



The caretaking service contractor

This factsheet provides information relating to the role and engagement of a caretaking service contractor under the *Body Corporate and Community Management Act 1997* (the BCCM Act) and the *Body Corporate and Community Management (Standard Module) Regulation 2008* (the Standard Module).

What is a caretaking service contractor?

A caretaking service contractor (commonly referred to as the resident manager) is defined in the BCCM Act as 'a service contractor for a (community titles) scheme who is also a letting agent for the scheme, or an associate of the letting agent.'

Generally the caretaking service contractor is the registered owner or lessee of a lot from which he or she conducts a letting agent business for the scheme and as such can vote at general meetings. A caretaking service contractor is not eligible to be a voting member of the committee. However he or she is automatically a non-voting member of the committee.

The role of a letting agent

A letting agent is a person authorised by the body corporate to conduct a letting business for the scheme. They offer letting services to investor owners and are required under the *Property Agents and Motor Dealers Act 2000* (PAMDA) to hold a license to rent out lots and to collect rents.

Details of the letting arrangements are not the body corporate's business. There is no provision in the BCCM Act requiring the letting agent to provide information on letting arrangements. However, a lot owner must give notice to the body corporate, under section 193 (Notices for roll) of the Standard Module about certain particulars relating to the lot.

The role of a service contractor

A person is a service contractor for a community titles scheme if they are engaged by the body corporate (other than as an employee) for a term of at least one year. They supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the scheme.

Initially engaging a caretaking service contractor

The initial authorisation of a letting agent is by the original owner (developer) for the scheme and will quite often include two agreements. These include the authorisation as letting agent and the engagement for caretaking services. The initial salary is negotiated and set by the developer and should be related to the work being carried out.

A caretaking service contractor will therefore have the business and assets or the management rights of the complex, and that business may be sold for money in the way that any business may be sold.

The term of the engagement and the authorisation must not be longer than 10 years for a scheme regulated by the Standard Module, and not longer than 25 years for a scheme regulated by the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (the Accommodation Module). This includes any rights or options of extension or renewal, whether provided for in the engagement or later agreed to.

Subsequent engagements of a caretaking service contractor

A caretaking service contractor may, from time to time, choose to sell the management rights. The sale may involve a simple transfer of the current contract or negotiating a new engagement with the body corporate.

Transferring a contract

A caretaking service contractor's rights under the contract for services and the authorisation as a letting agent may be transferred to another person only with the approval of the body corporate.

Approval may be given by the committee, which must decide within 30 days after it receives the information necessary to decide the application for approval. In deciding whether to approve a proposed transfer, the body corporate may consider:

- the character of the transferee
- the financial standing of the transferee
- the terms of the transfer

- the competence, qualifications and experience of the transferee and
- any training which the transferee and any related persons have undertaken.

Note: approval may not be unreasonably withheld.

A transfer fee is payable by the service contractor or letting agent upon transfer of the engagement or authorisation if the transfer is sought within two years (the prescribed period*) of the initial contract date.

The transfer fee will be either:

- three per cent of the fair market value for the transfer if the transfer is approved in the first year after the initial contract date; or
- two per cent of the fair market value for the transfer if the transfer is approved after the first year after the initial contract date.

However, the service contractor or letting agent may ask that the transfer fee be waived because of genuine hardship. The service contractor or letting agent must give the body corporate information or documents to support any claim of genuine hardship.

* See Standard Module section 124 “Definitions”

Engagements and contract amendments

The body corporate may engage a caretaking service contractor by a new engagement for services and a new authorisation as a letting agent. It may also approve amendments to existing contracts.

The new engagement, authorisation or amendment must be approved by an ordinary resolution of the body corporate at a general meeting.

Note: a vote by proxy may not be exercised, and the motion must be decided by secret ballot.

The notice of the general meeting must include:

- for a new engagement or authorisation — the terms of the engagement or authorisation including any rights of extension or renewal, or
- for an amendment to a current contract — an explanatory note in the approved form (BCCM Form 20) explaining the nature of the amendment.

The new contract of engagement, authorisation or amendment must:

- be in writing
- state the term of the engagement
- state the functions authorised to be carried out
- state the basis on which payment is determined.

