VCAT | victorian civil & administrative tribunal

4 March 2016

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 – Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers Issues Paper No. 1 - Tribunal submission

The Tribunal is pleased to contribute to the Consumer Property Law Review.

In response to the *Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers Issues Paper No.1* (Issues Paper No.1), Tribunal members and staff with expertise in matters involving estate agents, conveyancers, and in owners corporation, met to discuss the review and the Issues Paper.

I enclose *Tribunal Response – Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers Issues Paper No.1*
It addresses questions 1, 5, 11, 22-25, 36-43, 48, 64-68, 71-74 and 77 in the Issues Paper No.1, as these raised jurisdictional, procedural and/or substantive issues of relevance to VCAT.

The Tribunal would welcome the opportunity to meet with CAV to discuss the review.

The Tribunal looks forward to working with CAV throughout the review.

Yours faithfully,

Justice Greg Garde AO RFD
President

Attachment: Tribunal Response – Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers Issues Paper No.1

Victorian Civil and Administrative Tribunal (VCAT)
President's Chambers
55 King Street
Melbourne VIC 3000

TRIM REF:BC/16/5790

Tribunal Response – Conduct and Institutional Arrangements: Estate Agents, Conveyancers and Owners Corporation Managers Issues Paper No.1

Part A - Estate Agents and Conveyancers

Introductory Comments

The *Estate Agents Act 1980* (the EA Act) confers jurisdiction on VCAT to conduct inquiries into estate agents (s 25), inquiries into agents' representatives (s 28) and review decisions of the Business Licensing Authority (BLA) regarding the licensing of estate agents (s 32). The BLA decisions that may be reviewed include the grant or refusal of a licence (s 21), imposition of conditions that must be complied with before a licence is granted, imposition of conditions or restrictions on a licence, variation or revocation of any conditions or restrictions (under s 21A) and refusal to give, or impose conditions on any permission to a person to regain their licence after automatic cancellation, or be allowed a limited right to hold a licence, or hold a licence despite disqualifying factors (under ss 31A, B, C, CA, D).

Under the *Australian Consumer Law* (ACL) and the *Australian Consumer Law and Fair Trading Act 2012* (ACLFT Act), the Tribunal has jurisdiction to deal with matters such as, a claim for damages by a client against an estate agent for an alleged failure in the provision of services or an action by an estate agent for fees for services supplied.

The *Conveyancers Act 2006* (the CA Act) confers jurisdiction on VCAT to review decisions of the BLA concerning a conveyancing licence (s 187); to review decisions of the Secretary of the Department of Justice to disallow a compensation claim on the Victorian Property Fund once all other rights have been exhausted (s 146); and to hold inquiries into the conduct of conveyancing licence holders on application by the Director of Consumer Affairs Victoria (s 33). Proceedings under the CA Act are rare.

Similarly to estate agents, although rare, VCAT has jurisdiction concerning the provision of services by conveyancers under the ACLFT Act.

Question 1 – Is the definition of an estate agent easy to understand and apply? How could it be improved?

The Tribunal is unaware of any definitional issue arising in proceedings under the EA Act. VCAT's regulatory jurisdiction is only invoked where the person concerned falls within the definition of estate agent.

The definition appropriately addresses forms of transactions rather than specific transaction types. It is presumably able to encompass new business practice which falls within the substance of what is regulated. Changing the definition can bring uncertainty to recent case law.

The definition of estate agent is discussed in the Victorian Court of Appeal decision in *P'Auer AG & Anor v Polybuild Technologies International Pty Ltd & Anor* [2015] VSCA 42. In summary, Whelan J [at 94] concluded that the provisions of the EA Act are directed at the regulation of people engaged in an ongoing estate agency business and not in a 'one off' transaction.

Proceedings brought under the ACLFT Act by a consumer against a real estate agent or a person involved in providing services to a consumer related to land transactions arise from the provision of those services, not from the definition of estate agent.

Question 5 – Is the definition of conveyancing work sufficiently broad to capture all those who should be licensed? If not, how could it be amended?

VCAT rarely deals with matters under the CA Act. In 2013, the Tribunal received two related applications and in 2014, five applications, three of which were related, essentially forming one matter. Since July 2014, VCAT has not received any applications. Proceedings under the ACLFT Act arise from the provision of services by the conveyancer, not the definition of conveyancing work.

Question 11 – What are your views on the current eligibility criteria for estate agents and conveyancers?

