

How Far can 5% Ratchet Increases in Management Agreements go?

The majority of strata schemes across the country have builder managers, caretakers and strata managers in place to assist the owners corporation in managing and maintaining common property. Under legislation, these management companies are required to be appointed by a written instrument, normally a written agreement, which can have a maximum term of 10 years.

Usually, management agreements require the owners corporation to pay the company engaged, a fee for their services that is increased annually either by CPI or a fixed percentage amount (5% being a very common number), whichever is greater.

Under the general arrangement the responsibility of issuing the correct invoice is on the management company, whilst the owners corporation pays all invoices it receives with no obligation on the owners corporation to verify that the invoiced amount is correct (as it would be ridiculous to expect that!).

Nonetheless, we have become aware of numerous owners corporations who have received letters of demand for alleged “shortfall” amounts due to their management company for amounts of over a quarter of a million dollars, resulting from the manager incorrectly increasing the fee amounts annually in their invoices.

However, just because management agreements have fee increase clauses does not mean that owners corporations have to pay the increased amount and, in some instances, it can be argued that they should not have to. If an owners corporation has received a demand for historical payment, it should seek advice.

Some things to consider include whether:

- earlier settlements between the parties under the agreement have negated the ability of the management company to make the historical claim;
- the debt or claim for the percentage increase is older than 6 years and so cannot be claimed by way of the *Limitation Act 1969* (NSW);
- equitable principles relied on by the Courts would come into play, particularly when a party makes a representation to another party that the other party relies on and then proceeds to act against that representation causing detriment to the other party.

Management companies should ensure that all invoices are correctly issued and that the CPI or fixed percentage annual increase is applied immediately and clearly communicated to avoid disputes.

Demands for historical payment have a major impact on owners corporations, who would not have envisaged such a large liability nor accounted for one in their budgets.

**Prepared by Bannermans Lawyers
4 November 2019**



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA