Consumer Property Acts Review Paper No. 1

Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers

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These comments are limited to Part B: Owners Corporation Managers.

Q 64: What are your views on whether owners corporation managers should be separately licensed or be part of an estate agent's licence?

Comment: Registration is necessary and sufficient. Licencing is not preferred for the following reasons:

1. Additional red tape.

2. Any licencing regime is likely to require a number of classes of licence and fulfilment criteria, depending on the building size and scope that the owners corporation manager is targeting. It may well be that smaller managers are burdened with licencing requirements more suitable for larger managers, and these additional costs will be passed onto owners corporations.

3. An owners corporation has the responsibility for entering into an appropriate contract with a manager, and this may including seeking independent advice on the terms and conditions of that contract. The terms and conditions may include aspects that would otherwise be included in a licencing regime, and at the same time, provide flexibility to agree terms and conditions that better suit both parties.

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

Comment: Yes.

Wherever money is held in trust, which may be used inappropriately by the trustee, criminal law should apply – not just to the corporation, but also to the individuals responsible for the misappropriation and to senior officers in the corporation who knew or should have known that misappropriation has occurred.

We have too many examples, particularly in the finance sector, where individuals are not being held criminally liable for their or their subordinates actions, such actions from which they may also derive a benefit (eg bonus payment).

Q 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?

Comment: Yes.

As a standard business practice, corporations involved in the provision of professional services should hold professional indemnity insurance.

Q 68:

In your experience what is the current practice of owners corporation managers in relation to disclosure of commissions?

Comment: In my experience, there is no current practice of disclosure. It is a tenant of good governance and ethical business practice that a corporation discloses commissions for the supply of goods and services from third parties. The owners corporation should make decisions with full information, and withholding such information may prevent the best overall outcome.

Q 70: What are the non-regulatory approaches that could be considered to ensure commissions and other payments do not distort the market?

Comment: A requirement for the manager to disclose commissions and other payment could be included in the terms and conditions of the agreement between the manager and the owners corporation.

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

Comment: Unfair contract terms should in general not be something that the legislation needs to address.

The owners corporation or committee on behalf of an owners corporation has a responsibility to negotiate a contract appropriate to the property concerned. If an owners corporation is derelict in its duties and agrees to terms which are later found inappropriate, then these may be re-negotiated, which may involve costs to the owners corporation.

Due diligence and perhaps independent advice should be sought where the owners corporation lacks the necessary expertise. Otherwise, the owners corporation may decide to rely on an industry template, or choose another manager.

Likewise for assignment, if a manager does not include assignment provisions in the terms and conditions, then the manager should conduct the business (including the possible restriction of sale of the business) on that basis.

Q 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?

Comment: —.

Q 73: Should any distinction be drawn between the required contractual terms for initial and subsequent management contracts? If so, why? How would such a distinction be drawn?

Comment: Yes, a clear distinction should be made between initial and subsequent management contracts.

It is reasonable to provide a developer with control over the management company, but not for unreasonable time durations.

Once the developer has sold and settled Lots, they should not be able to hoist previous (and sometimes unfair) contracts on the new owners. One way to provide a balance between the interests of the developer and the interests of the new owners is to mandate a 12-month sunset clause in management contracts, triggered from the date at which (50%+1) lot liabilities have been settled. Assuming that a greater majority than (50%+1) of new owners will have settled by the time of the sunset, the new owners will then be in a position to determine if the existing management company's contract is extended or a new contract agreed, or a new manager contracted.

The argument that managers need extended time contracts to train staff and invest in the owners corporation is vacuous. During the process of selecting a manager, the management company can easily explain to the owners corporation to benefits and costs of letting a contract for a longer or shorter period. The owners corporation, armed with the information provided, can then make an informed decision over the preferred term of the contract. This should be a commercial matter, and not one for legislation. This argument holds true for both initial and subsequent management contracts.

Q 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?

Comment: No rules are required for renewals. This is a contractual matter, and not one requiring legislation. Automatic renewals are convenient, especially for the arguments outlined in the discussion paper (eg quorum), and likewise, it is the responsibility of the owners corporation to serve notice of termination as prescribed in the agreement. This is no different to any other terms in the agreement – both sides must comply. It is simply a contract management issue.

For a renewal option that is only exercisable by the manager, if the owners corporation signs an agreement with such an option, then it should stand. We should assume that owners corporations enter into agreements briefed and aware of the terms and conditions. Correcting what may be later determined to be clumsy terms is a contract negotiation matter, and does not require legislation.

Termination and the consequences of early termination should be left to the terms and conditions of the contract, and do not need legislation. The discussion paper suggests that understanding termination

payments is beyond the understanding of most owners corporations. If true, then the owners corporation should seek advice. Many matters may be beyond the understanding of the owners corporation, and external advice is typically sought (eg the consequences of tree root damage that may be caused by the selection of certain fauna, where a gardening expert may be engaged). Contract managements and understanding the terms and conditions are not different.

Q 75: Are there other issues that require a regulatory response relating to long-term management contracts?

Comment: —.

Q 76: How can concerns about managers' influence on voting be addressed?

Comment: The manager is a contracted service provider to the owners corporation. It is not and should not be a role of the manager to motivate owners to stand for or participate in the running of the owners corporation. If the owners are apathetic about the operation of their building, so be it. The only involvement from the manager should be to distribute notices and other material that candidates may supply in preparation for an election. The manager should be a conduit for information, not a campaigner.

Q 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?

Comment: Separate bank accounts for each owners corporation is preferred to a consolidated bank account. It provides far better transparency and the ability to reconcile the bank balance with the accounts produced by the manager. It is alarming to read in the discussion paper that a pooled bank accounts can act as a prop to owners corporations in deficit. Any deficit should definitely not be funded from other owners corporations.

Q 78: What proportion of managers still use pooled accounts, and what would be the realistic costs and time required to transition to the use of separate accounts? Where possible, include the basis for these estimates.

Comment: As an owner and not a manager, the time required to transition to separate accounts should be set at 5 business days. This will be sufficient time to open the required bank accounts. The accounting system should already have separate accounts, so determining the balance due to each owners corporation should take no time at all.

If 5 business days is insufficient, then it suggests there are systemic problems within the management company that should be addressed separately.