Eligibility criteria should align with the purposes of registration, which is to protect the public and maintain standards. Section 21 of the EA Act provides an appropriately broad test for the BLA to apply when deciding whether or not to grant a licence.

Automatic disqualification is a serious matter and any expansion of the grounds requires careful consideration and an understanding of the ramifications for the agent or conveyancer and the regulator.

Question 22 – What would be the merits or otherwise in having some established principles about the role of estate agents in the Estate Agents Act and/or setting out the duties for the conduct of an estate agent in relation to sellers, buyers, landlords and tenants (i.e. would it clarify expectations about the role of the agent and their conduct)?

Question 23 – What additional information should be included in the Estate Agents Act about the role estate agents play in property management, including in respect of their duties and obligations to landlords and tenants?

Question 24 – What sanctions should be in place for estate agents who display poor behaviour in the property management space (for example specific offences, limited licence)?

Question 25 – What are your views on the merits of clarifying and directly expressing in the Estate Agents Act the duties and obligations, if any, that an estate agent may hold towards buyers of property?

Setting out principles and/or duties and responsibilities of estate agents in the EA Act would cause conflicts with existing legislation and is unnecessary. For example, the estate agent who is engaged by the landlord to let a property also has a duty to the tenant under the ACL not to mislead or deceive or act unconscionably. Where a tenant is aggrieved, the tenant may take action against the landlord under the tenancy agreement and also against the estate agent under the ACL.

Question 36 – Do the current professional conduct rules for conveyancers deal sufficiently with matters conveyancers should observe in the conduct of their functions?

Question 37 – Are there changes or additions to the rules that should be considered? Should the rules align with relevant rules for legal practitioners wherever practicable?

Question 38 – what regulation, is any, is required to deal with circumstances where a conveyancer is asked to pay, or offers to pay, a commission to a third party who refers a client to the conveyancer?

Question 39 – Are the current costs disclosure provisions in the Conveyancers Act sufficient? If not, in what respect should they be amended? Should the costs disclosure required for conveyancers align with those for legal practitioners?

The Tribunal rarely deals with inquiries into the conduct of conveyancers, therefore makes no comment on the specific issues.

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

Question 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?

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

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

Since January 2013, VCAT has received 31 applications under the EA Act, the majority being from the Director of Consumer Affairs seeking inquiries. The minority of those applications were related to the Director's applications for inquiries and brought by estate agents. When taking account of the related applications, the Tribunal effectively dealt with 19 matters under the EA Act. The inquiry process can be onerous on parties, but it is appropriately so. In an inquiry, the VCAT member is obliged to consider all relevant factors, which may or may not lead to suspension or cancellation of licence, as the member considers appropriate.

VCAT employs Alternative Dispute Resolution (ADR) wherever possible to explore areas of common ground between parties and appropriate outcomes. ADR assists with reducing the complexities and often leads to shorter, more efficient VCAT proceedings. These proceedings are overwhelmingly resolved after successful ADR procedures are employed. They are usually resolved by written agreement, at compulsory conference or following a hearing of one day or less. The resolution is on the basis of wholly or largely agreed facts and determinations from the parties or agreed facts with the determinations contested.

With respect to an estate agent's conduct under the *Residential Tenancies Act 1997* (the RT Act), consideration should be given to whether the Tribunal should have a power to impose a civil penalty where the agent is found to have breached an obligation under the RT Act, similar to the existing power under s 166 of the *Owners Corporations Act 2006* (the OC Act). Section 166 provides for VCAT to impose a penalty not exceeding $250 where it determines that a person has failed to comply with a rule of the owners corporation that imposes an obligation that is binding on the person.

Question 48 – What is your view about the appropriate sanction if an estate agent or conveyancer does not comply with the annual auditing requirements?

The suggestion that non-compliance should constitute automatic grounds for ineligibility to continue to hold a licence, should be treated with caution.

In the Tribunal's experience, there are a variety of explanations for a failure to comply with these requirements, such as, depression or other mental illness. To simply disqualify an agent for this type of non-compliance would be unworkable. The BLA usually works with the agent through the auditing process, rather than applying to the Tribunal. Prompt identification of the issue and resolution between the BLA and the agent, by negotiation where possible, is preferable to automatic sanctions

which severely impact the agent and more importantly, the agent's clients who, for example, may be halfway through a property sale.

Part B – Conduct of Owners Corporation Managers

Introductory Comments

VCAT has jurisdiction under the OC Act to appoint a manager of the owners corporation (s 125); hear and determine disputes relating to the operation of an owners corporation; an alleged breach by a lot owner or an occupier of a lot of an obligation under the OC Act, the regulations or rules of the owners corporation; or the exercise of a manager's function regarding the owners corporation (s 162). Almost all matters heard by VCAT are disputes under the OC Act.

