

Statutory reviews – a process for changing your caretaking agreement

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When a new community title scheme is established the developer has an obligation - to both the body corporate and the caretaker - to ensure the caretaking agreement is appropriate for the scheme.

It is not uncommon for bodies corporate and caretakers to have issues with the caretaking agreements and remuneration in new schemes, and we regularly act for bodies corporate where:

- the schedule of duties is not appropriate or tailored to the needs of the scheme (we have seen agreements which refer to pools and lifts when the scheme had neither!);
- there is a divergence between the extent of the duties and the remuneration which the body corporate is required to pay (this can result in the body corporate under paying or over paying for services).

When these issues arise, the body corporate has two options:

- amend the agreement; and/or
- look to the developer for damages.

In this article we discuss what is required to amend the caretaking agreement to address issues with the caretaker's duties or remuneration – with a specific focus on the lesser known, and often overlooked, statutory review process.

How can you change an agreement?

A caretaking agreement can be changed in a number of ways, namely by:

- mutual agreement between the body corporate and the caretaker;
- an existing contractual mechanism under the agreement itself (e.g. a market review clause); or
- the lesser known, and often overlooked, statutory review process.

It is this last alternative with which this article is concerned.

Statutory review basics

A statutory review allows either the body corporate or the caretaker to request a review of either:

- the remuneration payable to the caretaking service contractor; or
- the duties carried out by the caretaker.

This right of review exists regardless of what is contained in the agreement itself and cannot be contracted out of.

The circumstances that must exist for a statutory review to take place are when the:

- caretaking agreement is entered into during the "original owner control period";
- "original owner control period" has now ended; and
- caretaking agreement has not been assigned.

Once requested, the review must be completed before the end of the "review period" (which is usually around 3 years after the scheme was established).

The key elements to a successful statutory review are timing, following the correct process, and having the right commercial strategy from the outset.

Timing is important

The circumstances for a statutory review rely heavily on timing.

The "original owner control period" relates to the period when the developer has the ability to force the body corporate to make decisions. This decision making control is exercised through the developer's right to vote through lots it still owns or as part of an agreement with other lot owners.

The "review period" ends on the latest of:

- three years from the commencement of the caretaking agreement; or
- the anniversary of the annual general meeting held after the "original owner control period ends".

These complicated timing calculations result in a window of opportunity of between approximately one and three years from the scheme's registration date – which can be extended if the developer still owns a majority of lots in the scheme for longer than normal.

The process

The body corporate begins the statutory review process by:

- passing an ordinary resolution;
- notifying the caretaker;
- obtaining a "review advice" within 2 months from notifying the caretaker;
- giving the caretaker a copy of the "review advice";
- negotiating an outcome with the caretaker; and
- approving the change at a further general meeting.

If after negotiating, the Body Corporate and the Caretaker are unable to reach agreement on a revised salary or duties, the Queensland Civil and Administrative Tribunal has the power to make a decision and determine the salary or duties which should apply.

Considerations

In implementing the statutory review process there are a number of complicated legal and commercial considerations that the body corporate needs to consider as part of its strategy. As examples:

- is the body corporate going to be better or worse off by starting the statutory review process?

Statutory reviews cont.

- what aspects of the agreement should be reviewed – duties or remuneration?
- which consultant should be engaged to provide the “review advice”, and when?
- has the “original owner control period” started and is there sufficient time to complete the statutory review within the “review period”?
- has the caretaking agreement already been reviewed or assigned?
- how will the caretaker respond to any notice of the statutory review – will it be disputed?

These issues (and others) need to be considered by the body corporate as part of any statutory review process.

Mahoneys has acted in every significant statutory review dispute since the legislation was enacted and has significant expertise in this area.

Making sure your by-laws are correct

Author: Todd Garsden

Given the recent lockdowns that have forced many occupiers to spend more time within their lots, interferences between occupiers have been tested to their limits. Committees may have then found themselves unable to properly manage these interferences because their by-laws were insufficient.

The purpose of by-laws is to provide the committee the power to regulate the use of lots, body corporate assets and common property unique to the body corporate.

Committees have a statutory obligation to enforce the body corporate’s by-laws. However, by-laws are often forgotten about until they are actually needed to be enforced.

The problem for bodies corporate with that is:

1. There are a myriad of legislative requirements for a by-law to be valid (and if it is not valid it cannot be enforced);
2. Changing by-laws is not necessarily a quick process; and
3. This leaves the committee in a position where it cannot effectively regulate improper conduct when that improper conduct actually takes place, leading to the view that by-laws are a toothless tiger.

Requirements for by-laws

By-laws:

- must be regulatory and not prohibitive;
- must be consistent with the BCCMA;
- cannot restrict the type of residential use for a residential lot;
- cannot restrict dealings with a lot;
- cannot discriminate between different types of occupiers;
- cannot impose a monetary liability; or
- must not be oppressive or unreasonable.

If a by-law offends any of these requirements it cannot be enforced by the committee.

Changing by-laws

Aside from exclusive use by-laws, a change to the by-laws requires a special resolution at general meeting and registration of the change at the Titles Office.

This means that any changes must be implemented well in advance of the improper conduct taking place.

Enforceability

If by-laws meet the above requirements they can be successfully enforced by following the specific procedure of enforcement set out in the legislation.

Often this specific procedure is not followed, where the committee looks to shortcut the process. This prevents the committee from successfully enforcing the by-laws.

The committee just needs to have the correct by-laws in place earlier than the improper conduct before beginning the enforcement process.

How we can help

Mahoneys have prepared, and enforced, by-laws for all types of bodies corporate in Queensland. With extensive experience in this area, we understand the nuances and drafting protocol to be able to have in place the right by-laws for the scheme that are able to be enforced and called upon when required.

If you are interested in your body corporate implementing new by-laws that are enforceable, please let us know so we can:

1. review your current by-laws (without cost or obligation); and
2. provide a fee proposal to prepare and record new by-laws with the committee’s requirements being met.

We can also assist with any by-law enforcement issues.



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