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10 January 2017

Mr Simon Cohen
Director,
Consumer Affairs Victoria
Level 17, 121 Exhibition Street
MELBOURNE VIC 3000

Via email: Simon.Cohen@justice.vic.gov.au

Dear Simon,

Consumer Property Law Review – Options for reform of the *Owners Corporations Act 2006* – Tribunal submission

Thank you for the opportunity to respond to the options paper, Options for reform of the Owners Corporations Act 2006 (Options Paper).

I enclose *Tribunal Response – Owners Corporations Act 2006 Options Paper* (Response). It addresses questions 1-2, 9-15, 17-18, 21-25, 31, 33-35, 39, 42-44, 47, 59-60 and Option 6B in the Options Paper, as these raised jurisdictional, procedural and/or substantive issues affecting VCAT. The Tribunal does not ordinarily comment on policy matters more properly the domain of Government or the Department.

Yours faithfully,

Justice Greg Garde AO RFD
President

Attachment: Tribunal Response – *Owners Corporations Act 2006* Options Paper.

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Tribunal Response – *Owners Corporations Act 2006* Options Paper

Question 1 – What option do you support, and what are the features of that option that make it the most practical and cost effective way of improving the quality and conduct of owners corporation managers?

Option 1A is preferable. It would align the *Owners Corporations Act 2006* (OC Act) with other consumer protection legislation for licensing of professional persons. Volunteer managers should be exempt from any licensing scheme.

Question 2 – What other eligibility criteria should be considered under Option 1A or Option 1B?

As to the requirement to hold an appropriate amount of professional indemnity insurance at all times. The Tribunal repeats the comments made in response to question 67 of Issues Paper No.1 – *Conduct and Institutional Arrangements: Estate Agents* (Issues Paper 1), *Conveyancers and Owners Corporation Managers*, that professional indemnity insurance will in the main cover professional negligence, but not deliberate misconduct. For example, where a manager misappropriates money held on trust for the owners corporation. Lot owners should be protected in these circumstances.

Question 9 – Under option 3A, if certain terms are to be prohibited as unfair what types of terms should be prohibited and what types of terms should not be prohibited and why?

The second last paragraph under Option 3A on page 15 requires clarification. If the OC Act was amended to prescribe certain terms in management contracts as 'unfair', then VCAT could hear and determine cases as to whether the terms fell within the unfair terms prescribed in the OC Act. It is incorrect to state that by amending the OC Act as proposed in Option 3A, this *'...would also give...VCAT the power to rule generally whether terms in management contracts were unfair under the unfair contract term provisions of the Australian Consumer Law...'*

In response to question 71 of Issues Paper 1, the Tribunal referred to commonly encountered terms in management contracts that might be considered 'unfair'.

Question 10 – Should 'reasonable' notice be quantified under Option 3B and, if so, for how long?

Yes, so that there is less scope for dispute about the reasonableness of the period of notice. One month is appropriate.

Question 11 – What is the best and fairest way to exercise the termination right under Option 3B?

By ordinary resolution of the owners corporation or the committee, of which notice is given to the manager of at least one month.

Question 12 – Are the disclosure requirements proposed under Option 4A sufficient to address potential conflicts of interest for managers and, if not, what other measures are required?

Yes.

Question 13 – Is Option 4B sufficient to address the issues arising from the pooling of funds, or is the extra level of regulation under Option 4C required, and if so, why?

Yes, Option 4B is sufficient. It is reasonable to permit the pooling of funds of separate owners corporations where each owners corporation has consented.

Question 14 – What are the risks, if any, of unintended consequences arising with the measures proposed in Option 4B or Option 4C?

The risks of unintended consequences arising from Option 4C are that it would unnecessarily increase costs for owners corporation managers, leading to an increase in owners corporations' fees.

Question 15 – Are the enhanced general obligations under Option 5A sufficient or are the additional obligations under options 5B, 5C and 5D needed, and if so, why?

Question 17 – Why would the 'building defects' obligation be necessary?

Option 5A alone is insufficient to protect owners corporations from the kind of behaviour by developers that Options 5B and 5C are designed to prevent. Option 5D in addition to options 5A and 5C is required.

The breadth of language used under Option 5B is concerning. For example, the phrases under the first two bullet points on page 20:- '...a fair and reasonable balance...'; and '...are appropriate and do not adversely affect...' Broad statements may provide greater scope and flexibility, however they can also encourage argument between the parties as to the interpretation. This in turn, may lead to protracted litigation and higher legal costs. It is preferable that the obligations be framed using more objective, rule based language, which sets out prohibitions.

