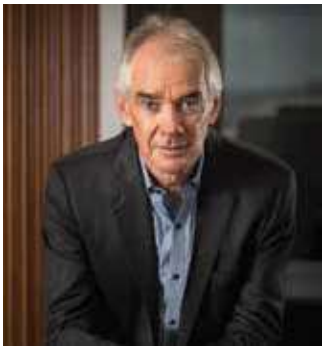
The accommodation module trap

Most readers will be acutely aware of the importance of your complex being in the accommodation module which, apart from reducing some of the red tape associated with the standard module, allows for management rights agreements to be for a term of up to 25 years.



By John Mahoney, Mahoneys

Unsurprisingly, developers who choose which module to apply to the complex they are developing, opt for the accommodation module, often without too much regard as to whether the complex actually qualifies for that module. However, doing so in circumstances where the complex clearly never qualified for that module, can be a problem for the resident manager.

The effect of the *Body Corporate and Community Management Act* and various case authorities is that for a new complex to qualify for the accommodation module, when the first CMS is recorded (when the complex is completed) the majority of the lots in the scheme must be intended to be accommodation lots (ie, lots being let out or immediately available to be let out for short or long term residential purposes).

Whilst historically little attention has been paid to this requirement, as a consequence of a relatively recent decision from the Body Corporate Commissioner's Office, lawyers for managers buying off the plan are investigating this issue with much greater scrutiny. That decision confirmed the right of a body corporate, or even an owner, to subsequently challenge the developer's selection of the accommodation module in circumstances when the complex clearly did not qualify for that. In that case the outcome was that the complex was ordered to transfer to the standard module.

The good news is that in a subsequent QCAT decision regarding that complex, where Mahoneys represented the manager, the body corporate's argument that in such case the caretaking and letting agreements were void, was rejected.

QCAT accepted the position put forward by Mahoneys that this was not the case, that whilst the scheme was (albeit incorrectly) initially placed in the accommodation module, the subsequent change to the standard module did not change that initial position as the module change was not retrospective and that in such instances agreements will retain their 25-year term.

The not so good news is that the consequence of the change of module is, based on certain QCAT decisions about the impact of an assignment on caretaking and letting agreements, likely to be that if these agreements are assigned in the future, the term will reduce to 10 years from the assignment. Still, this is a far better position than the outcome sought by the body corporate.

As a consequence of the decision from the Commissioner's Office it is likely that off the plan buyers of management rights, and subsequent buyers from them, will look closely at the makeup of unit buyers ie, owner occupiers versus investors when the scheme is established. In the case of an off the plan buyer, unless it is clear when they go to contract that the complex will qualify for the accommodation module, they are likely to require a mechanism in the contract to deal with what happens if there are more owner occupiers than investors at settlement which is usually shortly after the scheme is established.

What that mechanism might be, will no doubt depend on many factors including the multiplier used to calculate the proposed purchase price, the buyer's experience in the industry and what appetite the buyer has for risk.

It will be interesting to 'watch this space' as the industry grapples with yet another twist. However as has been shown over many years and many challenges, the ever-resilient management rights industry will find a way to deal with this latest one. ■

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