Applications can be made to VCAT to exempt an owners corporation from compliance with certain requirements under the OC Act (s 170); to restrict access to personal information contained in owners corporation records (s 172); to appoint an administrator for the owners corporation (s 173); and to review a decision of the BLA regarding the registration of a manager of an owners corporation.

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

Many owners corporation managers are estate agents too, but owners corporation managers have different functions to estate agents and do not require the same skill set. A person can be a competent owners corporation manager without being an estate agent.

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

There should be no licensing of volunteer managers. Any legislative change should be aimed at professional managers only, being those who are entitled to, and do, charge fees for their services.

The OC Act provides for the registration of owners corporation managers, however it would be desirable to separately license professional owners corporation managers to align with other consumer protection legislation for licensing of professional persons.

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

A finding of guilt without conviction has occupational implications in licensing matters. These implications are often not considered by criminal solicitors advising clients to plead guilty. This is a further reason why automatic consequences need to be carefully considered and related to the legislative purpose, which is to protect consumers.

Question 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?

Making it a condition of practice that a paid owners corporation manager hold professional indemnity insurance cover would achieve consistency with other consumer protection legislation. It would also correct the anomaly under s 180(2)(c) of the OC Act which only requires an application for registration to be accompanied by evidence of professional indemnity insurance, rather than continue to hold that insurance.

Professional indemnity insurance policies vary which may unfairly affect lot owners' rights if a particular event is not covered by all insurers. Consideration should be given to prescribing the matters that a policy must cover. Registered building practitioners are required under legislation to have forms of insurance which cover the matters prescribed in a Ministerial Order that an approved insurance policy must cover.

Professional indemnity insurance will in the main cover professional negligence, but not deliberate misconduct. Legal practitioners have a separate scheme to protect clients in relation to trust account defalcations. As owners corporation managers may manage significant sums of client moneys and hold all money on trust for the owners corporation (s 122(2)(a) of the OC Act), a scheme to protect lot owners from trust account defalcations is required.

Question 68 – In your experience what is the current practice of owners corporation managers in relation to disclosure of commissions?

In the Tribunal's experience there is widespread disclosure (usually in the agenda for the annual general meeting and in the minutes of the meeting) of insurance commissions, but no widespread disclosure of any other commissions. It is unclear whether this is because there are seldom commissions other than insurance commissions. It is desirable that there be comprehensive disclosure of commissions and a broad approach would be beneficial.

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

Unfair contract terms have been rife in this industry.

The most commonly encountered terms in a management contract that might be considered 'unfair' are terms that:

- Restrict, or impose conditions upon, the owners corporation's right to revoke the manager's appointment.

  Subsection 119(6) of the OC Act provides that an owners corporation may revoke the appointment of a manager. It is arguable that a term that seeks to curb this right is void pursuant to s 202, however this is not an issue that the Tribunal has had to determine. It is appropriate that consideration be given to clarifying the position. Notwithstanding s 119(6), where an owners corporation determines by resolution to terminate the contract, the owners corporation may be liable for a damages claim, which is separate and distinct from a right to revoke the appointment of a manager.

- Provide for the management contract to be rolled over for a further fixed term, unless by a deadline the owners corporation has given notice that it is not to be rolled over.

  Clause 5 of the Consumer Affairs Legislation Further Amendment Bill 2014 (introduced by the previous Government but never passed) (the 2014 Bill), had proposed to insert a new s 119A into the OC Act to, inter alia, render void a term for automatic renewal where the owners corporation fails to give notice of its intention not to renew the contract. It provided for the contract to roll over on a monthly basis (similar to the over holding regime in a lease), where the owners corporation failed to give notice of its intention to renew the contract.

- Provide that the manager is entitled to charge, on top of the fixed annual fee, at an hourly rate for certain specified 'extras', then load the description of the 'extras' with things that ought to be covered by the fixed fee.

The Tribunal had a case where an individual lot owner had a dispute with the owners corporation manager requiring the manager to correspond with and provide documents to the lot owner. The manager charged the owners corporation a very substantial hourly rate for dealing with these administrative matters, which created a dispute between the owners corporation and the lot owner. The charges were akin to what a legal practitioner would charge for performing work under the Supreme Court Scale of Costs. Unlike costs claimed by legal practitioners, there is no similar mechanism for assessing costs claimed by an owners corporation manager. The result being that these disputes come to VCAT for resolution.

