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Caretaking and Letting Agreements

Extensions

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What We Will Cover

- My Thoughts, Initial Overview.
- Relevant legislative provisions.
- Key termination and definitions.
- Key statements within the explanatory material and notes.
- Current industry practice.
- Can a body corporate reasonably say no to an extension/top up?
- Case study.
- Schools of Thought.
- My thoughts.
- Case study.

Disclaimer: This webinar and power-point has been provided as a general guide only, and should not relied upon as legal advice. Please ensure you seek legal advice for your individual scheme.

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My Thoughts… Initial Overview

- Respectfully, I do not read the legislation to be so clear as to support a position that there is a cap on the number of subsequent rights or options which can be granted in respect of an Originating Agreement. It is certainly not the case that I don't agree that there should be a cap, however simply that I interpret the legislation differently.
- I can, however, understand and see merit in the argument and I would be extremely interested to see where the Tribunal sits on the matter.
- Irrespective of the above, and in my opinion, there is already a cap which exists on caretaking and letting agreements – being the maximum 25 year term for Accommodation Module schemes and 10 year term for Standard Modules schemes.
- Bodies corporate are under no obligation whatsoever to agree to subsequent rights or options to extend agreements. The Body Corporate is not a rubber stamp!
- Bodies corporate do have a say, and are entitled to say 'no' to a motion which proposes to insert a subsequent right or option in the agreements.
- In my opinion, in order to break the current cycle that we see in management rights in Queensland, owners and committees need to ensure that they are educated on the body corporate's legal position, requirements and entitlements. More often than not, I will receive a shocked response when I advise committees that owners do not have to agree to a proposed right or option, or better yet the Committee can work with the Caretaker so that the variation supports both parties' best interests.

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Accommodation Module

Term of Engagement

"130 TERM OF ENGAGEMENT OF SERVICE CONTRACTOR [SM, S 140]

(1) The term provided for in the engagement of a person as a service contractor, after allowing for any rights or options of extension or renewal, must not be longer than 25 years.

Example—

The engagement of a service contractor begins on 1 January 2021 and is for a term of 15 years with a right of renewal of 10 years. The engagement can not end later than 31 December 2045.

*(2) The body corporate **may** subsequently amend the engagement to include a right or option of extension or renewal (a "subsequent right or option") only if—*

(a) the subsequent right or option is for not longer than 5 years; and

(b) the unexpired term of the engagement, from the day the resolution approving the subsequent right or option is passed by the body corporate, is not more than 25 years; and

(c) section 125 is complied with for the amendment.

Example—

The term of the engagement of a service contractor is 25 years beginning on 1 January 2021. On 1 January 2026, the body corporate could amend the engagement to include a right of renewal of 5 years.

(3) If the unexpired term of the engagement purports to be longer than 25 years, it is taken to be 25 years.

(4) To remove any doubt, it is declared that at the end of the term—

(a) the engagement expires; and

(b) the person can not act again as a service contractor without a new engagement."

(my emphasis added)

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Unexpired Term

126 DEFINITION FOR PART [SM, S 136]

In this part—

"unexpired term" , of an engagement of a person as a service contractor or an authorisation of a person as a letting agent, includes the term of—

(a) a right or option of extension or renewal of the engagement or authorisation, whether provided for in the engagement or authorisation or subsequently approved by the body corporate; and

(b) a subsequent right or option, under section 130(2) or 131(2), for the engagement or authorisation.

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Body Corporate and Community Management and Other Legislation Amendment Bill 2002 – Explanatory Notes

- *"However having regard to the fact that these agreements were imposed on bodies corporate by developers during the regime of the Building Units and Group Titles Act 1980, with no opportunity for the body corporate to renegotiate a more defined option period (usually found in most contracts), and that the BCCM Act imposes term limitations with a maximum period of 25 years, the limitation on these agreements is seen as balancing the rights of the body corporate as a whole, as against a single person in the body corporate whose contractual rights were perpetually imposed over the wishes of the body corporate without opportunity for renegotiation." (page 12)*

- *"Each of the Body Corporate and Community Management Module Regulations will provide the body corporate with the ability to extend all the letting authorisation or service contractor engagements. That ability will only be available if the body corporate votes by secret ballot. The opportunity therefore remains with the body corporate not to extend any contract. The secret ballot will minimise the influence of the letting agent or service contractor over the granting of the extension. The amendment returns to the body corporate the control over letting authorisation or service contract engagements as well as giving a reasonable time for existing contracts to run." (Page 65)*

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Current Industry Practice

Accommodation Module Schemes - Originating Agreements

(the Caretaking and Letting Agreement or Deed of Engagement or Authorisation)

- Originating Agreements can consist of a full 25 year Agreement, or consist of an initial term plus options (up to the maximum 25 year term) - for example a 10 year initial term and 3 x 5 year options.
- It is the term provided for in the initial/originating Agreement(s) and acts to satisfy Section 130(1) of the Accommodation Module.
- There is usually contractual requirements as to how these options are to be exercised by the Caretaker/Letting Agent. For example, the Caretaker must provide written notice to the Body Corporate no more than 6 months however, no less than 3 months from the expiration of the current term (perhaps the initial term) of its exercise of the option.
- This clauses can vary quite dramatically. There can be greater preconditions placed on the Caretaker or there can be almost automatic preconditions. There can also be a requirement that the Caretaker not have any un-remediated breaches under the agreements. It is therefore important for bodies corporate to obtain legal advice on its specific contractual clause and what is required of the Caretaker.

