

# Building Management Agreements

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- The Strata Schemes Management Act 2015 (**the Act**) uses the term “building manager” in place of the term “caretaker”, which had been used under previous legislation. The definition of building manager is also somewhat different to the previous definition of caretaker. The Act applies to a person who assists the owners corporation in managing common property, controlling the use of common property by persons other than the owners and occupiers of lots or maintaining and repairing common property, other than as a volunteer or strata committee member. He or she no longer needs to have exclusive possession of a lot or common property area. Section 66.
- The appointment of a building manager must be by an instrument in writing executed by the original owner (if executed before the scheme commenced) or executed by authority of a general meeting resolution (if executed after the scheme commenced). Section 67.
- Building management agreements may be transferred to another person only with the approval of the owners corporation - Section 69.

## Validity of building management agreements

- Building management agreements expire at the conclusion of the first annual general meeting if executed before that date. If executed after that date, they have a maximum 10 year term. Section 68.
- Initial period restrictions apply – an owners corporation must not appoint a caretaker for a period extending beyond the holding of the first annual general meeting. Section 26.
- Certain functions can only be delegated to the strata committee or strata managing agents. Section 13. If there is a delegation of such functions to a person without a strata managing agent’s licence, it could operate to void the agreement (see *The Owners – Strata Plan 51847 v Broadsand Pty Limited [2002] NSWSC 770*).

## Secret Commissions

- *Community Association DP No 270180 v Arrow Asset Management Pty Ltd & Ors [2007] NSWSC 527* A developer received undisclosed benefits from causing a community association to enter into an uncommercial caretaker agreement with a third party. The developer was found to have breached its fiduciary duties and was required to pay the association \$190,000 as an account of profits.

## Improving performance



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- Schemes may wish to pursue improved performance by building managers, but the ability to achieve this under an existing agreement, depends on the terms of the specific agreement. There can be differing expectations, which can often be addressed by having an open dialogue with the building manager.
- Contract terms may include KPIs, although they are difficult to measure and set due to the fact that KPIs are often monetary targets.
- Building management agreements often include provisions involving breach notices and expert determination.
- Building management agreements may be reviewed under the Contracts Review Act 1980.

### **Termination of building management agreements**

- Before seeking to terminate an agreement advice should be sought in regards to the balance of the agreement, repudiation, etc.
- A building management agreement may be terminated in accordance with its terms if authorised by a resolution at a general meeting. Section 68.
- NCAT can make various orders in relation to building management agreements, including compensation, variation of terms or termination. The required grounds include unsatisfactory performance, failure to make required disclosures or where the agreement is “harsh, oppressive, unconscionable or unreasonable”.

### **Court decisions regarding building management agreements**

- *Yedway Pty Ltd v Owners Corporation of Strata Plan 62871 [2009] NSWSC 8* (3 February 2009) – caretaker agreement terminated for ‘misconduct’ under the agreement.
- *Waldorf Apartment Hotel, The Entance Pty Limited v Owners Corp SP 71623 [2010] NSWCA 226* – failure to date seal – agreement entered into before first annual general meeting – agreement not binding, although found to be binding due to conduct of owners corporation.

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