Caretaker Breach Notices

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While it is tempting for a body corporate committee to issue, without legal advice, a default notice or remedial action notice when a caretaker fails to comply with a term of their agreement or a provision of the Code of Conduct, it can be very unwise.

This is best explained by highlighting a number of very important things about these types of notices; in particular:

- A breach of a caretaking agreement, even if not remedied, will not necessarily form the basis for termination of that agreement. The breach must be serious enough to warrant termination.
- The content of the notice is critical for its effectiveness and that content needs to be carefully identified and expressed accurately and completely.
- The way in which the notice is authorized and served is also critical for its effectiveness.
- If the notice is followed by a termination the body corporate can anticipate a substantial legal battle as the caretaker, most likely supported by their financier, fight to preserve their underlying valuable asset. This fight will focus sharply on the form and content of the notice.

The options

When there is a breach of a caretaking agreement and negotiations with the caretaker have failed to resolve the matter there will usually be a number options to deal with the breach, including (but not limited to):

1. Issue a Code Contravention Notice[1] with the option in the event of non-compliance to require the caretaker to transfer their management rights to another person, other than an "associate"[2] and, possibly, with a further option to terminate and replace the letting agent authorization and service contract.[3]
2. Issue a Remedial Action Notice[4] on one or more of the grounds set out in the relevant Module with an option to terminate the caretaking agreement if the notice is not complied with.[5]

[1] Under section 139 of the Act.
[2] See sections 140 to 143 of the Act.
[3] See sections 145 and 146 of the Act.
[4] Under section 131 of the Standard Module or corresponding provisions in other Modules.
[5] See section 131(3) of the Standard Module and corresponding provisions in other Modules.

3. Issue a default notice under any available grounds in the caretaking agreement itself, with an option to terminate the agreement if the notice is not complied with.[6]

Authorizations

All of these options will need to be authorized by ordinary resolution of a general meeting and in most cases that resolution will need to be decided by secret ballot. In some cases there is a two stage process and each stage will need to be authorized by an ordinary resolution. The wording of the resolution will vary depending upon the option chosen and the stage in the process. In all cases the option will need to be carefully chosen and the appropriate resolution will need to be carefully drafted, both dependent on the nature of the particular breach.

It is also important for a committee to ensure that it has strong support from owners before embarking on any process which potentially leads to the termination or compulsory transfer of management rights. Failure to do this may result in the required authorizations not being obtained or a waning of owner support as the termination or transfer process continues and becomes more expensive and drawn out.

The termination process

The termination process is even more critical, particularly if the caretaker has taken some steps to remedy a contravention or breach or if a financier involved. If the breach, or the extent to which the body corporate believes it has not been remedied, is insufficient to justify termination of the agreement, then termination can expose the body corporate to liability for substantial damages. The longer the remaining term of the caretaking agreement then, potentially, the higher the damages.

When considering terminating a caretaking agreement a body corporate should remember that termination is a serious consequence when compared to say orders for specific performance or damages (which are other options which may be available to a body corporate) and a Court may not lightly allow a termination. There will always be an element of risk in terminating a caretaking agreement and a body corporate needs to carefully consider that risk before starting the process.

The ensuing battle

The body corporate must also keep in mind that the termination of a caretaking agreement is likely to be contested before QCAT or the Court, or possibly both. This is likely to be time consuming for the committee and expensive for the body corporate. Legal proceedings

[6] This being an alternative allowed by section 129(1)(c) of the Act.

about the termination of management rights are expensive and owners need to be fully committed to see the legal process through. Failing that the termination attempt is likely to be unsuccessful and the body corporate (and the caretaker) will be left with a bill for substantial legal costs.

The bright side

The costs, the effort and the risks need to be carefully weighed up against the benefit (or otherwise) of not having a management rights regime in place. Clearly, there will be cases where a body corporate has a good chance to force a transfer or achieve a termination of management rights and in those cases the committee is duty bound to consider those options, while keeping in mind the interests of owners generally. In many cases success can lead to substantial savings for bodies corporate (as appears to have been demonstrated in the case of *Carmel by the Sea* community titles scheme) without diminishing the investment performance of units in a rental pool.

This is where the right legal and commercial advice can add substantial value to the termination or transfer process, particularly in relation to controlling risk.

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