



The committee's guide to
dealing with the assignment of
management rights agreements



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A bit about us

We are a refreshing experience to most traditional law firms. As examples of how we operate:

- **We are accessible** - We have direct lines. We don't hide behind secretaries and receptionists and filter phone calls.
- **We return phone calls and emails** - Simple – yes we know. But it is surprising how many lawyers don't return phone calls. It frustrates us when we have them on the other side of a matter, and we aren't even paying them!
- **Our office is open plan** - Not even the directors have offices. We have cut the traditional law firm overhead substantially, meaning cost savings that we can pass on to you.
- **We are very much a 'plain English' firm** - You won't get verbose advices from us including a lot of legal words that prove we have a law degree. We communicate very much on a layperson's level. Having acted for hundreds of committees over the years we know what you need to know and present that in an easy to read manner.
- **Lawyers find it very easy to recite the law** - What many lawyers cannot do is then apply that to your individual circumstances. We do that. If the law says you can do something, but we think you should not (for whatever reason) we will tell you. There is no point being legally correct but commercially wrong.

We are excellent value for money, and the proof of that is how many loyal clients we have. Some of these are new clients who asked around other firms, and the others are clients continue to use us and who trust us to do the right thing by them – which we do.

Just have a look at our website for the material we publish to both the body corporate and management rights industries.

Try us - you will be surprised at how different we are to the usual law firm experience.



Who this guide is aimed at

This is a guide for committees who have been asked to (or may soon have to) consider the question of consenting to the assignment of the management rights agreements for their scheme.

This guide does not answer all of the legal questions (as none of these things ever can), but it is designed so that you can understand generally what you have been (or will be) asked to do, and of course, direct you to where you can turn for legal help.

It starts to help understand the nature of a management rights business and from there the rest follows.

I am the secretary of a body corporate that has engaged Hynes Legal for advice on legal issues in relation to management rights and what the committee considered to be unfair and uncommercial management rights agreements. The opportunity to address these issues came about through the appointment of a receiver, and the desire of the receiver to be able to sell the management rights.

Whilst not without its difficulties, I believe that the advice from Hynes Legal on both a strategic and legal level has ended up producing an outcome for our scheme that is far more palatable to that which we would otherwise have had. Our building needs management rights – but just not in the form that we had thrust upon us.

I can recommend Hynes Legal to any body corporate with similar issues.

John Hyde, Secretary Noosa Blue Body Corporate



What are management rights?

Management rights are a unique style of business that only exist in a true sense in strata titled buildings. They are usually (but not always) a combination of two separate business components - caretaking and letting. Usually the person entitled to those rights will also reside in a lot in the scheme. For the purposes of this guide that person will be the 'resident manager'.

The first component is a caretaking contract. This is a contract for service (not one of employment) in which the body corporate engages the resident manager to provide services as set out in that agreement for a finite term.

The second component is a letting authorisation. This is where the body corporate as a real estate agent authorises a resident manager to provide letting services to owners who choose to appoint the resident manager as their letting agent. These letting services are not provided to the body corporate itself – only to individual lot owners.

A management rights business is usually tied to an individual piece of real estate in a scheme. This is usually a residence but quite often will include an office component of some sort.

These arrangements are collectively known as 'management rights'. The description above is what would be considered a standard management rights arrangement, but there are multiple variations on the same themes.

The management rights industry is a relatively large one with management rights arrangements common in smaller buildings who have 20 lots or so all the way through to the largest of complexes. They can apply to any style of complex including; permanent and holiday rentals, corporate lettings, student and seniors buildings.

Management rights businesses are usually sold on a multiple of the net income earned from them based on the work that a two person management team should be able to perform. The multiple can range from zero (for a very poor business) up to nearly six times (for an extraordinary business). The management unit is in addition to this. Obviously the pricing of management rights businesses is well beyond the scope of this guide but what is important to note is that when all of that is added up, a management rights business can have quite substantial capital value. In smaller management rights businesses the resident manager effectively buys themselves a job and in the larger ones a management rights business can be a full blown business enterprise.

