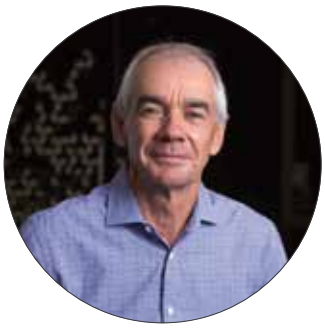
Another attack repelled!

In yet another attack on the management rights industry certain academics and lawyers with an anti-management rights agenda have been pushing a disingenuous theory that any management rights agreement can only ever be 'topped up' once.

That of course is contrary to the long-established industry practice for managers to top-up the term of their management rights agreements every five years or so, and even more often in the case of agreements subject to the Standard Module's 10 term limitation.

Once again, we find ourselves having to defend against an attack that seeks to cause confusion and disputation. Those who have latched onto the argument do not seem capable of accepting the will of the owners. After all, any top up can only ever happen if a majority of voters at a general meeting vote for it and if that is what the majority want, why not accept it?



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Those who came up with the theory and those who perpetuate it rely on a misconceived interpretation of a particular section of the Regulation Modules.

The particular wording is: *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... the subsequent right or option is for not longer than 5 years...*

The argument is that the right to include "a" right or option means that there can only ever be one such right or option, and no more. Part of their argument relies on reference in the previous sub-section of the Regulation which allows for multiple rights or options of extension or renewal in the initial agreement, in contrast to reference to 'a' right or option for top ups. However, in the context of statutory interpretation such contrast is inconsequential.

It is a principle of statutory interpretation that the words of a statute ought to be given the meaning which the legislator intended them to have. This requires consideration of the actual wording and its context and purpose, not just the act and regulations but any extrinsic material.

In considering the actual wording the *Acts Interpretation Act 1954* provides that in any legislation there is a presumption (which may only be displaced by a contrary intention appearing in the legislation) that words in the singular include the plural and vice versa.

The relevant section in the Regulation Modules cannot be interpreted as imposing a singular cap on the number of top-ups, as the substance and tenor of the legislation as a whole is not capable of displacing this presumption.

It is reasonable to expect that if there was a legislative intention to cap the number of top-ups permitted, it would appear with reasonable clarity from the terms of the legislation itself. By way of example section 130 of the Act (which deals with the statutory review re the terms and remuneration of a management rights agreement) states: *The contract may be reviewed under this division only once.*

If there was a legislative intention to impose a similar cap on 'top-ups,' then arguably a similarly phrased provision would have been included in the regulations.

Further, the cap on 'top-ups' is inconsistent with the operation of those sections of the Modules which preclude top up motions from being included on the agenda of a general meeting more than once in any financial year. If a manager was only able to 'top-up' their management rights agreement once, then only one motion would ever be able to be considered. If that were the case, there would be no need for these provisions.

The one only 'top up' concept cannot be reconciled with the purposive and extrinsic material related to the BCCM Act and Regulation Modules. Explanatory notes to the 2003 amendments include these words: However, at any time, the body corporate may grant an extension of the term of the agreement, up to a maximum equivalent to the term limitation. Explanatory notes to the 2020 Module changes are also consistent with the concept of multiple 'top ups'.

Whilst the issue has not yet been tested by the Queensland courts and tribunals, comments by adjudicators have recognised without question current industry practice. Whilst I cannot envisage a court or tribunal would accept the argument that there can only ever be one 'top up', I genuinely hope that a hostile body corporate does not seek to challenge a 'top up' on the basis of the argument and put the manager to the trauma and expense of having to fend off what I am confident would be a futile and unsuccessful attack. ■