

29 May 2016

Mr Garry Clements
Australian Consumer Law Review Committee
Consumer Affairs Australia and New Zealand

VIA Online Upload: <https://aclfeedback.treasury.gov.au/Produce/wizard/5ee0d504-0726-4197-ab1c-9f280c5a80a9/>

Dear Mr Clements

RE: AUSTRALIAN CONSUMER LAW REVIEW ISSUES PAPER

Strata Community Australia (Qld) (SCA (Qld)) thanks the Committee for inviting comments to the Australian Consumer Law.

SCA (Qld) is a non-profit, professional organisation for bodies corporate, body corporate managers and suppliers of services to the body corporate industry in Queensland. SCA (Qld), through its predecessor CTIQ, was established in 1984 and currently has more than 600 members. SCA (Qld) members administer around 65% of all strata titled properties in Queensland and up to 90% of all managed properties.

The core objectives of SCA (Qld) include:

- representation on body corporate and community title issues to Government;
- educating the general community on strata management and lifting the profile of the profession;
- provision of on-going professional educational development to its members;
- facilitating relationships between members, government, sponsors and suppliers of services; and
- the establishment and maintenance of professional standards of practice for SCA (Qld) members.

SCA (Qld) works closely with the Office of the Commissioner for Body Corporate and Community Management in Queensland and has a well established relationship with the Attorney General in regards to body corporate matters. The nature of our organisation enables us to assist in advising on strata community title living.

BACKGROUND

Currently there is no licensing or registration requirement for strata managers in Queensland, and there is no legal requirement to engage a professional body corporate manager for the administration of a strata scheme. However, due to the complexity of legislation, the profession has established itself and mostly self-regulates through voluntary membership with SCA (Qld). SCA (Qld) advocates for strata managers but also takes a consumer protection stance where it affect strata living.

This submission outlines in brief a few incidents where Australian Consumer Law affects the strata and community title sector.

1. Overlapping jurisdictions

Strata Community Australia (Qld) represents body corporate managers and suppliers to the sector. Body corporate managers administer strata schemes within the framework of the Body Corporate and Community Management Act 1997 (BCCMA), and the accompanying Regulation Modules¹.

¹ Body Corporate and Community Management (Standard Module) Regulation 2008, BCCM (Accommodation Module) Regulation 2008, BCCM (Commercial Module) Regulation 2008, BCCM (Small Schemes Module) Regulation 2008,

The BCCMA has dispute resolution provisions. Recently SCA (Qld) has been involved in an issue where jurisdiction of the BCCMA and the Australian Consumer Law overlapped so that the Office of Fair Trading applied dispute resolution outcomes despite the exclusive jurisdiction provisions of the BCCMA (section 229).

SCA (Qld) prefers to see the BCCMA as exclusive jurisdiction about matters relating to body corporate management contracts to avoid any such conflicts again in future.

2. Unfair commercial practices

The Issues Paper in section 2.4.1 addresses business models that are based on ongoing fees. Body Corporate Managers have ongoing fees and charge for goods or services according to a cost schedule provided with the engagement contract. SCA (Qld)'s concern is the provision of "a fee significantly disproportionate to the cost of providing the good or service".

SCA (Qld) seeks clarification on the definition of "disproportionate fees" to enable more transparency to the consumer while maintaining a balance to enable companies to continue operating.

3. Developer phoenix companies (Question 13)

SCA (Qld) supports a tightening of the phoenix company provisions to provide consumer confidence in new strata developments.

4. Safety provisions for materials (Question 14)

Recent reports about flammable cladding have caught SCA (Qld)'s interest, in particular as reports came afloat that those large scale imports were not sufficiently supervised and controlled. There have also been media reports about asbestos contaminated materials that were imported and used for construction.

SCA (Qld) supports a stronger safety standards regime where the importing of major goods is recorded to be able to be tracked.

