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The Management Rights Lawyers
ManagementONE
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## Recent Victories for Managers

**By Ben Seccombe and Mitchell Downes**

Towards the end of 2017 we secured a number of victories for our clients in various situations and in various forums. We have maintained and will continue to maintain our policy of never acting for a body corporate in a dispute with a resident manager.

The most recent of these victories involved managers in a very large complex who have for some months been embroiled in a termination dispute with their body corporate.

We had previously procured an injunction restraining the body corporate from terminating our clients' management rights agreements until the QCAT trial, still some 8 months or so away. The body corporate, in adopting what is becoming a common tactic, stopped paying the caretaking remuneration.

Our clients could not afford to pay their employees or their repayments to the bank. The committee knew that without the remuneration our clients' business would be quickly ruined.

We successfully applied to QCAT for orders requiring the body corporate to pay the overdue remuneration (many tens of thousands of dollars) and to continue to pay the future remuneration without deduction.

This QCAT decision will be of much benefit to the industry as it will discourage other bodies corporate from pursuing a similar tactic of stopping payment of remuneration in the hope of drying up the manager's source of income.

We have also secured other victories for our clients in QCAT in various circumstances including an attempt by a body corporate to terminate management agreements on the basis that an option was not properly exercised.

There have been multiple disputes in which we have become involved where we and our clients, through careful and considered tactics, have successfully brought about the removal of all of the committee or where appropriate just the hostile and belligerent ones at a requisitioned EGM. In one such case we also succeeded in having the same EGM approve the entry into new 25 year agreements with our clients at a substantially higher (but much fairer) remuneration.

We have also witnessed badly advised managers becoming involved in litigation they had no hope of winning. In one case the manager's lawyers issued proceedings in the Body Corporate Commissioner's Office when they should have been issued in QCAT. Surprisingly the body corporate's lawyers, a well-known firm who like the manager's lawyers specialize in body corporate law and management rights, did not pick up on the error. The body corporate and the manager spent tens of thousands of dollars on legal fees before we were approached by the manager to take over the litigation. At which time we advised the proceedings had been wrongly issued in the Commissioner's Office and of the obvious flaws in the manager's case which meant that it was doomed to fail (advice subsequently borne out by the decision of the OCBCCM in that matter).

Disputes are best avoided wherever possible. Mahoneys, unlike some of the lawyers we see acting for bodies corporate, will always do what we can to avoid litigation and the uncertainty and expense that comes with that. However if litigation is the only or best way to deal with a dispute then Mahoneys have the most experienced and successful team of lawyers to do so. It is essential in order to achieve a successful outcome that we be consulted as early as possible.

## Sellers Beware

**By John Mahoney**

At a recent forum held on the Gold Coast and attended by most of the leading management rights lawyers, accountants, real estate agents and finance brokers, overwhelming support was shown towards including in management rights sale contracts a clawback provision to protect a buyer from a drop in the numbers of units in the letting pool between the time the contract is signed and settlement.

Many attendees at the forum told of experiences of their clients when buying businesses and finding that there had been a reduction, and in some cases a dramatic reduction, in the letting pool between contract date and settlement.

It is also the case that some financiers have been imposing conditions on finance approvals that there must not be a reduction in letting pool numbers beyond a certain figure prior to settlement.

Whilst it may have been a valid argument in the past that fluctuations in letting pool numbers are common and was a business risk covered in the multiplier paid for such businesses, that argument is hard to sustain today with record multipliers and a number of complexes moving towards predominant owner occupation.

There was much discussion around including a claw forward condition also but the consensus was that a claw forward presented too many obstacles for a buyer and a financier because any increase in the purchase price may mean that the buyer does not have the additional funds to complete the purchase at the higher price.

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The other point which was extensively discussed was whether or not a clawback condition was really suitable for holiday complexes as the loss of a small percentage of units from the pool would only have a financial impact during any period of very high occupancy approaching 100%.