There is a relatively active market in the purchase and sale of management rights businesses. If you Google 'management rights' you will find a plethora of information on them (including – (hopefully) - quite a bit about our firm) – but more on that later.



Why the committee is involved

The body corporate is the entity that has respectively engaged (as caretaker) and authorised (as letting agent) the resident manager.

As a party to the management rights agreements (even if the agreements themselves do not provide for it) the *Body Corporate and Community Management Act 1997 (BCCM Act)* requires that the body corporate must consent to the transfer of any interest of the resident manager in them. This transfer is also known as an assignment.

This right allows the committee to meet the buyer and ensure that they are capable of performing the job of the resident manager. The committee is effectively a gatekeeper for the interests of the body corporate as a whole so far as it relates to who the new resident manager will be.

Short of it having been previously made a restricted issue in a general meeting, almost all body corporate committees have the right to consent to the assignment without reference to owners in a general meeting. The committee can put it to general meeting if they want to, but almost all assignments are decided at committee level.

The management rights sale process

Usually a management rights contract will take somewhere between 60 to 90 days to settle from when the seller and buyer agree on the terms of the sale and sign the sale contracts.

Over the first 30 days of that period the buyer usually performs a due diligence on the business itself. This is usually a staged process where the buyer and their chosen advisors review the income earned by the business and then the legal components of it. The due diligence step is usually ensuring that finance can be obtained to purchase it.

Sometimes the committee will be aware that the management rights business is for sale and other times not. This will depend on the relationship each committee has with their resident manager and how actively a committee may monitor advertised listings of management rights businesses.

Once the contract is unconditional with respect to things within the buyer's control, the lawyers for the seller will normally write to the body corporate informing it that the management rights business has been sold and asking that the committee consent to the assignment of the management rights agreements.

That request will usually include a bundle of legal documentation together with information and material about the buyers. It is when this request arrives that the body corporate should engage the right lawyer to guide them through the assignment process.

A common complaint is that the committee may have been kept in the dark about the fact the management rights were for sale until the contract was unconditional. Why a resident manager may not inform their committee of the sale is because if the committee were to get involved before this stage and the sale did not meet due diligence standards or there were issues with finance, the body corporate would have incurred unnecessary costs in considering an assignment that never had prospects of going through.

When we are engaged at this stage we take control of the process.



'Our Body Corporate engaged the services of Hynes Legal five years ago. In that time, Frank Higginson and the team at Hynes Legal have undertaken work on a Caretaking Dispute and a Facility Sharing Agreement for us. Both of these matters reached a conclusion that our Body Corporate was very happy with. Hynes Legal also does our ongoing Body Corporate work which includes any motions required for our General Meetings. We have found Hynes Legal very efficient and their dealings with us were conducted in a totally professional manner.'

Lynne Dobbs, Chairperson of the Body Corporate for Brighton on Broadwater-Dune



The key elements of an assignment

There are really two elements to any assignment of management rights agreements. We call these the 'legal' element and the 'commercial' element.

The legal element of an assignment.

As you would expect, it is important that an experienced lawyer review all of the legal documents submitted for the purposes of the assignment and to ensure the body corporate's interests are protected.

The first thing is the motion to consent to the assignment. It needs to reflect the correct parameters and conditions (if any) imposed in relation to the assignment.

The other key legal document will be the deed of assignment itself. This is usually a deed to which the resident manager, proposed buyer and body corporate are a party. This deed will confirm the actual assignment of the resident manager's interest in the management rights agreements and also record the body corporate's consent to that assignment.

Quite often this deed will seek to confirm (or reinforce) the terms of the management rights agreements. It is important that the body corporate get legal advice on what it is being asked to sign.

If the management rights business is not Queensland based, there may also be a document called a deed of consent to security or financier protection deed. This deed is a tripartite document in which the body corporate, the buyers and the buyer's financier agree how defaults under the management rights agreements will be handled. These documents are prohibited in Queensland as financiers have statutory of protection rights under the BCCM Act.

Your chosen lawyer should review this material in detail. Our retainer always includes a comprehensive advice to the body corporate about what is happening, why it is happening and what the body corporate is being asked to sign.