FURTHER INFORMATION

SCA (Qld) is happy to send a representative to discuss this submission and the proposed reforms with an appropriate Review Committee representative. In this regard, the Committee may contact:

Mail: The President
 SCA (Qld)
 PO Box 1280, Spring Hill Qld 4004

Tel: 07 3839 3011
E-mail: president.qld@stratacommunity.org.au

Sincerely



Simon Barnard
President

2 October 2015

Mr Chris Irons
Commissioner for Body Corporate and Community Management
GPO Box 1049
Brisbane Qld 4001

Email: chris.ironson@justice.qld.gov.au

RE: Office of Fair Trading Jurisdiction

Dear Commissioner,

We write to you regarding a matter that has been raised by one of our body corporate manager members in Cairns (the **Member**).

Recently, the Office of Fair Trading (OFT) in Cairns has received and investigated the following complaints in relation to the Member:

1. a complaint by a person purporting to be representing a body corporate against the Member for alleged overcharging under the Member's administration agreement with the body corporate (the **First Complaint**); and
2. a complaint by a lot owner of a body corporate against the Member in relation to a levy notice received by the lot owner (the **Second Complaint**).

The First Complaint was made in January 2015 and resulted in the Member making a settlement payment to the body corporate after a long investigation by the OFT, including a meeting between an OFT officer and a representative of the Member.

In our view, a dispute of that nature can only be instigated by the body corporate and, since it concerns a claimed contractual matter regarding the Member's agreement with the body corporate, section 149B(1)(a) of the *Body Corporate and Community Management Act 1997* (the **Act**) requires the dispute to be determined by specialist adjudication under Chapter 6 of the Act or by the Queensland Civil and Administrative Tribunal (QCAT) exercising its original jurisdiction. In any event, since the complaint was made by an owner, that owner had no standing in relation to any dispute against the Member under section 227 of the Act.

The Second Complaint was made in August 2015 and is currently under investigation by the OFT.

In our view, the complainant has no standing in relation to a dispute against the Member and, if it has a genuine complaint about a contribution notice, the proper respondent is the Body Corporate pursuant to section 227(1)(b) of the Act. Your office has exclusive jurisdiction in relation to that matter.

Both complaints have caused considerable disruption to the Member's business and are very concerning to SCA (Qld).

Effectively, the OFT seems to be of the view that it is immune from the exclusivity of the dispute resolution provisions of the Act. That is particularly concerning to us because, if the practice continues, it has the potential to cause significant disruption and confusion not only to our members but to all stakeholders in the strata industry in Queensland.

Since you have the responsibility for the administration of Chapter 6 of the Act, we kindly request your written confirmation that the OFT does not have jurisdiction in relation to disputes of the above nature. Once we receive your correspondence we intend to include it as part of a formal submission to the OFT.

Please contact us if you require any further information in relation to this matter.

Thank you for considering this letter.

Yours Sincerely,



Simon Barnard
SCA (Qld) President

Strata Community Australia (Qld)
www.stratacommunityqld.org.au



Department of
Justice and Attorney-General

05 November 2015

Mr Simon Barnard
President
Strata Community Australia (Qld)
PO Box 1280
SPRING HILL QLD 4004

E-MAILED
05/11/2015

Dear Mr Barnard

Thank you for your letter dated 2 October 2015 regarding the exclusivity of dispute resolution provisions under the *Body Corporate and Community Management Act 1997* (the BCCM Act). I apologise for the delay in responding.

I note the SCA's concerns about the Office of Fair Trading (OFT) investigating complaints from unit owners about matters that could be resolved under the dispute resolution provisions of the BCCM Act. I also note the view of SCA that the exclusive jurisdiction provisions of the BCCM Act (section 229) preclude OFT from dealing with complaints about those matters.

As you know, it is not my role to provide legal advice or interpretations of provisions of the BCCM Act. That said, I have taken the opportunity to consult with the Office of Regulatory Policy within the Department of Justice and Attorney-General, as well as OFT, about the issues raised in your letter. I trust the following general comments will be of assistance in clarifying the exclusive jurisdiction provisions of the BCCM Act.

My Office is, as you are aware, primarily responsible for administering the dispute resolution provisions of the BCCM Act, although external specialist adjudicators and the Queensland Civil and Administrative Tribunal also have roles. OFT administers a range of consumer protection and other legislation in Queensland, including the Australian Consumer Law (ACL).

