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Consumer Property Acts Review
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Dear Sir/Madam

Consumer Property Acts Review Issues Paper No.2– Owners Corporations

Thank you for the opportunity to comment on the above review.

I would like to draw the Review's attention to two issues relating to Owners Corporations (OC), specifically:

- (1) A lack of transparency for OC costs that may be passed on to a tenant by a landlord/owner as outgoings; and
- (2) the difficulty of resolving a dispute involving a landlord/tenant/OC.

The latter issue relates to Discussion Paper section 4.5 - *Repairs and alterations of common property and services*, specifically question 23 (*other issues relating to repairs to common property or services*).

Background

My Office deals with, *inter alia*, commercial disputes between business tenants in retail and other commercial premises and their landlords. The *Retail Leases Act 2003* (the RLA) defines 'retail premises' very broadly, and landlord-tenant disputes generally are required to be referred to my Office for Alternative Dispute Resolution (ADR) before they can be litigated at the Victorian Civil and Administrative Tribunal (VCAT). Landlord – tenant disputes relating to non-retail commercial premises may also access ADR services under the *Small Business Commissioner Act 2003*.

1. Transparency of OC costs passed on to tenants

Under the RLA, subject to certain notice requirements, a landlord may pass on to a tenant outgoings under a retail premises lease which can include OC fees.

It appears from a 2015 advisory opinion from VCAT that repairs and maintenance costs cannot be passed on to a commercial tenant under the RLA. Further, the RLA prohibits a landlord from passing on capital costs to a tenant

Where OC fees are passed on to the tenant the landlord is only obliged to provide a copy of the invoice or proof of payment to the tenant. The tenant therefore has no way of knowing what comprised the OC fees or whether repairs and maintenance or capital costs have been included in the fees that have been passed on.

More generally, landlords are required to provide tenants with an estimate of outgoings, which may include OC fees. Where costs increase beyond the estimate, in the absence of details of the OC fees, a tenant is unable to understand the basis on which such costs have increased beyond the initial estimate. This is a regular cause of disputation between landlord and tenant handled by this Office.

2. Dispute resolution involving OCs

Some disputes brought to my Office by business tenants relate to access to, use of or problems arising from common property in or around the premises. Resolving such disputes through ADR where OC issues arise or potentially arise is extremely difficult due to the structure and decision making nature of an OC. There is no contractual relationship between the OC and the tenant. A landlord may or may not raise a tenant's concerns with the OC. If the landlord does raise the tenant's issue with the OC, the landlord who is a member of the OC cannot guarantee that an OC will make any particular decision. While the RLA enables me to join a party to a mediation, it is impractical to expect all members of an OC to attend a mediation with a tenant. While a manager or a delegate of the OC may attend a mediation with tenant and landlord, the manager/delegate rarely has the authority to enter a binding agreement. Any suggested resolution would need to revert to the OC for consideration and decision – which may be positive or negative.

The key issue is that a tenant's rights by lease or licence which relate to common property do not need to be addressed or resolved by an OC, and the landlord's obligations in such instances is unclear.

Example 1 - car parking

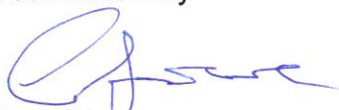
A tenant's right to use a car park may be granted as part of the lease or by way of a license given by the OC to each landlord who in turn licenses the use of the car park to their tenant. A difficulty arises where the use of the tenant's car park is interrupted. In this situation, depending on the terms of the lease/licence the landlord/owner may or may not be obliged to respond to a tenant request to prevent interruption to their car park access. The OC has no direct relationship with the tenant and may take no action to respond to a tenant complaint.

Example 2 – repairs to common property

In a matter brought to this Office for dispute resolution, the tenant could not use the designated car parking space due to large potholes. The landlord refused to pay for the repair on the basis it was common property, and the OC also declined to take any action. The lack of access to parking was detrimental to the tenant's business.

In conducting the Review, it would be appreciated if the issue of the respective rights and obligations of tenant, landlord and Owners Corporation in respect of a tenant's dispute regarding access to or use of common property could be given consideration, and in particular the mechanisms by which ADR may be more effective than is currently the case.

Yours sincerely



Geoff Browne
Small Business Commissioner