



Enforcing Caretaking Duties Tool Kit¹

Enforcing caretaking agreements can be a complex and risky exercise. The efforts of bodies corporate often fail because of technical deficiencies. This Tool Kit explains those complexities and provides guidance towards a successful outcome.

¹ This Tool Kit is suitable for use under all Regulation Modules, other than the *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* and the *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011*.

1. Source of Caretaking Duties

Caretakers are usually engaged under an agreement known as a “service contract”. This can be a caretaking agreement or a combined caretaking and letting agreement. In this tool-kit the agreement, whatever form it takes, will be referred to as the “**Agreement**”.

The Agreement will set out the list of duties which the caretaker is required to undertake in respect of the common property. Sometimes the duties are set out in a schedule to the Agreement or in tables and are reasonably specific. In other cases, they are scattered throughout the Agreement and can be difficult to accurately interpret. This tool-kit is concerned with the enforcement of those duties by the body corporate where they are not being performed by the caretaker or are being inadequately performed.

2. Types of performance issues

From our experience, caretaker performance issues usually fall within one or more of the following categories:

- (a) the duty is not being performed at all;
- (b) the duty is being performed, but is not being performed satisfactorily;
- (c) there is a dispute as to what is required to satisfactorily perform the duty; or
- (d) there is a dispute as to whether the duty has to be performed by the caretaker.

Categories (c) and (d) above present the most challenge for bodies corporate. In the case of (c), the underlying problem is often the vague description of the duty in the Agreement, such as a general duty to “*keep the common property clean and tidy*”.

Does that mean that the caretaker:

- (a) has to personally clean every minute part of the common property in the entire scheme;
- (b) is only required to ensure that it looks clean and tidy (the deep cleaning process being undertaken by someone else); or
- (c) is only responsible for ensuring that someone does the cleaning at the expense of the body corporate?

In the case of category (d), the Agreement commonly has a clause excusing performance of a duty where it would normally be carried out “*by a tradesperson*” or “*by a skilled tradesperson*”. This often leads to arguments about whether certain gardening or cleaning duties, in particular, need some special skills or equipment that the caretaker cannot be expected to have.

3. Have realistic expectations

At the outset of any performance process, the body corporate should have realistic expectations as to what can be achieved given the wording of the Agreement. If the duties are vague or do not fit the scheme’s circumstances, that may be something the body corporate needs to live with. It may even be something entitling the body corporate to compensation from a developer who put the Agreement in place.

To pursue the performance of vague or irrelevant duties can be a time consuming and costly exercise which fails to produce any positive outcome.

4. Importance of a “paper trail”

If a body corporate is serious about enforcing caretaking duties it needs to ensure that a detailed ‘paper trail’ is created throughout the entire performance process. This includes such things as:

- (a) keeping copies of correspondence and e-mails –
 - (i) to the caretaker; or
 - (ii) from unit owners, about performance issues;
- (b) making notes (including date, time and place) about conversations with –
 - (i) the caretaker; or
 - (ii) unit owners, about performance issues;
- (c) taking photographs (with records of date, time and place) of the consequences of non-performance, such as unattended damage, inadequate cleaning, etc.; and
- (d) authorising all significant communications with and instructions to the caretaker by resolutions of the committee.

If the enforcement process ends up in a formal dispute before the Queensland Civil and Administrative Tribunal (“**QCAT**”), that paper trail will be critical to the body corporate’s chances of success.

5. Importance of owner support

In many cases caretakers actively try to limit the extent to which they must perform the caretaking duties. For example, they may argue that:

- (a) a particular duty (such as pool maintenance or bin cleaning) requires the services of a tradesperson;
- (b) they cannot trim the hedges because they are too high for anyone but a skilled tradesperson; or
- (c) there are workplace, health and safety issues with a particular duty, such as window cleaning.

In such cases, confronting the performance issues may result in defensive action by the caretaker. Such action can include things like threats of defamation action or complaints about ‘bullying’ to Fair Work Australia. In most cases it also includes an orchestrated campaign against the committee members who are driving the enforcement process. This campaign usually involves:

- (a) communications from the caretaker direct to unit owners;
- (b) pressure for support from owners whose units are in the letting pool;

- (c) complaints of bullying or unreasonable conduct by the committee; or
- (d) organising owners sympathetic to the caretaker to stand against sitting committee members at the annual committee elections.

These sympathetic owners are often members of the caretaker's letting pool who have no firsthand experience of the performance issues and who may be more concerned about the stability of the on-site letting operations. From our experience, these campaigns have a high success rate and they often result in the entire committee being replaced and the new committee discontinuing the enforcement process (often after significant costs have been incurred by the body corporate).

It is therefore most important that any committee wishing to pursue caretaker performance issues should ensure that owners are kept fully informed about the problems being experienced and the action being taken. Owners need to be fully supportive of the committee's position if the enforcement process is to be sustained and effective. If owners are not supportive, then the committee should seriously consider abandoning the enforcement process.

6. Suggested enforcement process

We recommend consideration of a staged enforcement process to minimise costs and to try to preserve the relationship between the caretaker and the body corporate. This staged process involves the following sequential steps:

STEP 1 – Make a list of the performance issues and sit down with the caretaker and discuss them. The discussion can include such things as –

- (a) the desire to preserve the relationship and avoid enforcement action;
- (b) the need for fairness in the relationship (e.g. “you are working about 20 hours a week and being paid \$110,000 and that is clearly not what the agreement intends and is fundamentally unfair to the owners”);
- (c) the caretaker's concerns and views;
- (d) the importance of caretaking to the “letting appeal” of the building and the preservation of unit values (both of which are common interests to the caretaker and unit owners);
- (e) ways in which a compromise may be reached; and
- (f) whether the engagement of an independent mediator would assist.

STEP 2 – Document any points agreed at that meeting and list points that were not agreed.

STEP 3 – If performance issues continue, send a ‘warning’ letter to the caretaker (see **Form A** for a suggested letter).

STEP 4 – If there was some improvement, but it was not sustained by the caretaker, send a further warning letter (see **Form B** as an example of this type of letter).

STEP 5 – If there is still no improvement, consider what further action is the most appropriate (if necessary, with the assistance of legal advice).

7. Options for further action

Depending upon the content of the Agreement and the circumstances, there may be other options available for enforcement of the terms of the Agreement. This is because the various regulation modules² allow a body corporate to terminate an Agreement in a number of circumstances.

Apart from mutually agreed terminations, an Agreement may be terminated either:

- (a) under the Act; or
- (b) under the Agreement.

Termination under the Act

There are 2 types of “terminations” under the Act. The first type does not involve any prior notice requiring the caretaker to remedy the matter. The grounds for this type of termination occur where the caretaker (or a director of the caretaker, if it is a corporation):

- (a) is convicted of an indictable offence involving fraud or dishonesty;
- (b) is convicted on indictment of an assault or an offence involving an assault;
- (c) carries on a business contrary to law and which involves the supply of services to the body corporate, or lot owners or occupiers; or
- (d) transfers an interest in the Agreement without the body corporate’s approval.

The second type of termination can only be used where the caretaker has been served with a remedial action notice (“**RAN**”) and has failed to comply with that notice. The grounds for this type of termination occur where the caretaker (or a director of the caretaker, if it is a corporation):

- (e) engages in misconduct, or is grossly negligent in carrying out functions under the Agreement;
- (f) fails to carry out duties under the Agreement;
- (g) contravenes their code of conduct (as to which see later);
- (h) fails to disclose their relationship with a person supplying goods or services to the body corporate;
- (i) fails to disclose certain contracts involving “associates”; or
- (j) fails to disclose a commission or other benefit arising from certain contracts.

Termination under the Agreement

Termination under the Agreement will depend upon the content of the Agreement, so it is only possible to provide general comment on this option. Some Agreements give immediate rights to terminate (without notice to remedy the default), while others require a default notice (similar to a RAN) to be served and not complied with before the termination can occur.

² For the purposes of this tool-kit we will work with the *Body Corporate and Community Management (Standard Module) Regulation 2008*.

Each Agreement needs to be looked at separately to determine what options may exist under its terms.

The Code of Conduct

Caretakers are bound by the *Code of conduct for body corporate managers and caretaking service contractors* (“**Caretaker’s Code**”)³ while Letting Agents are bound by the *Code of conduct for letting agents* (“**Letting Agent’s Code**”).⁴ The provisions of a code of conduct are taken to be included in the terms of the person’s engagement (i.e. they are implied terms of their contract). In addition, if there is a conflict between the provisions of the contract and the provisions of a code of conduct, the provisions of the code prevail.

It follows that a body corporate contemplating the issue of a RAN should consider whether there has also been a breach of the relevant code of conduct and whether it is worth including that breach (as a breach of the contract) in the RAN.