By way of context, the ACL is a single, national law concerning consumer protection and fair trading, which applies in the same way nationally and in each state and territory. The ACL consists of schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth) and is applied as a law of Queensland under the *Fair Trading Act 1989*. The ACL is jointly administered and enforced by the Australian Competition and Consumer Commission, state and territory fair trading agencies, and the Australian Securities and Investments Commission on relevant matters.

Enquiries:
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It is important to note that the ACL is a generic consumer protection law that has wide application across the marketplace. It covers general standards of business conduct, prohibits unfair trading practices, regulates specific types of business-to-consumer transactions, provides basic consumer guarantees for goods and services and regulates the safety of consumer products and product-related services. Like any business, people providing body corporate management services have a range of obligations under the ACL, including for example, to avoid particular unfair business practices. Information and resources to assist businesses comply with the ACL are available at www.consumerlaw.gov.au.

There are particular types of disputes that may be resolved under the dispute resolution provisions of the BCCM Act. "Disputes" are defined under the BCCM Act by reference to combinations of parties to a dispute (section 227). For example, a dispute (for the purposes of the dispute resolution provisions) could arise between the body corporate for a community titles scheme and the owner of a lot included in the scheme or between the body corporate for a community titles scheme and the body corporate manager for the scheme. As you point out in your letter, section 229 of the BCCM Act establishes the exclusivity of the BCCM Act dispute resolution provisions, in relation to these "disputes" that may be resolved under the BCCM Act.

With this in mind, it is not considered that section 229 of the BCCM Act prevents regulators such as OFT from investigating potential offences arising under other legislation. I am informed that OFT's normal operating practice is to carefully consider and assess all complaints from members of the public to identify whether potential breaches of legislation administered by OFT (including the ACL) have occurred. If a complaint highlights a potential breach of OFT-administered legislation, then a range of investigation, compliance and enforcement options will be considered. OFT also proactively investigates potential breaches of legislation it administers, including through 'spot-checks' and similar compliance programs.

OFT does not have a role in the administration or enforcement of provisions of the BCCM Act (apart from a limited role in investigating potential offences relating to 'off the plan' sales of lots to be included in a community titles scheme). Similarly, dispute resolution officers under the BCCM Act do not have a compliance and enforcement role under the ACL or other fair trading legislation. If a complaint to OFT does not raise potential breaches of OFT-administered legislation, but does appear to concern matters arising under the BCCM Act, OFT will refer the complainant to my Office.

Accordingly, it is conceivable there would be a scenario which could form the basis of a "dispute" within the meaning of the BCCM Act, as well as raise the possibility that an offence has been committed under the ACL. Having said this, it is considered that the resolution of a dispute by way of a dispute resolution process under the BCCM Act (as contemplated by section 229 of the BCCM Act) is quite distinct from investigation and potential prosecution of offences undertaken by OFT under the ACL or other fair trading legislation. It is also relevant to note that OFT does not necessarily need a complaint in order to undertake its role as a marketplace regulator. In that sense, OFT's role can again be contrasted to the formal dispute resolution process under the BCCM Act.

An analogous situation arises in relation to bodies corporate and caretaking service contractors. More specifically, while particular disputes between bodies corporate and caretaking service contractors can be resolved under the dispute resolution provisions of the BCCM Act, this does not prevent OFT from investigating complaints about a caretaking service contractor in relation to their conduct and obligations as a licensed resident letting agent under the *Property Occupations Act 2014* (Property Occupations Act). Again, the remedy to resolve the dispute through the dispute resolution provisions of the BCCM Act is quite distinct from action OFT could take under the Property Occupations Act, which could include disciplinary action in relation to the person's licence, or prosecution for breaches of offence provisions.

I trust this information is of some assistance and I thank you for bringing this matter to my attention. I am happy to discuss this matter further at our next stakeholders' meeting.

Yours sincerely



Chris Irons
**Commissioner for Body Corporate
and Community Management**