

Victorian term limitation update

As we reported in early 2020 the Victorian government introduced legislation which sought to limit the term of management rights put in place by the developer to a maximum term of three years.

Whilst seemingly designed to overcome unduly onerous agreements put in place by strata managers and infrastructure service providers for substantial and often grossly inflated fees, the proposed legislation also covered caretaking and letting agreements.

Rather than follow the position in Queensland where there are strict disclosure requirements, specific contemplation of a developer establishing the management rights and a procedure for the review of the remuneration and the duties in caretaking agreement, the Victorian legislation sought to impose a blanket term limitation of three years.

The new laws were originally set to commence early 2020 but as a consequence of intense lobbying by industry representatives including Mahoneys and ARAMA and the intervention of Covid-19, the legislation did not pass through parliament until early 2021.

Fortunately, the proposed retrospective commencement on January 1, 2021, was removed



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and at the time of writing the legislation is yet to be proclaimed so has not yet commenced. However, it will commence no later than December 1, 2021.

As reported previously the legislation is poorly worded and arguably does not achieve the outcome sought but it is likely that lawyers and others will assume that the new laws will be interpreted by VCAT to have their desired effect. The legislation will continue to have a huge impact on developers selling management rights off the plan.

In relation to management rights the relevant section provides that if the developer enters into a contract (other than an owners corporation management contract) which relates to the owners corporation and benefits the developer, any term of that contract must not exceed three years.

To achieve the objective of the legislation it is likely that

the section will be treated as covering contracts with an owners corporation that are entered into at a time when the developer controls the owners corporation. In other words, the section will catch service contracts and letting agreements entered into at the inaugural general meeting where such contracts benefit the developer.

It is also likely that "benefits" will be given a very wide meaning and will extend to contracts with entities in which the developer has any type of financial interest including where the developer receives a benefit from causing the owners corporation to enter into such contracts – exactly the case in an off the plan management rights agreement.

Whilst the language used is open to other interpretations which do not have the dramatic consequences that this article suggests, experience to date shows that financiers and potential buyers of management rights off the plan are treating the legislation to limit the term of new management rights agreements to three years.

One of the concessions we gained from the government during our intense lobbying was an exemption for caretaking and letting agreements (and related licenses for the use of common property) for a hotel, resort or serviced apartment complex. Such agreements are exempt from the

three-year term limitation if the agreement "complies with the prescribed requirements (if any)".

These "prescribed requirements" are to be set out in the regulations to the act, but the regulations are yet to be enacted. It is expected that they will contain certain protections for owners corporations to ensure that the terms of those agreements do not adversely impact on the owners corporation. Given that the legislation is yet to commence and we are yet to see how the regulations will deal with caretaking and letting agreements in hotels, resorts and serviced apartment complexes, things are still very much up in the air.

However, where it can be said with certainty that within the next couple of months that a new complex will be completed, the owners corporation formed and the inaugural general meeting at which new management rights agreements are approved and entered into, a person buying the rights off the plan ought be confident that the term will not be limited to three years.

However, as we get closer to the likely commencement date of December 1, 2021, the level of uncertainty for all buyers off the plan will increase. For buyers of off the plan rights for hotels, resorts and serviced apartments, only when we see the regulations and how they apply will that uncertainty subside. ■



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