The term of the engagement and the authorisation must not be longer than 10 years for a scheme regulated by the

Standard Module, and not longer than 25 years for a scheme regulated by the Accommodation Module. This includes any rights or options of extension or renewal, whether provided for in the engagement or later agreed to.

Codes of conduct

A caretaking service contractor must comply with both the *Code of Conduct for Body Corporate Managers and Caretaking Service Contractors* (BCCM Act Schedule 2) and the *Code of Conduct for Letting Agents* (BCCM Act Schedule 3).

The codes are taken to be automatically included in the terms of the contract of engagement and prevails if there is an inconsistency between a provision of the codes and another term of the contract.

Some of the standards included in the code at Schedule 2 provide that a caretaking service contractor must:

- have a good knowledge and understanding of the Act and the code relevant to his or her functions
- act honestly, fairly and professionally in performing the contract
- act in the best interests of the body corporate unless it is unlawful to do so
- not engage in fraudulent or misleading conduct in performing the contract.

Terminating an engagement

The body corporate may terminate the caretaking service contractor’s engagement and the authorisation by ordinary resolution at a general meeting and by secret ballot.

Reasons for termination could be due to the caretaking service contractor:

- being convicted of an indictable offence involving fraud, dishonesty or assault.
- transferring an interest in the engagement without the body corporate’s approval
- failing to carry out duties under the engagement
- contravening the code.

To start termination procedures the body corporate must give the caretaking service contractor a written ‘remedial action notice’. The notice must include:

- details of the duties not carried out or the provision of the code which has been contravened
- a period of notice (not less than 14 days after the notice is given) to remedy the infringement
- notification that if the caretaking service contractor does not comply within the period stated, the body corporate may terminate the engagement or authorisation.

If the caretaking service contractor fails to comply with the 'remedial action notice' within the stated period, the body corporate may, by ordinary resolution at a general meeting and by secret ballot, approve the termination.

Code contravention notices and 'move on' provisions

As an alternative to the termination provisions the body corporate has the power to require the letting agent to transfer the management rights particularly in those situations where the performance of the letting agent is unacceptable to the body corporate.

Unlike the termination process, where the letting agent is left with no return, a requirement to transfer may allow the letting agent to depart from the scheme with some sort of financial return for the business.

The process leading up to a notice requiring the transfer is complex. Sections 136 to 149 of the BCCM Act apply.

Note: it is advisable to take legal advice whenever the actions of the body corporate seek to terminate, amend or transfer a legal contract.

Resolving disputes

The BCCM Office has certain jurisdiction to resolve a dispute about a caretaking service contractor. However, the parties to a dispute can be only one of the following categories:

- the body corporate and a caretaking service contractor for the scheme
- the body corporate and a service contractor for a dispute concerning a once-only review of the terms of a service contract or
- the body corporate and a letting agent for the scheme.

Note: a lot owner cannot make an application against a caretaking service contractor.

Disputes concerning a contractual matter relating to a caretaking service contract, the transfer of management rights or the review of terms of a service contract are known as complex disputes. Complex disputes may be lodged with the Queensland Civil and Administrative Tribunal or with the Commissioner for specialist adjudication (BCCM Act sections 133, 149A and 149B).

Parties to specialist adjudication must agree in writing on a person who is to be the 'specialist adjudicator' and the method of payment for the specialist adjudicator. The Commissioner must be satisfied that the nominated person has appropriate qualifications, experience and standing to perform the role.

The Office of the Commissioner for Body Corporate and Community Management (BCCM Office)

Phone (freecall): 1800 060 119
Email: bccm@justice.qld.gov.au
Website: www.justice.qld.gov.au/bccm
Street address: Brisbane Magistrate's Court
Level 4, 363 George Street, Brisbane
Postal address: GPO Box 1049, Brisbane Qld 4001

Copies of the *Body Corporate and Community Management Act 1997*, the regulation modules, and any amendments can be accessed for free via the Office of the Parliamentary Council by visiting:

www.legislation.qld.gov.au/Acts_SLs/Acts_SL.htm

Copies can be purchased online by visiting

www.bookshop.qld.gov.au, or by contacting SDS Customer Service by phoning (07) 3883 8700 or 1800 801 123.

Disclaimer

The laws referred to in this guide are complex and various qualifications may apply in different circumstances. The information in this factsheet does not constitute legal advice. You are encouraged to obtain independent legal or financial advice if you are unsure of how these laws apply to your situation.

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