**Consumer Property Law Review**

Submission of a 100-unit Owners Corporation – March 2016

**Opening Statement**

There is a significant power imbalance between Managers and Owners Corporations which is not adequately addressed by the current regulatory regime.

Owners Corporations place significant trust and confidence in their Managers. However, there are particular features of Owners Corporations as consumers which often result in a circumstance where Owners Corporations are at a pronounced disadvantage in the relationship.

In particular, Owners Corporations committee members often have:

* little, if any, pre-existing knowledge of owners corporation law, regulation and best practice at the commencement of their terms;
* limited experience of interpreting financial statements; and
* a significant work load managing the day-to-day challenges of the Owners Corporation, which greatly reduces the capacity to investigate uncertainties in Managers’ advice or conduct.

Further, committee members may be on the Owners Corporation committee for short periods of time, impairing Owners Corporation corporate knowledge.

These factors, among others, make Owners Corporations highly reliant on their Managers, in turn placing the Manager in a significant position of power and influence.

The current ‘light touch’ regulation creates an environment in which Managers can abuse this position of trust in circumstances and where malfeasance can go undetected potentially indefinitely. The law needs to limit the potential for unscrupulous and unconscionable Managers to take advantage of vulnerable Owners Corporations.

**Are there benefits in aligning the eligibility requirements for an Owners Corporation Manager to the extent practical with those of estate agents?**

Yes. Owners Corporation Managers are handling the affairs of property owners and should be subject to at least the eligibility criteria of estate agents with the capacity for unsuitable managers to be disqualified.

**What are your views on whether Owners Corporation Managers should be separately licensed or be part of an estate agent’s licence?**

Owners Corporation Managers should be separately licensed and preferably separated from the real estate industry. Conflict of interest is already a significant issue for Owners Corporations and this is further complicated when a Manager may be representing an owner as an agent.

Ideally, an Ombudsman or similar would be established that would license and regulate Managers, establish minimum standards of conduct and provide a dispute resolution mechanism for Owners Corporations in conflict with their Managers. Such an office could be funded by a levy on Managers proportional to the number of lots in the Owners Corporations they manage.

Further, Managers should be required to undertake mandated annual Professional Development to help maintain adequate and professional standards in the industry.

**Is it appropriate to extend the current regulatory criteria to include serious criminal offences?**

Yes. Owners Corporation Managers are handling significant amounts of money and should be prohibited from doing so if they are not of good character.

**What would be the benefits and costs of placing requirements on Owners Corporation Managers to hold professional indemnity insurance as a condition of practice?**

Maintaining professional indemnity insurance should be a mandatory and explicit requirement of practice.

**In your experience what is the current practice of Owners Corporation Managers in relation to disclosure of commissions?**

Our experience is that Owners Corporation Managers do not disclose commissions or indeed any other income earned indirectly from its relationship with an Owners Corporation (that is, income earned from sources which are not payments made pursuant to management contracts between the Owners Corporation and the Manager).

We submit two examples.

For at least the past five years, our Manager has never formally disclosed the commissions it has received from our insurance broker/ building insurer.

Secondly, the Manager has failed to disclose significant payments made to it by a third party pursuant to a contract entered into by the Manager and the building developer (in its capacity as sole representative of the Owners Corporation upon its inception), in circumstances where the existence of the contract was also not disclosed to subsequent committees.

In each instance, the Owners Corporation became aware of the commissions and payments by way of accidental disclosure, or in the case of the latter, after engaging external consultants.

Managers should be compelled by law to disclose if they have received a commission or payment for recommending a provider. Commissions are not always a negative but the consumer should have the right to choose whether they are paid and there should be transparency around such arrangements. The law should require that Managers must disclose at least annually (ideally as part of the AGM reports) all revenue earned directly and indirectly from an Owners Corporation or in any way connected with an Owners Corporation.

Such a compulsion would help drive more competition in the market for Managers by ensuring that Owners Corporations could compare the true costs of services provided.

More generally, our experience suggests that the concept of conflict is not well understood by Managers.