Our advice will break down each individual warranty or statement the body corporate is being asked to give and what it means. If there are any unlawful requests made we will simply have them removed from the agreement. It is far from uncommon for buyer's lawyers to ask for confirmation of things that may be beyond the statutory power of the committee to deliver.

Sometimes a buyer will seek comfort from a committee about other things relating to the management rights agreement. To the extent that comfort requested is not unlawful we will advise the committee what is being asked for and what it means if it is given.

It will then be a discussion for the committee on whether they want to provide that comfort.

The body corporate may also be able to ask for personal guarantees from the buyer, which should also be incorporated in the deed of assignment.

Depending on how the prospective buyer has structured the purchase there may also be lot owner or trustee indemnity provisions to include in the deed of assignment.

Engaging a lawyer is a form of insurance. It ensures the committee is going to be guided about acting reasonably and the body corporate's interests are protected.

The commercial elements of an assignment

Leaving aside the legal issues, in general terms (and this is always subject to the terms of the management rights agreements) the body corporate is entitled to know that the buyer can do the job of the resident manager.

Under the BCCM Act the committee is entitled to information and material that addresses each of the following with respect to the buyer:

- character;
- competence;
- qualifications;
- experience; and
- financial standing.

The committee is also entitled to know the proposed terms of the transfer and the training that will be provided. If the management rights agreements allow further information to be asked for then that can also be requested.

This is a component where the committee may want further advice, or it may be comfortable to run the assessment of the buyer on its own. Ultimately, these issues are not so much legal as commercial.

Whilst we have provided advice to many committees in the past on these issues, our role normally tends to fall back to be an advisor about discrete questions on the material submitted, such as; *'Is this enough?'*, *'Can we ask for more on this point?'*, and so on.

Even though the BCCM Act does not set out that it is compulsory for an interview with the prospective buyers, common practice is at the buyers will meet the committee for the purposes of the committee asking them questions about their background, going over their material or just generally wanting to meet them.



What happens at the interview?

It is really up to you and can be as tightly structured or as informal as you want it to be.

Part of our engagement process is to provide a list of questions that can be asked of a prospective buyer. Whether you want to ask them all is a question for you. We think that if you are going to ask questions that it is better for the buyer to be on notice of them so they can be prepared and we also recommend writing to them with any specific issues before the meeting if you want certain things addressed.

While it is not a formal job interview, there are still questions you should not ask a buyer. Treat it like a job interview in that context. Stay away from questions about age (how old are you?), marital status (are you married?), sexual preference (are you gay?), race (delving into family history), religion (so why don't you go to Church every Sunday?), children (so are trying for children?) and gender (are you sure you can do a man's job?). There are obviously plenty more examples of these types of questions.

First impressions count. How you present in this interview will colour your relationship with the buyer (if it settles) and your resident manager (if it doesn't) evermore.

Can a body corporate refuse to consent?

The body corporate cannot unreasonably withhold consent to an assignment. This means that it must consent to the transfer unless there are reasonable grounds to refuse it.

Even though we think you should treat the meeting like a job interview, it isn't really a job interview in the context that there is only one applicant. You don't have 10 applicants go through the process and you get to pick the best one. You have one applicant and you cannot unreasonably refuse to consent to them.

It is not common for management rights assignments to be refused but it has been known to happen. Before a body corporate refuses an assignment it should have very strong legal ground(s) for doing so, which would encompass proper written legal advice and a complete and full assessment of all of the circumstances. It is beyond the scope of this guide to advise on those circumstances and this is where you need the right legal advice at the time.

If consent to an assignment was found to be unreasonably refused the body corporate would be exposed to a claim from the resident manager to the extent they suffer loss in relation to that refusal. The loss can only be quantified after the management rights are next sold.

Obviously this is a very serious step and not one to be undertaken lightly.

How long does a body corporate have to make a decision?

At law the body corporate has 30 days from the receipt of all information reasonably necessary to consider the assignment.

What information is 'reasonably necessary' depends on what the management rights agreements provide together with the criteria as set out in the BCCM Act which we discussed above.

