

EXTENDING OR RENEWING MANAGEMENT RIGHTS AGREEMENTS

Bodies Corporate are regularly asked by resident managers to extend or renew management rights agreements. Mostly this is done with a minimum of fuss, particularly where the owners have had a good experience with their resident manager. Other times the manager's request is met with opposition and hostility, perhaps because the owners believe their manager has been performing badly or perhaps because one or more individual owners (who are usually also committee members) believe they are giving something away or losing control.

Management Rights have been around for a long time – some 40 years in fact. In that time they have been subject to many reviews and legislative changes. The management rights provisions in the current legislation, the Body Corporate and Community Management Act 1997, were the culmination of a major review in the early 1990's following the release of a green paper, a further review in the mid 1990's after the proposed 1994 legislation was passed but never implemented and yet another review of the 1997 legislation during the early 2000's resulting in significant changes from 2003.

At the time of each review, interest groups particularly the Unit Owners Association of Queensland (UOAQ), played an active role and were very vocal in their demands for short term agreements and for the ability for a Body Corporate to itself be able to "sell" management rights. In the lead up to the 1997 Act, distinguished strata and community management lawyer Gary Bugden, widely recognised as Australia's leading lawyer in this field, headed the State's review and drafting of the Act. Management rights was a very extensively and hotly debated subject in that review. Mr Bugden and various other government representatives listened to the arguments from all interest groups before finalising the legislation.

As had been the case some years before, groups like the UOAQ (even though representing a tiny percentage of unit owners), complained vigorously about management rights and demanded all sorts of changes that would have all but destroyed the management rights industry. Representatives from the Body Corporate Management industry, the tourism industry, the management rights industry and the REIQ also took part in the debate. The resultant legislation came about after the arguments and submissions of all interested groups were scrutinised and balanced.

One particular aspect of management rights that was the subject of much debate was the term of agreements. The outcome, a 10 year maximum in the standard module and a 25 year maximum in the accommodation module, was an outcome that achieved broad support from those that took part in the consultation process.

Then in 2001 and 2002, as part of its next review, the government set up a number of working groups where unit owners and industry groups spent many hours, indeed days, with senior departmental staff reviewing the 1997 legislation and having many of the same debates and discussions as those 5 years earlier. Again the extreme policies of the UOAQ were seen for what they were and whilst there were some changes made to provide a better balancing of the interests of all parties, their extreme demands were rejected.

Again the issue of the term of management rights agreements was raised and discussed at length. Quite sensibly, the government put in place a mechanism where the term of an existing agreement could not be extended other than by way of a variation to the agreement to add a further option. Strict rules for doing that were set – secret ballot, only one variation in any year, the circulation of a summary of the existing agreement and a maximum of 5 years for the option period.

So when considering the current management rights regime in Queensland, it is important to understand that it has come about after this extensive consultation and scrutinisation and ought to be regarded as a fair balancing of the interests of all interested parties.

The reality is that history has shown that in large community titles schemes, management rights, where the resident manager has a vested interest in the complex and the business, is the most efficient and effective form of management, providing sound onsite management and good returns for letting owners. That is not to say that there are not some bad managers. There are, but the legislation (and usually the agreements themselves) provide mechanisms to effectively deal with the relatively small percentage of problem managers.

The legislation recognises the importance of stability in the management of buildings. It also recognises the unfairness of a body corporate holding a resident manager to ransom in relation to renewing existing agreements by forbidding bodies corporate from obtaining a benefit on granting new agreements or extending existing agreements.

Management rights, for their success, depend on a sound tenure. That is something that a manager and a financier insist on and is the reason why managers regularly seek to "top up" their agreements back to the initial term (by adding a further option) as provided for in the legislation. The industry recognises that a body corporate is not obliged to extend the term of existing agreements but believes there are sound commercial reasons why it should.

It is in the interests of a body corporate to have valuable, stable long term agreements in place. Such agreements give a body corporate the best chance of attracting a good manager, one who is prepared to firstly put up the capital needed to acquire the management rights business and secondly to perform as required under the agreements in order to protect that capital. On the other hand, potential managers prepared to risk their capital on their performance will not be interested in short term agreements or in complexes where the body corporate is unlikely to support an additional option/s. The manager's significant financial investment in the building is the principal reason why management rights work.

Assuming an existing agreement is soundly drafted and working well, extending its term allows a body corporate to lock in the performance or other standards set out in the agreement. It shows the manager that he or she has the support of the owners giving the manager both confidence and enthusiasm. An enthusiastic manager building up his business not only leads to an increase in the return for unit owners, but also increases the value of the units in that building because of the increased return in comparison to others and the attractiveness of a building with sound and harmonious onsite management.

The topping up of agreements back to, or close to, their original term, whether that be 10, 20, 25 or some other number of years, is the norm. The legislation recognises the appropriateness of the 10 year limit for some buildings and a 25 year limit for others – topping up agreements back to the original term is just as appropriate. Whilst opponents suggest that these periods are far too long and could force a body corporate to accept a poorly performing manager for many years, they fail to point out the myriad of ways a body corporate can deal with problems that might arise during that time.

Some opponents of management rights suggest that the term of agreements should not be extended as to do so in some way means that the body corporate is giving away control of the building to the manager. Such claims are often made by opponents who want to control and dominate (and often bully) the manager but find that the legislation actually ensures that the relationship is more balanced than they would like. Because they cannot dominate and bully, they resort to claims that the manager has all the control. What they are really complaining about is not that the owners have lost control but rather that they themselves cannot control and dominate the manager and other owners.

Once it is recognised that the manager's financial interest in the building is important, it makes sense to preserve the value of that asset for the benefit of the manager and the owners by supporting reasonable extensions to the term of agreements. Opponents argue that because a body corporate has no control over to whom the management rights might be sold, it should not support long term agreements or extensions of the term of existing agreements. The reality is that a body corporate does have control over to whom the rights can be transferred. It can insist that any proposed transferee of the rights have the appropriate qualifications and experience to perform all the requisite duties. Also, whilst it is true that managers do come and go, regulated turnover of managers every few years can promote new ideas and renewed enthusiasm.

Opponents also argue that extending existing agreements takes away the option for a body corporate to put the management rights out to tender, or implement a new management system, at the end of the term. Until recently these opponents were hailing the decision at Cathedral Place in Brisbane as the example all bodies corporate should follow. Cathedral Place refused to extend the manager's agreements, allowed them to come to an end, put the management out to tender and appointed the successful tenderer to the position of manager. The Cathedral Place experiment has been a disaster. All sorts of security and other problems arose because the replacement manager did not reside onsite or have an onsite presence. The Bodies Corporate had to pay the newly engaged offsite manager \$250,000 compensation for the early termination of its agreement. Not surprisingly owners at Cathedral Place recently voted overwhelmingly to abandon the unsuccessful experiment.

To quote from the chairperson of one of the bodies corporate that make up Cathedral Place:-

"It is apparent from the dismal failure experienced at Cathedral Place that if the onsite manager does not have a financial investment in the building or does not face a financial risk in the case of poor performance, there is little incentive to perform to an acceptable standard. It is my observation that an onsite manager must have a vested financial interest in the complex and the business in order to ensure an appropriate level of performance and accountability.

The proponents of the new system claimed it would give the Bodies Corporate or the unit owners more control. In fact we finished up with less control, more problems, increased levies, many disputes, massive legal costs and the Bodies Corporate having to pay huge compensation for damages for dismissing the new manager."

Extending existing agreements by adding a further option is a common and well recognised practice. It offers real advantages to managers and bodies corporate.

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