8. Remedial Action Notice

A RAN is a written notice which states **each** of the following:

- (1) The body corporate believes that the caretaker has acted in a way mentioned in items (e) to (j) above.
- (2) Details of that action sufficient to identify –
 - (a) the misconduct or gross negligence the body corporate believes has happened;
 - (b) the duties the body corporate believes have not been carried out;
 - (c) the provision of the code of conduct the body corporate believes has been contravened; or
 - (d) the provision of the relevant regulation module the body corporate believes has been contravened (i.e. in relation to items (h), (i) and (j) above).
- (3) That the person must within the period stated in the notice:⁵
 - (a) remedy the misconduct or gross negligence;
 - (b) carry out the duties; or
 - (c) remedy the contravention.
- (4) That if the caretaker does not comply with the notice in the period stated, the body corporate may terminate the Agreement.

That all sounds simple enough, but historically a string of QCAT cases has shown that the drafting of the RAN is probably the most critical process involved in terminating the Agreement. The RAN must be very carefully drafted and must contain very specific information based on

³ See Schedule 2 to the Act.

⁴ See Schedule 3 to the Act.

⁵ Which must be of sufficient length to reasonably allow time for the caretaker to remedy the particular breach and in any event, must not be less than 14 days after the notice is given.

the circumstances of the Agreement and the breaches which have occurred. For that reason, we have not provided a “precedent” for a RAN – to do so would not be in the interests of the body corporate.

9. Another Option

If a caretaker’s poor performance or conduct amounts to a breach of the Caretaker’s Code or the letting agent commits a breach of the Letting Agent’s Code, then there may be another option. Leaving aside the possibility of including that breach in a RAN (as discussed above), it may be possible to give the caretaker and/or letting agent a “code contravention notice”. There are exceptions to the right to give such a notice, but they rarely apply, and this option may be worth considering.

If the caretaker or letting agent fails to comply with a code contravention notice the body corporate may require the transfer of the management rights. The Act contains very detailed provisions as to how a code contravention notice must be approved by the body corporate and how the transfer process must occur. Therefore, a body corporate considering use of the forced transfer provisions should not attempt to handle the process itself, but rather engage legal assistance.

10. Prospects before QCAT

It is fair to say that statistically, bodies corporate have not been very successful before QCAT. While QCAT can be relied upon to competently apply the law, it is understandable that a Court or Tribunal will be reluctant to extinguish a very valuable asset in the form of management rights in the absence of a compelling case.

It therefore follows that:

- A case should be carefully scrutinised before it is allowed to go to QCAT.
- The body corporate’s chances of success can be improved by careful planning of the process leading up to the issue of a RAN or code contravention notice (as suggested above).
- A body corporate needs to be committed to endure the time and costs involved in a contested QCAT case.
- Committees need to carefully manage their communications with owners prior to and throughout the contest (as suggested above).

11. Conclusions

Enforcing Agreements can be difficult, particularly if they have been drafted more in the interests of the caretaker than the body corporate. Committees therefore need to:

- Understand the options and processes involved.
- Make every effort to mutually resolve any differences before committing the body corporate to a formal dispute process.
- Keep owners fully informed and “on side”.
- Use competent legal advisors before embarking on any formal enforcement process.

Form A

Warning letter

[Addressee]

Dear [Salutation]

At the meeting between you and the committee on [insert date] the body corporate's concerns about the way in which you were performing your caretaking duties was discussed and the following was agreed:

[Insert brief terms of the agreement reached]

After that meeting the committee noticed a marked improvement in the way your duties were being performed and the general appearance of the building. However, in recent weeks the standard of performance of your duties has declined. In particular, the committee has noted:

[Insert brief description of current issues.]

I have been asked to bring these matters to your attention, to ask you to again improve the performance of your duties and to sustain that improvement into the future. Your co-operation in this regard would be appreciated.

Yours faithfully,

.....

[Name]

Secretary
Body corporate for [Name] CTS [Number]

Form B

Further Warning letter

[Addressee]

Dear [Salutation]

I refer to my letter dated [insert date] in which I conveyed the committee's concerns about the way in which you were performing your caretaking duties. The committee notes that there has been [no/little] improvement since that letter was written.

I have been asked to again direct your attention to the need for you to [substantially] improve the performance of your duties. While the committee has been reluctant to take formal enforcement action under your Caretaking Agreement, if your performance does not improve it will have no alternative but to take such action.

In particular, you need to pay attention to the following duties:

[Here set out the main duties needing performance improvement.]

Please take immediate action to address these performance issues, otherwise the committee will commence formal enforcement action without further warnings or notice.

Yours faithfully,

.....
[Name]

Secretary
Body corporate for [Name] CTS [Number]