



Management rights variations, extensions, assignment and remedial action notices

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Chain of title

- Unlike titles documents – there is no registry or database that manages these contracts
- Similar to what existed before electronic titles – needed to hold the physical title to show proof of ownership of an asset
- Management rights contract works the same. Original agreement shows original manager. When the agreement is assigned or varied how is that evidenced? Only through deeds of assignment and variation.

Document	What does it achieve
Caretaking agreement	Core document showing terms of the contract (including party)
Letting agreement	Core document showing terms of the contract (including party)
Deed of variation	Supplementary document showing changes to the core documents
Deed of assignment	Supplementary document showing changes to the parties. Only way to prove ownership
Deed of extension	Supplementary document confirming an option has been extended

What is a variation?



- It is simply changing an existing contract. A change to any contract simply needs both parties to agree – it is the same for a management rights variation
- Not limited to management rights and is the same as changing any other contract like your employment contract, contract to buy a house, etc.
- For the manager to agree – it is much simpler than the Body Corporate. But in theory they need approval consistent with the terms of the company's constitution. As most managers are small companies (or are individuals) this is normally not considered
- For the body corporate to agree – it is a much more complicated and technical process because of the terms of the BCCMA

Body Corporate agreement



- The regulation modules provide that a management rights agreement can only be varied if the following requirements are met:
 - An ordinary resolution is passed approving the amendment without any proxies. This is why it creates the additional burden and difficulty for the body corporate
 - The agenda for the general meeting includes the “terms and effect” of the variation
 - If the variation is to amend the management rights agreements for an option the following additional requirements must also be met:
 - The motion is considered by secret ballot – which is why a returning officer is required, increasing the costs of the meeting to the body corporate
 - The approved explanatory note – which is why the BCCM Form 20 is also sent

Why do they happen?



- Variations can happen for any number of reasons including:
 - An agreed change to the duties
 - Changing the residential obligations of the manager
 - The manager seeking an increase to the remuneration
 - Removal of invalid or unwanted clauses, for example, dispute resolution clauses or termination clauses
 - Changes in legislation or the interpretation of particular sections of the BCCMA, for example, "Gallery Vie"
 - An increase in the term of the agreements

Committee's position



- Any properly submitted motions must be included on the agenda of the upcoming general meeting (assuming it has been submitted on behalf of a lot owner and within the correct timeframes)
- The committee can:
 - seek to negotiate changes but the:
 - manager does not need to agree to them, but often will if they are reasonable
 - body corporate is restricted from seeking or accepting the payment of an amount or a benefit in exchange for granting an extension
 - support, lobby against or have no view on the variation
- The committee should make sure that the variation is properly considered at general meeting with the necessary requirements. Otherwise it may be forced to reconsider the variation at another general meeting at a further cost
- If it is approved, the body corporate has an obligation to advise the manager's financier of any change. This is rarely followed though

Costs



- As with any other issue (except for assignments) the starting position is that each party will bear their own costs. This means the:
 - manager would pay for the costs of their lawyers preparing the variation documents; and
 - body corporate would pay for its own cost of the:
 - general meeting
 - returning officer
 - any legal costs
- However, the manager will usually agree to bear all or some of the body corporate's costs as a trade off with any benefit the manager may receive as a result of the variation (for example, a further 5 year extension of the agreement)

Top ups



- Is simply a variation to the clauses that regulate the length of the management rights agreement
- Usually done by including a new clause that bolts on a further term starting the day after the current expiry
- Can only be for a maximum of either:
 - 5 years; or
 - To the relevant module's limit (Standard = 10 years, Accommodation and Commercial = 25 years)
- The clause that is inserted will usually require the manager not to be in breach of the agreements for the extended term to be available and either:
 - be an automatically exercised option
 - require notice to be given during a timeframe

Gallery Vie



- Long story short is that:
 - A manager breached the agreement and the body corporate had the right to terminate the agreements
 - The financier took control of the business which means that the body corporate cannot terminate the agreement because of the manager's breach unless another breach happens during this control period
 - Another breach happened during the control period even though it was not the financier's fault
 - The financier (and the wider industry) thought that because the second breach was not the financier's fault the body corporate can't terminate the agreement
 - QCAT disagreed and said that the second breach allowed the body corporate to terminate the agreement and there was no protection to the financier
- Has been blown out of proportion – has only happened to 1 scheme in the history of management rights and the body corporate still didn't terminate the agreements. However, all financiers then required any management rights agreements to now fix any gallery vie issues
- The solution was to vary the management rights agreements to adjust the second breach to not allow termination if the financier wasn't at fault
- Has slowly been filtered out and most agreements will have had the one-time fix completed by now

