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22 January 2024

The Hon Stephen Jones MP
Assistant Treasurer
Minister for Financial Services
Parliament House
CANBERRA ACT 2600

Dear Minister

Australian Consumer Law and Owners Corporations

On behalf of the Owners Corporation Network of Australia (OCN), I write to ask that Consumer Affairs Ministers identify and address gaps in the Australian Consumer Law (ACL) insofar as they apply to owners corporations.

An owners corporation, also known as a body corporate, is a legal entity comprising all the owners of a subdivided property, responsible for the management and maintenance of common areas and shared aspects of the property.

Gaps in the ACL, as outlined below, leave owners corporations, lot owners and tenants at a significant disadvantage in their dealings with other businesses, including developers and strata/owners corporation managers.

About OCN

The OCN exists to help strata owners navigate the complexities of strata living, from social and organisational challenges to financial and legal issues. Our people have first-hand experience of living in strata and the upsides and downsides of this fast-growing residential sector. We provide a range of services to members and also guidance and education for the wider community on achieving harmonious communal living. We are fiercely independent and not aligned with any commercial interest. OCN is a full member of the Consumers' Federation of Australia.

Gap in the Australian Consumer Law

While many consumer protections in the ACL apply to trade and commerce broadly, some protections are not well-adapted to the situation of owners corporations, lot owners and tenants, resulting in a protection gap. Gaps include the unfair contract terms regime and the consumer guarantee provisions.

Part 2-3 of the ACL provides that unfair terms of a consumer contract or a small business contract are void. Terms are unfair if they cause a significant imbalance in the parties' rights and obligations, the term is not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and the term would cause detriment should it be relied upon.

However, this regime does not apply to contracts entered into by owners corporations. This is because such contracts do not meet the definition of 'consumer contract' or 'small business contract'. Section 23 of the ACL provides that consumer contracts must be 'to an individual', and that small business contracts relate to parties carrying on a business. Owners corporation contracts are neither.

This gap in coverage is despite the fact that contracts commonly entered into by owners corporations are of a type that generally receive protection, i.e. the goods and services are acquired for personal, domestic, or household use or consumption.

The OCN observes many contracts entered into by owners corporations include unfair terms, however there is little remedy. Strata/owners corporation management contracts provide one example, and terms that might be unfair include those that provide for excessive notice periods for termination, excessive early termination fees, allow for automatic rollovers, or prohibit owners corporations from refusing consent to assignment of the contract.

This issue has recently been partially addressed by the Victorian legislature. Amendments made to owners corporation legislation in 2019 now enable owners corporations to claim that a term of a management contract is unfair. Section 162(d) of the *Owners Corporation Act 2006* (Vic) enables the Victorian Civil and Administrative Tribunal to determine that a term of a contract of appointment of the manager of an owners corporation is unfair. Section 167(2) provides that, in doing so, the tribunal is to consider Part 2-3 of the ACL as a reference point, as if it applied to the contract.

This amendment is welcome but, as far as we are aware, there is no similar legislation in other states and territories. Moreover, it only applies in relation to management contracts, not to other types of contracts that may be entered into by owners corporations directly.

Beyond unfair terms, the consumer guarantee provisions in Division 1 of Part 3-2 of the ACL are not well-adapted to owners corporations. These provisions include the guarantee that services are provided with due care and skill, are fit for purpose, and are provided within a reasonable time.

Consumer guarantees apply to 'consumers' as defined by section 3 of the ACL. A person is taken to be a consumer for the purpose of this section if the amount paid for goods or services did not exceed $100,000 or were of a kind ordinarily acquired for personal, domestic, or household use or consumption.

Generally, an owners corporation should fit within this definition of consumers. However, in some cases, the relevant services may not have been provided to the owners corporation. For example, services provided by the initial owner/developer relating to common property are not provided to the owners corporation; rather, the owners corporation merely becomes responsible for shared property under the subdivision. While initial lot owners may be able to make consumer guarantee claims against a developer, the developer does not provide the common property to them. This leaves a gap in protection where developers provide sub-standard services relating to a common area; there is little claim for the lot owner or owners corporation under the ACL.

There may well be other gaps in the ACL regarding owners corporations, because it does not appear that the law was developed with the protection of owners corporations, lot owners and tenants in mind. This is despite the intent being that the ACL is an economy-wide protection.

Some 2 million Australians live in owners corporations Australia wide, and are likely to be disadvantaged by the gaps outlined in this letter. We urge Consumer Affairs Ministers to identify and address gaps in the ACL so that owners corporations and those associated with them are protected in a way that is consistent with other Australians.

Your sincerely

Karen Stiles
Executive Director