**Do commissions and discounts have an adverse impact on premiums for insurance, and if so, how does this manifest?**

It is difficult to say whether there is an adverse impact or not when Owners Corporations aren’t necessarily aware of what commissions are being paid. Again, we emphasise the need for transparency around any financial benefit the OC manager derives as a result of managing a building. This would allow committees to determine whether they would prefer to pay a lower fee to the Manager subsidised by a commission or pay a premium for independent advice or services. As noted above, transparency in incomes and commissions would drive greater competition in the market for Manager services.

**What are the main concerns about unfair contract terms in management contracts?**

Committees are elected from year to year at annual general meetings. These terms do not always align with management contracts and renewals, which begin when a building is commissioned. In our building, the OC manager was appointed for five years, with an automatic five-year extension at the end of the first term. The Manager did not disclose in a transparent manner the automatic renewal clause to incoming committee members appointed just months before the clause came into effect, or at best, were opaque in relation to the renewal process. This essentially deprived the incoming committee of any legitimate opportunity to consider the terms of the contract and whether they wanted to consider other Managers.

Further, Owners Corporations must be in a position to consider Management contracts at any time of year. There should be consideration given to amending the Owners Corporation Act to remove the requirement that Managers can only be appointed by general resolution.

If the Act is not to be amended, it should be mandated that Managers cannot seek to make termination more onerous than the terms of the Act. A general resolution is ample balance between the rights of the Owners Corporation and the needs of the Manager. Further, a ballot is an entirely appropriate mechanism for obtaining the view of the owners, particularly in circumstances where investor-owners may live interstate or overseas. To require anything more than this would effectively render the exercise futile.

In any event, the appointment of a Manager should not require a general resolution.

Further, Managers should be required to notify Owners Corporations that they should seek legal advice in relation to the terms of Manager agreements, and provide sufficient time for that advice to be sought.

Lastly, Managers should be required to table the Management contract in full at every AGM so that new owners and committee members are aware of the terms of the contract, and in particular, its expiration.

Separately, the law should be amended to define Owners Corporations as Consumers for the purposes of the Australian Consumer Law. This would allow Owners Corporations to take challenge unfair terms and would go some of the way to help address the significant power imbalance between the Managers and Owners Corporations.

**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?**

Automatic renewal at the sole discretion of the Manager should be prohibited in all contracts.

Further, thought should be given to how to Owners Corporations can remove a substandard Manager during the term of an initial term in circumstances where a relationship has broken down but a technical breach hasn’t occurred (mindful that the standard of breach can be very high, and difficult to prove).

**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?**

Contractual terms need to better support the rights of the Owners Corporation vis a vis the Manager. The Manager has a vested interest in utilising automatic renewals whether this is beneficial to the Owners Corporation or not. In our case, this led to an automatic five-year renewal for the manager, which may have been rejected by the committee had it been in a position to make such a decision. If automatic renewals are to be considered, they must be accompanied by a notice requirement; that is, Managers would be required to notify all owners in sufficient time and in a form mandated by regulation, that an automatic renewal is to occur and what steps are available to the Owners Corporation to terminate the contract prior to renewal.

Automatic renewal is not of itself necessarily unwarranted. In the case of a disinterested Owners Corporation, automatic renewal may be necessary for the smooth operation of the Owners Corporation. But renewal should not occur at the sole discretion of the Manager, and should be for no more than one-year terms after the expiry of the initial term. There is naturally nothing to prevent Managers from seeking to negotiate new contracts at any time and as such, would suffer no prejudice by automatic renewals of one-year terms.

Initial terms should be restricted to no more than five years. This is ample time for a Manager to recover its costs associated with the establishment of an Owners Corporation.

**How can concerns about Managers’ influence on voting be addressed?**

Proxies should default to the Chair of the Owners Corporation, and not the Manager.

**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?**

Separate accounts should be a minimum. In a digital age, there is minimum cost associated with the maintenance of multiple accounts, and separate accounts will ensure a much higher level of transparency and accountability.