Separating manager's lot from the business



- More and more common
- Property value has increased; management rights value has not
- Has created a barrier of entry into the market – buying a \$200k management rights business requires an investment of real estate of more than \$2M (Teneriffe)
- Also needs to consider a variation to the by-laws – so that the person buying the lot does not have special rights granted to them
- Need to consider what to do with office/reception – is it on title or is it common property
- Pros:
 - more managers available - larger pool of available contractors
 - Manager not at heightened risk of financial distress
- Cons:
 - Manager offsite/harder to get in contact with
 - Less investment in the scheme – may not be as interested as an onsite manager

Submitted documents and what to look for



- The submitted documents normally include:
 - Motion
 - Deed of variation
 - BCCM Form 20 (if it is a top up)
- Motion (what to look for):
 - is it made subject to the manager paying the body corporate's costs
 - does it properly approve entry into the exact deed attached to the agenda
 - does it accurately explain the terms and effect of the variation
- Deed (what to look for):
 - is it made subject to the manager paying the body corporate's costs
 - is it limited to what the motion says it is going to do (i.e. nothing else has been slipped in)
 - what is the actual effect of the changes
 - what assurances and warranties are the body corporate providing
- BCCM Form 20 (what to look for) – whether the information is factually accurate

What a body corporate manager needs to do



- Check that the documents have been submitted properly – timing with the AGM and the party who submitted them
- Arrange for a returning officer if the variation relates to a top up
- Seek instructions from the committee as to whether they would like to engage a lawyer to review the documents on the committee's behalf – this is not a requirement but as the manager ordinarily will pay some of the costs it is a good level of protection for you to at least ask the question
- Make sure the final form documents after any changes have been made are the documents that appear on the general meeting agenda
- If approved, ensure that the body corporate signs the correct deed properly (2 committee member signatures under seal with one of the signatories being the chairperson or secretary)
- If approved, advise the manager's financier

Extensions



- Extensions encompasses the process of when a top up is triggered
- Top up may be automatic – no need for anything to take place. Sometimes the committee will be asked to sign a deed of extension acknowledging that the term automatically extended.
- Top up may require notice – if that is the case, all that needs to happen is that notice is given:
 - Within the correct timeframes contemplated in the option clause (which is strict – 1 day late means not exercised); and
 - In the correct manner – the agreement will set out a process to serve notices.
- Top up may require “renewed” or “new” agreements to be entered into – rarely takes place.
- Can be seen as rudimentary – but can be a very technical area when the conditions of an option being exercised are examined.

Documents



- Note that there was no reference to a need to pass a motion or enter into a deed of extension – most likely just for the manager to serve the notice on the body corporate.
- The deed of extension commonly sent through is preferred because it records for the benefit of both parties whether the notice was correctly provided to avoid future uncertainty
- The motion is to authorise the body corporate’s entry into the deed – can be approved at committee level.
- Costs – unless agreement specifically says – costs borne by each party. Manager will usually agree (like variation) to bear the body corporate’s costs.
- Things to look out for:
 - Deed seeks to include agreements, acknowledgements or warranties that are beyond the simple recording of the option being exercised.
 - Requests to sign the deed for options that were not properly exercised.
 - **Deeds being signed too early – there are still conditions that need to be satisfied (i.e. not in breach).**

What is an assignment?



1. The caretaking service contractor has a legal right in the management rights agreements.
2. That legal right (just like any other type of property) can be sold to another party
3. This transfer is given effect to by way of novation, commonly referred to as an assignment.
4. Because the body corporate is a party to the agreement that creates the legal right, its approval to the transfer is needed

Body corporate agreement



1. Threshold of approval:
 - The committee has the power to consent to the assignment as long as the body corporate has not previously made such a decision a restricted issue.
 - If consenting to the assignment is a restricted issue, a general meeting is required to consider the motion.
2. What the committee can consider:
 - Character, competence, qualifications and experience of the Buyer and any related persons
This would ordinarily be satisfied by providing resumes, personal references, business references credit checks, police checks and copies of any qualifications of the Buyer and related persons.
 - Financial standing of the Buyer
This would ordinarily be satisfied by providing confirmation of finance approval from a lender or statements of assets and liabilities of the Buyer.
 - Training of the Buyer and any related persons
This would ordinarily be satisfied by providing confirmation of the training that the Buyer and related persons have carried out or will carry out.
 - Proposed terms of the assignment
This would ordinarily be satisfied by providing copies of the deed of assignment, and arguably, a copy of the contracts of sale for the management rights business.
 - Provisions of the management rights agreements

Committee's position



What the body corporate must do

Make a decision whether to consent to the assignment within 30 days after it receives the information reasonably necessary to decide. This means:

- not all information that the body corporate is entitled to must be provided for the 30 day period to start; and
- until sufficient information is provided, there is no time restraint on the body corporate.