Obviously there is some grey in this in terms of whether the information provided is sufficient which is always a question of fact and degree in each individual assignment. This also references back to the commercial elements of the assignment above.

There is an obligation to act reasonably.

Can changes be made to management rights agreements as a condition of approval?

No.

The request to consent to the assignment of management rights agreements is not an invitation to renegotiate the management rights agreements.

Naturally, if the parties to the assignment are seeking changes to the agreements then that potentially does open the opportunity for the body corporate to negotiate - but otherwise it really is a "yes" or "no" question; Can the prospective buyer do the job or not?

What will be signed?

A deed of assignment is needed for the parties at settlement. There will usually be three identical copies and each party should be given one to keep after settlement. The committee (once the terms are finalised and agreed to) should sign this deed on behalf of the body corporate under the body corporate's seal in accordance with the resolution to do so.

The committee will also have to record a formal vote on the assignment, which will be in the terms of the motion your lawyer has advised on.



Costs - who pays what?

Because the body corporate has been put to the expense of dealing with the assignment purely at the request of the resident manager, the resident manager is obliged under the BCCM Act and most caretaker and letting contracts to pay the body corporate's reasonable legal and administrative costs relating to the assignment.

This covers your lawyer and your body corporate manager (administrative costs).

A body corporate can only recover costs that are reasonable and only in relation to the assignment. As an example, the body corporate may also want advice about the interpretation of certain clauses in the management rights agreements. These costs would not ordinarily be recoverable from the resident manager as they are not related to the assignment itself. That might be a different position if the parties to the assignment were asking the body corporate to confirm certain interpretation of the duties in the deed of assignment. Again, this is where an experienced legal adviser can help.



Is a transfer fee applicable?

A transfer fee is a fee that is payable to the body corporate as a condition of it consenting to an assignment within two years of the resident manager purchasing that management rights business. The fee is referenced purely to the value of the management rights business itself and not any associated real estate.

If the business is sold within the first year of the resident manager owning it, the fee is 3% of the value of the management rights business and it is 2% if it is sold in the second year.

After that, no fee is payable provided that the resident manager's service is continuous. The right lawyer can advise you about any potential rights in this context.

If a transfer fee is payable, it includes GST. If the body corporate is registered for GST 1/11th of it must be paid to the Australian Tax Office. The GST component cannot be passed on in addition to the 3% or 2% claimed.

The transfer fee must be paid to the sinking fund and will also be taxable in the hands of the body corporate as income (like interest on any term deposits).

Imposition of a transfer fee is compulsory unless the resident manager is transferring the management rights because of genuine hardship that was not reasonably foreseeable by it at the time they purchased the business. As you would expect, this is a question of fact in each individual set of circumstances.

What does your body corporate manager do?

Your body corporate manager will be the initial point of contact for the matter. They will usually be instrumental in recording the transfer of the agreements in the body corporate's records and minuting the decisions of the committee in relation to the assignment.

They will usually be the focal point of the transaction in a co-ordination context.

'As the state manager, I need to ensure that our bodies corporate are receiving the best available legal advice. I am always willing to recommend Hynes Legal to any of our bodies corporate, and do so frequently. I take comfort in knowing they will do the job right and understand the intricacies of various situations and legislations applicable to our clients.'

Hugh Beutel, State Manager for Cambridge Management Services

Some terms you need to know

20A / PAMDA 20A / Form 6: These are the common terms for a letting appointment, which is an appointment that a resident manager holds from an owner to let their lot for them. They are also called 'management appointments.' They are on a 20A form if signed before 1 December 2014 and on a Form 6 if signed after 1 December 2014.

BCCM Act: This is the *Body Corporate and Community Management Act 1997*. This legislation covers almost all community titles schemes in Queensland.

By-laws: These are body corporate rules relating to the use of common property. By-laws detail the responsibilities of the body corporate and apply to everyone entering the complex including owners, tenants and guests. These are contained in the CMS.

Body corporate: The body corporate is a separate legal entity - similar to a company, that is created to control common property. All owners are members of the body corporate. An elected group (like a board of directors) form the committee.