- Provide for lengthy contract terms appointing managers for five, 10 or more years, with very limited provision for termination of the contract.

  Where the owners corporation seeks to terminate the contract, though not in strict compliance with the contract, managers have withheld funds and threatened the owners corporation with a substantial damages claim – see *Owners Corporation No 2 PS338183E v Strata Plan Pty Ltd (Owners Corporations)* [2015] VCAT 1148.

There should be wide capacity for an owners corporation to terminate a manager's contract without penalty and remove a manager by decision of the owners corporation (that is, by delegation to the committee of the owners corporation; resolution of a general meeting; or ballot). If this capacity existed, other unfair terms would become less relevant. For example, if the owners corporation objects to the fees a manager is charging, they can terminate the contract.

Section 23(3) of the ACL provides that a term of a consumer contract is void if the term is unfair and the contract is a standard form contract. An owners corporation management contract is not a 'consumer contract' under s 23(3) as it is not one 'to an individual'. The services supplied by the manager pursuant to the contract, and the negotiation of the management contract, and the supply of the services, will amount to conduct 'in trade or commerce' within the meaning of the ACL. Accordingly, a manager could be liable to the owners corporation for misleading and deceptive conduct, and unconscionable conduct, in addition to breach of contract.

It is concerning that s 119(3) of the OC Act provides that the contract be in the approved form, yet the statutory form available on the Consumer Affairs Victoria website is effectively a series of 'blanks' in which quite onerous terms provisions can be inserted. It gives the appearance to owners corporations (consumers) that such a contract is 'government approved'.

Terms regarding the assignment of lengthy management contracts to managers not appointed by the owners corporation, with limited right to terminate the contract, are unfair. An ability to terminate a management contract without penalty is required. Legal practitioners and accountants sell their businesses without tying their clients to long term contracts.

The Tribunal receives a number of applications seeking orders that a manager hand over the books and records of account. Usually this is within the context of an allegation of overcharging by the manager and the owners corporation's revocation of the manager's appointment. To bring proceedings at VCAT, the owners corporation must be authorised by a special resolution under s 18 of the OC Act or with leave of the Tribunal under s 165(1)(ba). Special resolutions are notoriously difficult to achieve and hamper an owners corporation's ability to bring proceedings in VCAT against a manager who is behaving unconscionably. This issue requires consideration.

Question 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?

Clause 10 of the 2014 Bill, had proposed to enable the Tribunal to decide whether a term in a management contract was fair having regard to Part 2-3 of the *Australian Consumer Law* (Victoria) as if it were a term of a consumer contract.

Such an amendment was unnecessary and unlikely to assist in resolving most disputes between an owners corporation and its manager. It would have encouraged a disgruntled lot owner, unaware that an 'unfair' term had a particular legal meaning, to allege that standard and unexceptionable terms in a management contract are 'unfair'; and so potentially increase the Tribunal's workload.

For clarity and to avoid unnecessary dispute between parties, the phrase 'unfair term' needs to be sufficiently defined.

Question 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?

No. It is in both parties' interests for the terms of the agreement to be clear, and requiring different standards for initial and subsequent contracts can only reduce that clarity.

Question 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?

Please see comments under Question 71.

Question 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?

Section 122(2) of the OC Act provides that owners corporation managers hold money on trust. Trustees owe fiduciary duties to the beneficiary, separate to the management contract. Fraudulent financial conduct can thus already be addressed, and claims brought in VCAT at relatively little expense. Trust money should be protected. If an owners corporation manager misused trust money, and that conduct was not covered by its professional indemnity insurance policy, the lot owners could suffer an unrecoverable loss.

In the Tribunal's experience, it is quite common for there to be two owners corporations, No.1 and No.2, created by the same plan of subdivision. Most lot owners are members of both owners corporations, and the same person manages both owners corporations. The practice is for the manager to send one fee notice to each lot owner; levying fees for both No.1 and No.2; and itemising the fees separately but giving one total. When the lot owner fails to pay, the manager applies to VCAT, with both No. 1 and No. 2 named as applicants, claiming the total. An order is sought that the respondent pay the total amount to both owners corporations. Tribunal practice is to make the order sought.

Imposing regulatory requirements for separate accounts may lead to additional cost and administration (such as, separate fee notices, separate Tribunal orders, adjournments of VCAT proceedings due to insufficient evidence in support of separate orders) with very limited benefit.