What the body corporate can do

Ask questions, carry out an interview, require its costs be reimbursed, insist on additional training

What the body corporate can not do

Unreasonably withhold consent or seek to leverage the request for consent to force variations of the agreement

Submitted documents and what to look for



Motion

- Factually correct – refer to correct parties and agreement
- Subject to costs
- Authorises entry into deed

Deed

- Key part of the entire transaction
- Provides the body corporate's consent. Does not need to do anything more than that but always does
- Need to make sure it doesn't include clauses the committee shouldn't (or can't) agree to. For example:
 - variations to the agreement
 - warranties that options have been exercised
- No obligation on body corporate to provide assurances but often ok to do so to facilitate transaction

What a body corporate manager needs to do



1. Recognise when a request is made
2. Be aware of the 30 day deadline – but not panicked by it
3. Provide committee opportunity to obtain legal advice (and let them know usually they don't have to pay)
4. Facilitate meeting with the buyer if the committee wants
5. Not be responsible for performance of buyer
6. Managing committee expectations

Management rights breaches



1. These disputes are framed in the BCCMA as a “complex dispute” meaning that adjudicators do not have jurisdiction. Needs to be considered by a specialist adjudicator or QCAT
2. When a breach exists the legislation sets out a prescribed process to address the situation
3. Formal notice is called a *remedial action notice* not a *termination notice*. This means the remedy is for the breach to be remedied not for the agreement to be terminated

When can a RAN be issued

When the caretaker has:

- engaged in misconduct or gross negligence in carrying out the duties in the Management Rights Agreements;
- failed to carry out duties in the Management Rights Agreements;
- contravened the code of conduct in the *Body Corporate and Community Management Act 1997* (Qld) (**BCCMA**); or
- failed to comply with its disclosure obligations for associates or commissions;

Requirements of a RAN



- a statement that the Body Corporate believes the Managers have done any of the acts in the prior slide
- details sufficient to identify the above statement – comprising clear evidence of the breaches which will ordinarily require a third party report which identifies the breaches at the scheme;
- details of the specific remedial action that may remedy the breach which:
 - allows the caretaking service contractor to understand what is required of them; and
 - only includes breaches that are capable of being remedied;
- a timeframe for that specific remedial action to be undertaken by, that must be more than 14 days (or a longer time if a longer time is reasonable);
- a statement that if the RAN is not complied with, the body corporate may terminate the management rights agreement that is being breached; and
- the Body Corporate's decision to issue the RAN being:
 - properly authorised and funded; and
 - reasonable.

Termination



- Termination of the agreement is a consequence of non-compliance with the RAN. However, that can still only happen in circumstances where:
 - the RAN is valid (prior slide);
 - the Managers do not comply with the RAN;
 - the Body Corporate passes an ordinary resolution by secret ballot at general meeting;
 - the decision to terminate is reasonable; and
 - there is no financier of the Management Rights Agreements that exercises its right to prevent the termination of the Management Rights Agreements. This is because the BCCMA provides the financier of a caretaking service contractor the ability to prevent the body corporate from terminating the management rights agreements even if all other requirements of a RAN and termination have been complied with.

Commercial considerations



- A RAN simply has to be disputed by the caretaker – locking it up in QCAT because the consequences (termination) are so significant
- Due to the financier rights, it essentially removes any practical outcome whereby termination is going to actually happen
- What happens at QCAT – forced into conciliation to try and reach a deal
- What happens when the financier steps in – will sell the business
- Alternative considerations:
 - What we find most appropriate is to shortcut the entire process and go directly to the likely end outcome and seek to negotiate (in lieu of a RAN or QCAT dispute):
 - New agreements (with better terms, potential transfer fee, new duty schedule, etc.); and
 - Assignment to a party that the committee approves in its absolute discretion (which goes beyond the usual assignment rights).
 - Variation / assignment / third party inspection

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BRISBANE

P: +61 7 3007 3777

F: +61 7 3007 3778

E: info@mahoneys.com.au

A: Level 18, 167 Eagle Street
GPO Box 3311, Brisbane 4001
QLD Australia

GOLD COAST

P: +61 7 5562 2959

F: +61 7 5575 7803

E: info@mahoneys.com.au

A: Level 2, 235 Varsity Parade
PO Box 482, Varsity Lakes 4227
QLD Australia

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www.mahoneys.com.au