stated in our response to question 65 above, Consumer Action is strongly supportive of Option 22B. That being said, we do not believe that either of the sub-alternatives of Option 22A adequately resolves the problems involved in combining annual meetings for owners corporations and retirement villages.

The first sub-alternative would combine the meetings but require different voting entitlements for resolutions under each Act, including the rights of leasehold residents regarding resolutions under the *Retirement Villages Act 1986*. Further, the meeting procedures and dispute resolution processes under the *Retirement Villages Act 1986* would be applied to the combined meeting. While an improvement on current arrangements, this proposal would still allow village operators, as majority lot owners, to have a potentially harmful influence on owners corporation decisions, including but not limited to fee levy outcomes. Beyond that, this sub-alternative would likely lead to confusion, disputation and administrative errors with potentially significant consequences.

The second sub-alternative, (allowing the village operator to decide whether to hold joint or separate meetings, depending on the number of leasehold residents and the degree to which village facilities are common property) leaves too much power with the operator, does little to protect residents, and does not address the problem of operators driving harmful fee levy outcomes through holding majority lot ownership.

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

Yours sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer



Zac Gillam
Senior Policy Officer