Building defects are a significant issue where the developer (often the developer/builder) maintains control of a development and refuses to support a special resolution to commence legal proceedings against itself in relation to defective building works. The Tribunal's Building and Property List has a number of proceedings where there are significant issues between the non-developer lot owners and the developer lot owner. Increased regulation is needed in this area.

On a separate point but concerning building defects in the common property and individual units, the Tribunal in an addendum (dated 13 May 2016) to its response to Issues Paper No. 2 – *Owners Corporations* (Issues Paper 2) referred to a Tribunal decision of *Owners Corporation PS 517 029T v Hickory Group Pty Ltd* (Building and Property) [2016] VCAT 731. It concerned the effect of the 10 year limitation under s 134 of the *Building Act 1993* on lot owners who were not parties to existing proceedings. Deputy President Cathy Aird dismissed the application for joinder of other lot owners on account as their claim was statute barred. VCAT reiterates its recommendation that it would simplify matters if an owners corporation could be empowered to bring proceedings on its own behalf, and on behalf of the lot owners where consequential loss was claimed.

Issue 2.2.2 Access to private lots

Option 6B: Give owners corporations access to private lots to repair common property

The Tribunal supports this option.

Question 18 – If it is desirable to expand the rule-making power to include rules on smoke drift, renovations and access to common property:

(a) should Model Rules also be made on those subjects, and if so

(b) are the proposed Model Rules based on reasonable presumptions about what most lot owners in owners corporation would regard as unobjectionable, and are they adequate?

The Tribunal has no objection to the expansion of the rule making power under Option 6D. It is neither necessary nor desirable to amend the model rules. With the exception of a rule about keeping pets, at present the OC Act and the model rules afford, in general terms, the rights and protections that Option 6D is designed for. Option 6D would enable an owners corporation to make more specific rules on these areas if the members thought fit to make them.

Question 21 – What additional justification, if any, is needed for the proposal for the joint and several liability of lot owners for breaches of owners corporation rules by their tenants and invitees?

There is no justification for joint and several liability of lot owners, occupiers and invitees. The Tribunal submitted in response to question 42 of Issues Paper 2 that all lot owners and occupiers should be bound by the rules and aware of them. Invitees should not be liable for breaches of the rules. An invitee has no enforceable right to obtain a copy of the rules. Neither the lot owner nor the lot occupier is required to give an invitee a copy of the rules so that the invitee has constructive notice of them.

Question 22 – Is it sufficient simply to expand on the existing duties of committee members to address the issue raised, or is a complete reformulation of committee members' duties, along the line of the Associations Incorporation Reform Act, necessary, and if so, why?

Section 117 of the OC Act prescribes the duties of committee members. It appears unnecessary to expand the existing duties to include a duty to act in the owners corporation's 'best interests', as proposed in Option 7A. Implicit in the prescribed duties is that by doing so, members are acting in the owners corporation's best interests. The inclusion of a best interests duty is likely to lead to disputes over what the owners corporation's best interests are. The Tribunal would be in the difficult position of determining whether a decision by a committee (whose members are bound by the duties in s 117) should be overruled for not being in the owners corporation's best interests.

As to Option 7B, there appears to be no particular reason for imposing duties which apply to office holders in an unincorporated association on committee members in an owners corporation. In the absence of there being a real need for reformulating committee members' duties, the current law is sufficient and requires no change.

Question 23 – What risks or unintended consequences might arise with options 8A, 8B and 8C, which propose extending the powers of owners corporations to deal with community building, water rights and abandoned goods?

As to Option 8A, provision exists under the OC Act through appropriate rules to extend the functions of owners corporations to include community building. Expressly including the function of community building could result in fees and charges being imposed on people as a matter of course, some of whom do not want community functions. This is in turn, will likely lead to disputes. No change is needed.

Question 24 – What is the best approach for dealing with abandoned goods on common property, and why?

The Tribunal supports an approach for dealing with abandoned goods on common property which is modelled upon the provisions in Part 9 of the *Residential Tenancies Act 1997* and Part 4.2 of the *Australian Consumer Law and Fair Trading Act 2012*.

Question 25 – What are the benefits and risks of the additional power proposed for goods that block access?

Allowing owners corporations to remove goods which block access to common property will benefit lot owners and occupants who remain on the property. The risks are manageable. If an owners corporation is to be empowered to remove goods, there should be a provision that the owners corporation must take reasonable care not to damage the goods. There is always a risk that the owner of the goods left behind may argue afterwards that something very valuable has been lost but they will have the onus of proving this which will be difficult to satisfy but reasonable, given the circumstances.