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Current Industry Practice

- If the Caretaker fails to exercise the option, or fails to meet its contractual preconditions (e.g. served the notice out of the timeframe provided) there could be grounds for the Body Corporate to deem the agreements as ended.
- The contractual obligation to exercise usually rests with the Caretaker. However, more often than not, the Body Corporate will be called upon in deeds of variation or assignment to acknowledge and confirm the proper and correct exercise of previous options.
- So long as the Caretaker satisfies its preconditions and contractual requirements, it is difficult for bodies corporate to challenge the exercise of these types of options.
- In most agreements there is no requirement for the exercise of the option to be subject to further body corporate approval or at the very least committee approval.
- The reason for this is that the Body Corporate has already agreed to this term. It agreed to enter into an Agreement which included those options. Accordingly, it is bound by that acceptance and its only governance is to ensure that the Caretaker honours its contractual obligations in how and when that option is exercised.

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Current Industry Practice

Subsequent Rights and/or Options

- Subsequent rights and/or options fall within the ambit of s130(2).
- While they include similar terminology to the 'options' in Originating Agreements, the difference is, in practical terms, that the Caretaker is asking for an **additional** right or option outside of the Originating Agreement. Put simply, what the Caretaker is asking the body corporate for falls outside the terms previously agreed to in the Originating Agreement.
- A subsequent right or option:
  - Triggers the requirement for body corporate approval at a general meeting, which means the body corporate (i.e. owners) have a greater level of 'say' when it comes to approving or refusing the subsequent right or option;
  - Must be considered by ordinary resolution, secret ballot, and without the use of proxies. The secret ballot requirement gives owners the opportunity to anonymously 'have their say' on the motion without fear of adverse repercussions in the event that they vote 'no' to the subsequent right or option.

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Current Industry Practice

- To seek a subsequent right or option the Caretaker must:
  - Submit a motion to a general meeting – it must be carried by ordinary resolution, secret ballot and without the use of proxies.
  - Prepare a deed of variation – quite simply the deed records the variation/change to the terms of the Originating Agreement by the inclusion of a subsequent right or option.
  - Submit with the motion a BCCM Form 20 explanatory note. The legislation (s.125(2)(c)(ii) of the Accommodation Module) requires this explanatory note to accompany a motion which seeks owners approval for a subsequent right or option, so that owners are aware of the nature of the amendment.
- There are limitations on subsequent rights and/or options, being:
  - Only one (1) motion/deed for a subsequent right or option can be considered in each financial year of the body corporate; and
  - The subsequent right or option being sought cannot be more than 5 years at any one time; and
  - The total remaining term (as at the date of the general meeting resolution) cannot be any greater than a total of 25 years including the subsequent right or option.
    - It is common practice for Caretakers in Accommodation Module Schemes to seek an extension once its agreements remaining terms hits 20 years.
    - The greater the term, the more attractive the asset is and in turn the most saleable the agreements are.

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Can the Body Corporate Reasonably Say 'No' to a Subsequent Right and/or Option?

Castaway Cove [2006] QBCCMCmr 452 (17 August 2006)

"While I accept that the caretakers think it would be unfair if the Agreements were not renewed or extended, that is the contractual term that they signed up to and is certainly not unreasonable for the Body Corporate to simply abide by the current Agreements and no more. Similarly, while some owners bought into the scheme on an expectation of on-site caretaking, they should have been aware that the caretaking and letting arrangements for the scheme were for a fixed term and there was no guarantee that all owners would agree to continue the Agreements.

I consider that there is nothing inherently unreasonable in owners passing a resolution that expresses their view that the scheme work towards a situation of no on-site caretaking."

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Castaway Cove [2006] QBCCMCmr 452 (17 August 2006) continued…

"The caretakers were, or should have been, aware when they purchased the management rights of the term of the Agreements and that the Body Corporate had absolution no obligation to extend or renew the Agreements. They signed a contract for a fixed term and the remuneration provided to them is for that term alone. While they may have harboured hopes or expectations of a greater return on their 'investment' through an extension or renewal that they could either serve themselves or sell, the Body Corporate is not required to provide them with a saleable asset. It is unfortunate if their legal advice at the time of their purchase did not make them fully aware of the inherent business risks involved in purchasing management rights. Arguably, caretakers must 'earn' an extension or renewal by providing good service to all owners (whether in the letting pool or not) in the scheme. This is the nature of the management rights industry."