Body corporate manager: Although it may be confusing, what is known under the BCCM Act as a body corporate manager is the person who administers the financial and secretarial side of the body corporate. This person issues levy notices, chases arrears, records total minutes of meetings and undertakes other related duties.

Commissioner's office: This is the office that decides the vast bulk of body corporate disputes.

Committee: Effectively the board of directors of the body corporate, who are elected every year.

Committee meeting: These are meetings of the committee held at different times throughout the year to discuss body corporate issues. These can occur monthly, or not at all. It all depends on how active the committee is.

Common property: This is property shared by owners and tenants. This may include foyers, hallways, swimming pools, gardens, tennis courts, gymnasiums and entertainment areas. It is everything other than the lots in the scheme. Maintaining common property is the primary obligation under the caretaking component of the management rights business.

Community management statement: Commonly referred to as a 'CMS' this is the document that contains the by-laws, a description of the real property in the scheme as well as the lot entitlements for the lots in the scheme.

Community title scheme: What was a single property title, when owned by the developer, which has since been subdivided into separate titles or lots (units or townhouses) and common property.

General meeting: This is one of two types of meetings where all owners can vote on issues. The first type (held once a year) is the annual general meeting. This is where, amongst other things, the committee is elected. Any other general meeting held during the year is called an extraordinary general meeting (or EGM). Annual general meetings are held to address financial and other aspects of the body corporate as well as direct the committee. Extraordinary general meetings may be called at any time to address specific issues. Owners attend meetings in a similar context to company shareholders.

Lots: The pieces of property in a community titles scheme that belongs to the individual owners. This is what the letting authorisation component relates to.

Manager / letting agent: The owner of the management rights. Other terms include RAM (residential accommodation manager) or RUM (resident unit manager) or onsite managers. The BCCM Act uses the terms caretaking service contractor and/or letting agent.

Modules: There are more detailed rules for different community titles schemes under the BCCM Act. Standard, Accommodation, Commercial and Small Schemes modules cover various types of body corporate structures, but it is safe to say that management rights businesses deal almost exclusively with Standard and Accommodation modules. The big difference between the two for management rights purposes is that under the Standard Module a management rights agreement is limited to a term of 10 years while under the Accommodation Module, an agreement can run for up to 25 years.

QCAT: This stands for the Queensland Civil and Administrative Tribunal, which is responsible for determining complex caretaking disputes between resident managers and bodies corporate.

Specialist adjudicator: A person that determines caretaking disputes through the Commissioner's Office. Specialist adjudicators were quite common in the past, but nearly all caretaking disputes now go through the QCAT.

PAMDA: This is the acronym for the legislation that used to regulate real estate agents which was the *Property Agents and Motors Dealers Act*. From 1 December 2014 it is the PoA that regulates real estate agents.

PoA: The legislation that regulates all real estate agents in Queensland is the *Property Occupations Act 2014*.



Why you should choose Hynes Legal to act for you

Hynes Legal is the leading strata law firm in Queensland, with a dedicated team of lawyers advising hundreds of resident managers, body corporates and their committees and associated industry parties across an enormous range of strata issues. Our extensive knowledge of the day-to-day operations of a body corporate, and the management rights and strata industries as a whole, ensures that our clients can rely on us to get our advice right first time, every time.

At Hynes Legal, we act for some of the largest bodies corporate in Queensland and are familiar with all of the issues that arise in the management of community title schemes. We know where the risks are in the community management process and we work closely with committee members and bodies corporate to manage and minimise these risks.

We genuinely enjoy working in the Body Corporate industry and we are not afraid of leading change where it is needed, and as such, we have been involved in a number of ground breaking decisions in the field of body corporate law.

We meet our client's objectives by providing the highest quality of work, with the right people, at the right time and at the right price. For us this means a having a dynamic and flexible team led by industry leading practitioners and providing our clients with flexible pricing options.

We understand the importance of fostering long-term relationships with our clients, and where possible, we will always strive to add value through our network of contacts and industry leadership.



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