Question 31 – How well do options 11A and 11B address the issues raised about the role of owners corporations in dispute resolution and the procedures under Model Rule 6?

Option 11A confirms the position in the recent Supreme Court case of *Shearman v Owners Corporation No. 1 417405Y*[1] that it is only when a written complaint is made to the owners corporation that the owners corporation is obliged to go through the dispute resolution procedure before making an application to VCAT; when the owners corporation initiates actions itself against a lot owner or occupier there is no such obligation. The internal dispute resolution process should not apply to fee disputes.

As to Option 11B and the procedures under Model Rule 6, an extension of the timeframe from 14 working days to within 28 days for a meeting between the parties is reasonable. It is unclear what is envisaged by providing '...for referral of disputes for expert determination' and it raises several issues that require consideration. Is it proposed that there be a body or individual (other than VCAT) empowered to make a 'determination'? Would an expert determination be binding on the parties or would a disgruntled party have the right to apply to VCAT? To include an option for referral for expert determination is unnecessary and likely to delay the internal dispute resolution process and (depending upon whether there is a right to appeal the determination to VCAT) any hearing and determination of the matter by VCAT. The Tribunal has the requisite expertise and is the appropriate body for dealing with disputes. The difficulty with expert determination as a dispute resolution mechanism is that it is not arbitration and so the expert does not have the statutory backing of an arbitrator. For example, if an expert required information in order to make a sound decision, the expert has no way of obtaining information by subpoena as can an arbitrator (or VCAT). Finally, there have been cases in which experts have made determinations which are binding on the parties, but where it is found that the expert made an error. The party disadvantaged by the determination then sues the expert for damages, for example, *Kurc v Eyecare Pty Ltd*[2].

Question 33 – Which option for reforming the imposition and payment of civil penalties achieves the best balance between fairness and effectiveness, and why?

A combination of Options 12A and 12C would be the best way of improving the civil-penalty provision in the OC Act. The Tribunal repeats its comments made in response to question 47 of Issues Paper 2, that if the penalty were to be paid to the owners corporation, there would need to be a provision similar to s

[1] [2016] VSC 551 (21 September 2016)
[2] [2004] VCAT 1139 (16 June 2004)

168 of the OC Act, to ensure that the lot owner subject to the penalty does not receive any indirect benefit.

The Tribunal does not support Options 12B and 12D. Empowering owners corporations to impose penalties without having to make application to VCAT, is open to abuse. Including a right of appeal to VCAT by the offender is unlikely to act as a sufficient deterrent against the abuse of this power. The Tribunal has dealt with cases involving Rules adopted in large apartment buildings, where lot owners or occupants are effectively 'fined' substantial sums by the owners corporation for using the lifts to move furniture without obtaining proper permission.

Question 34 – Which option, and why, best balances the need for owners corporations to be able to commence legal actions with protection for those lot owners opposed to an action?

To clarify, the Tribunal had recommended in response to question 2 of Issues Paper 2 that s 18 of the OC Act be amended to allow VCAT in its discretion to order in an appropriate case that an ordinary resolution is sufficient. So the requirement for a special resolution under s 18(1) would have still applied. Option 13A which proposes to lower the threshold to an ordinary resolution, is an acceptable alternative. As to Option 13B there does not appear to be any likely benefit from lowering the threshold to two-thirds. It would be very rare for an owners corporation to commence proceedings in the County or Supreme Courts, so the need for different thresholds as proposed in Option 13C is questionable.

Question 35 – If Option 13A was adopted, would the current provision of the Owners Corporations Act that empowers VCAT to authorise a lot owner to commence proceedings on behalf of an owners corporation still be necessary?

Yes, the power to make an authorising order under sub-s 165(1)(ba) would still be necessary. An urgent application such as for an injunction is the paradigm case for the exercise of this power. The Tribunal supports the proposal included in Option 13C to extend VCAT's power to make an order authorising the applicant to bring any proceeding, not just an 'owners corporation dispute'.

Question 39 – What other options could be considered to enable owners corporations to recover debts?

The Tribunal does not have any suggestions for other options, however as to Options 15A – 15D, comments as follows:-

Option 15A – Empowering an owners corporation to require a lot owner to lodge a bond from which unpaid fees could be drawn may only serve an educative purpose. It is not uncommon in fee-recovery cases for VCAT to hear that many lot owners lack any understanding of what an owners corporation does or that they are liable to pay fees so that the owners corporation can function. The difficulty with this proposal is that it may only provide a temporary solution for addressing unpaid fees. It is highly unlikely that lot owners who do not pay their fees will either 'top up' or replace the bond in the event of any draw-down, to ensure the bond is maintained at the set level. The merits of this proposal are limited, however if it were to be adopted, the Residential Tenancies Bond Authority should hold the fee bond. Similarly to what occurs in residential tenancies cases, the owners corporation ought to be required to obtain a VCAT order before being able to claim the bond, and there should be no fee payable on the application claiming the bond only.