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Schools of Thought

Neil Hope, Dane Weber and Maija-Ilona Wilhelmiina (Authors)

- "Management Rights Agreements for Body Corporates in Queensland: Must They Expire, or May They Be 'Topped Up' Indefinitely?"
  - Neil Samuel Hope , Dane Bryce Weber and Maija-Ilona Wilhelmiina Pekkanen, 'Management Rights Agreements for Body Corporates in Queensland: Must They Expire, or May They Be Topped Up Indefinitely?'(2020) 38 *Qld Lawyer* 175-190.
- "The Statutory Life of Caretaking Service Agreements in Body Corporates in Queensland: The Exception to the Freedom of Contract Principle."
  - Neil Samuel Hope and Dane Bryce Webber, 'The Statutory Life of Caretaking Service Agreements in Body Corporate in Queensland: he Exceptio to the Freedom of Contract Principle' (2021) 39(1) *Queensland Lawyer* 39-54

Summary of Authors argument:

- There is a statutory life of Caretaking and Letting Agreements, namely:
  - Accommodation Module Schemes – 25 years plus one 5 year option;
  - Standard Module Schemes – 10 years plus one 5 year option.
- The explanatory material to the originating bill supports that agreements should have a maximum term.
- The argument is that section 130(1) of the Accommodation Module provides for an initial term of 25 years and 130(2) provides for a (singular) subsequent right or option. Therefore, the total life of the agreement should not exceed 30 years.
- By using singular language and referring back to the explanatory material, the argument is that the maximum term should then be read down to 25 years plus one 5 year option. The Authors argue that after that total term a new agreement needs to be agreed to and entered into by the parties.

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My Thoughts

- The research invested into the school of thought is invaluable, however as acknowledged in the articles it is yet to be tried and tested before the Tribunal.
- Until such time as this argument has been tried unfortunately, the merits of the position are largely unknown.
- What we can, however, rely on are the decisions already handed down by the Tribunal, because these form precedents.
- In my opinion, while I do not necessarily agree with the position, the decisions handed down to date seem to support a position that there are no caps on subsequent rights or options (i.e. there is no limitation on the number of subsequent rights or options that can be granted).
- Again, we stress the Tribunal has not yet been asked to determine this question. Accordingly, all we can do as strata lawyers at present is draw analogies from other decisions.

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Mariners North [2004] QBCCMCmr 344 (30 June 2004)

"28. The intention of the legislature is principally discovered by an examination of the Act itself. If the legislature intended the tests to be so difficult that every purchase agreement would have to be entered into before the notification day, then surely it would have used clearer language to achieve this result. This is particularly so having regard to the fact that this provision is retrospective legislation and as such would have been specially sensitive. To my mind the position is somewhat analogous to the position in Blue Metal Industries Ltd v. Dilley [1969] UKPCHCA 2; (1969) 117 CLR 651. In that case the Privy, Council in the context of takeover legislation, interpreted "company" in the singular. The Privy Council took the view that if the legislature intended the provision to apply to the takeover of more than one company, then it would not have relied solely on a rule of interpretation, but would have made its intention clear."

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Mariners North [2004] QBCCMCmr 344 (30 June 2004)

- This Decision involved a very different factual matrix and that it could be argued in a number of ways. However, a reasonable analogy to draw from the above quote, to the specifics of this webinar, would be that if the legislature had intended for s130(2) to be capped to permitting only one (1) subsequent right or option for each Originating Agreement, it would have made its intention clear in that regard.
- In our respectful opinion, on a plain English reading of s130, it is not clear that the intention is for any subsequent right or option to be capped to one (1) per Originating Agreement.
- This is especially so given those relevant sections of the Accommodation Module including the fact that any subsequent right or option:
  - Has to be considered by the body corporate at a general meeting;
  - Must be considered by a secret ballot, to give owners the chance to 'have their say' without fear of adverse implications;
  - Can only be considered once per financial year of the body corporate.
- In furtherance, this position is supported by the Acts Interpretation Act and most modern caretaking and letting agreements whereby in the interpretation provisions, words denoting the singular include the plural and vice versa.
- As held in *Castaway Cove*, the decision as to whether or not to approve a subsequent right or option is the body corporate's to make. Unlike the common myth in the industry that Caretakers are entitled to a subsequent right or option, owners do have a say on whether the subsequent right or option is approved, and should be voicing it.

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My Thoughts… Summary

- As the industry currently stands, with regard to current industry practise but also analogies from case law, I do not interpret the legislation to cap extensions/top ups to one (1) per Originating Agreement.
- If a Committee/ Body Corporate is out there that wants to test this theory please contact me!
- In my opinion, there is already a cap which exists on caretaking and letting agreements – however the problems are arising from the misconceptions and myths of the industry that the body corporate is a rubber stamp and has no say.
- For this pattern to be broken, the industry requires either:
  - A question to be put to the Tribunal on the statutory interpretation of section 130;
  - An amendment to the Regulation Modules; or
  - More likely, education given to committees and owners that in most circumstances it is reasonable to say no to top ups.

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Thank you!

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