At subsequent industry breakfasts which Mahoneys have hosted there has also been wide support for the general concept. There has been an understandable reluctance on the part of some brokers, who after all represent the interests of sellers, to embrace contract provisions which can work to the detriment of their clients and to further complicate a sale process.

However as pointed out by attendees at the forum and the breakfasts, the sale process is still a relatively simple one when compared to motel sales where 3 years of financials are required by buyers and financiers and to rent roll sales where not only are clawbacks the norm but so too are lengthy retentions of substantial parts of the sale price.

The forum endorsed the concept of a clawback for permanent complexes and the specialist lawyers at the forum have drafted and agreed on an appropriate special condition which has been circulated to the specialist real estate agents and other lawyers who work in the area.

The general principles are:

- The condition is expected to become the norm in sales in permanent complexes;
- The contract will disclose how many current letting appointments the seller holds at the contract date and the seller warrants the accuracy of that number;
- The parties will have to agree on and include in the contract the clawback value of each appointment;
- If the seller receives a notice of termination after the contract date the seller must notify the buyer of that;
- The seller must on the day before settlement advise the buyer of, and warrant, the number of current appointments then held;
- The buyer or buyer's accountant can attend the complex to verify that number;
- If the number of current appointments at settlement is less than the number at the contract date, the sale price is reduced accordingly.

Like anything new, it will take time for these changes to settle in and receive broad acceptance by all industry participants. There are also likely to be some transaction specific modifications to the basic condition.

## Forget It!

**By John Mahoney**

Over the course of 2017 we have seen multiple cases of managers forgetting to exercise their options or failing to exercise an option properly. In one week alone we saw 3 such cases.

Whilst in most cases we have been able to rescue the situation and obtain new agreements (albeit in some cases on more favourable terms for the body corporate) there have been some where the body corporate took the opportunity to tell the manager to forget about ever having management rights and to move on.

At the risk of repeating what we have stated in this and other publications many times before: **As soon as you buy management rights or obtain new agreements, diarise not only the dates by which all options must be exercised but dates a few weeks in advance of those dates so that you do not miss the relevant date.** Forget it and you may have to forget your rights.


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## CPI increases

Most caretaking agreements provide for CPI increases. We often see that managers have not claimed these increases for several years! The following is a table of the Brisbane All Groups CPI figures.

For example, if your remuneration started at $100,000 in October 2010, the correct calculation for the October 2014 increase based on Brisbane All Groups CPI would be $100,000 x 106.5 (i.e. the last index figure before the review date) / 96.9 (i.e. the last index figure before the commencement date) = $109,907.

That would be increased by 10% GST if there is a GST escalation clause in your caretaking agreement. Managers should check that there is.

Mahoneys have assisted many managers in having their remuneration increased to market level. Up to date figures can be found at http://www.oesr.qld.gov.au.

| | Mar | Jun | Sep | Dec |
|---|---|---|---|---|
| 2004 | 78.7 | 79.1 | 79.4 | 80 |
| 2005 | 80.7 | 81.1 | 81.6 | 82.3 |
| 2006 | 83 | 84.5 | 85.2 | 85.1 |
| 2007 | 85.5 | 86.7 | 87.5 | 88.4 |
| 2008 | 89.6 | 91.1 | 92.4 | 92.2 |
| 2009 | 92.4 | 92.9 | 94.2 | 94.5 |
| 2010 | 95.2 | 95.9 | 96.9 | 97.4 |
| 2011 | 98.6 | 99.6 | 99.9 | 99.7 |
| 2012 | 99.9 | 100.5 | 101.6 | 101.9 |
| 2013 | 102.0 | 102.5 | 103.8 | 104.6 |
| 2014 | 105.2 | 105.8 | 106.5 | 106.7 |
| 2015 | 106.7 | 107.4 | 108.1 | 108.5 |
| 2016 | 108.5 | 109.0 | 109.7 | 110.2 |
| 2017 | 110.5 | 111.0 | 111.4 | |