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Consumer Property Law Review
Policy and Legislation Branch
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CONSUMER PROPERTY ACTS REVIEW ISSUES PAPER NO.2, OWNERS CORPORATIONS: SUBMISSION - NICOLE JOHNSTON BA, LLB (Hons) M.Crim

Thank you for the opportunity to make this submission.

Author

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Executive Summary

This submission has been prepared taking into account my professional experience in the legal industry, personal experience in strata through living and owning in strata & research. I have selected the following topic to provide comment:-

1. Meetings and decisions of owners corporations – Developer's obligations

Developers' Obligations (Issue 5.1)

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Issue Questions:

What are your views about the appropriate obligations for developers who control owners corporations, including the:

- *obligations concerning any contracts they cause the owners corporation to enter into*
- *interests they must consider, and whether there are any matters they should be prohibited from voting upon, and*
- *duration of their obligations*

What other changes should be made to developers' obligations?

Issue

Developers are an integral part of the governance system in an owners corporation. A developer as the initial owners of all the lots in a scheme must make decisions in order for the owners corporation to function upon registration. Unfortunately, some of the decisions made by developers both in the scheme promotion stage (prior to the registration of the plan of subdivision) and in the early days of a scheme's life have long term negative consequences for owners corporation and in turn the members of the owners corporation (being lot owners).

As an academic researcher, I have studied a number of schemes both in Victoria and other jurisdictions. The same problems arise in every jurisdiction. The problems directly relate to decisions made by developers that either benefit developers' interests or other stakeholders (often affiliated with the developer) at the expense of the owners corporations. Owners corporations can become dysfunctional and conflict riddled for years due to the decisions made by developers.

The problems I have encountered relate to:

- a) Service agreements entered into by developers on behalf of owners corporations, where the developer and/or the service contractor receives a benefit (directly or indirectly) at the detriment of the owners corporation. The owners corporation may be burdened by the length of an agreement or the

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- fees charged may be overinflated or non-negotiated rates. The developer may receive a benefit in terms of equipment or infrastructure installation at a reduced or low (or no) fee.
- b) The underestimation of Initial budgets (practice known as lowballing). This is a common practice across Australia whereby developers keep the initial budget low in order to market a scheme as a 'low fee' development. The shortfall catches up with the owners corporation and owners are forced to pay higher than expected fees, sometimes for years, after the initial financial year.
 - c) The engagement of owners corporation managers. There is a common practice in Australia whereby the developer and nominated owners corporation manager enter into an arrangement whereby, in exchange for a management contract, the manager assists the developer in setting up the governance and management structures for the owners corporation including determining the initial budgets. This practice places the manager in a conflicted position especially if a dispute arises between the owners corporation and the developer. Managers may be reluctant to inform owners corporations about outstanding levies (owed by the developer) or to take legal action against the developer.
 - d) Leases and licensing arrangements. Often developers either enter into arrangements to lease or license common property areas at a low fee for their use or cause the owners corporation to enter into a lease or licence of an area (lot) owned by the developer. These are self-interested decisions that often detrimentally impact owners corporations.

Submission

I recommend that restrictions be placed on developers entering into agreements in the control period. Section 26 of the *Strata Schemes Management Act 2015* (NSW) places restrictions on developers in the control period and should be seriously considered in this review.

Developers' Obligations (Issue 5.1)

Developers have fiduciary obligations to owners corporation, both in the pre-registration and post registration periods. Codification of the fiduciary duty in the legislation is recommended.

I also recommend that consideration be given to § 4-103 of the *Uniform Condominium Act* (USA) in relation to disclosure requirements.



Nicole Johnston

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