Option 15B – There is no need for a statutory provision about being able to set payment plans; an owners corporation, like any creditor, may already do so. An owners corporation that issues a fee notice for unpaid fees may agree to a payment plan with the lot owner. If the lot owner defaults on the payment plan, the owners corporation's right to payment can be enforced in VCAT. It is unclear from

the phrase on page 48 *'...the owners corporation would have the option of sending a demand for payment to the lot owner or applying immediately to VCAT or the courts to recover the amount owing'* whether it is envisaged that VCAT would order a payment plan. It not appropriate for VCAT to order a payment plan. If the order for unpaid fees is registered in the Magistrates' Court, the lot owner can apply to the Magistrates' Court for an instalment order under the *Judgment Debt Recovery Act 1984* (JDR Act) with relevant supporting documentation. The JDR Act provides an appropriate framework in which the material on which an instalment order is applied for, can be tested.

Option 15C and 15D – In VCAT's experience it is common for owners corporation managers to include in fee notices improper demands for late payment fees and the like. At the hearing the Tribunal disallows those demands. Allowing owners corporations to recover pre-litigation debt-collection costs from lot owners is also open to improper demands being made and disputes. The Courts and the Tribunal are the appropriate forums in which claims regarding costs should be determined. If as proposed in Option 15D VCAT was empowered to make a default judgment in undefended debt-recovery actions against lot owners, there would be no curb upon the making of those improper demands. Further, the prospect of having a default judgment process applicable to the Owners Corporations List in isolation from other Lists at VCAT, is most unappealing and not supported by the Tribunal.

Question 42 – Would it be more efficient if fee bonds were held by the owners corporation itself, the owners corporation manager or the RTBA?

RTBA – see comments under question 39, Option 15A.

Question 43 – Should owners corporations be able to recover costs that exceed the debt or should they be capped at level of the debt?

The assessment of costs is an entirely separate matter to the quantification of the claim. Usually costs are in proportion to the claim. In some cases they are not. Both the debtor and the creditor have ample opportunity during legal proceedings to gauge what costs might eventually be incurred. Consideration should be given to whether it is fair to cap the costs at the size of the claim.

Question 44 – Which of the 'litigation costs' options better achieves a balance between financial equity for lot owners, encouraging alternative dispute resolution and discouraging unnecessary use of lawyers?

Neither Option 15E nor 15F provides an acceptable alternative. The power to award costs in accordance with s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* should remain unchanged. VCAT repeats the comments made in response to question 9 of Issues Paper 2.

Question 47 – In relation to the proposal under Option 16B for differential levies for insurance policy premiums (where a particular use of a lot increases the risk) should owners corporations be:

(a) required to apply to VCAT for the appropriate order, or

(b) permitted under the Act to apply the appropriate levy as of right, leaving it to an aggrieved lot owner to apply to VCAT for any remedial order?

If Option 16B were to be adopted there should be a provision in the OC Act requiring the owners corporation to apply to VCAT for an order authorising such a levy. An unregulated power to levy one particular lot owner whom the other owners consider to be at fault, would be open to abuse.

Question 59 – How might the proposal to reform the process for VCAT applications be sufficient to balance the rights of the majority of lot owners against those of a holder of the majority lot entitlement?

Option 20E appears to be premised upon the assumption that the consent of owners with more than 50 per cent of the lot entitlement is required in every case of an application under s34D. This is incorrect. It is only where an application is made under s34D(1)(b) of the OC Act that VCAT must not make an order unless, inter alia, it is satisfied that the member or members have refused consent and more than 50 per cent of the lot entitlement *consent* to the proposed action (sub-s 34D(3)(c)). If it is proposed that VCAT be given the power to make an order under s34D(3) even though 50 per cent of the lot entitlement has *not* consented, but all other lot owners have, the Tribunal supports it.

Question 60 – Which option, and why, is the best and fairest way to provide for a more flexible process to sell buildings governed by owners corporations?

The Tribunal notes that Options 21A – 21E propose a possible role for VCAT. As such proceedings may be complex and substantial. Any proposed expansion of the Tribunal's jurisdiction would need to be adequately funded.