



Managing the manager

It's a great help to have an expert manage the day-to-day administration of a multiple unit building. But it's worth knowing where to draw the line and who's controlling whom. PETER CEREXHE

CALLED A 'STRATA company manager' in Western Australia, a 'body corporate manager' in Queensland, a 'strata managing agent' in New South Wales, a 'strata manager' in South Australia and simply 'manager' in Tasmania and Victoria or 'agent' in the Australian Capital Territory and Northern Territory, it seems a lot of time and effort has gone into naming this person despite there being absolutely no requirement that your body corporate/owners corporation (OC) uses their services.

Yet the law of strata/unit/community title (which we'll refer to as 'strata') is complex with no sign of things getting easier. Indeed any large block of units or townhouses really needs the advice of a strata expert from time to time, if not *all* the time. Community relations can easily descend into antagonism without a steady, impartial hand to support the OC and help navigate the endless rules, rights and obligations imposed on your strata scheme. And then there's the whole issue of looking after the increasingly valuable finances.

Some states have been amending and updating their laws covering managing agents and this is a good thing. Investors are often absentee landlords who are grateful to have an expert managing the finances and legal responsibilities of the OC and the scheme, and who often deliver their proxy to the managing agent to vote on resolutions on their fairly disinterested behalf. If you don't attend the annual general meeting you have to rely on someone with a degree of objectivity and wide experience.

But do you know how to get a managing agent appointed? Or, once they're there, what they could and should be doing? How to find out what they've been up to? And, importantly, how to get them removed? There are things you should be looking at in their contracts of service (yes, they usually present your OC with their own contract) before you sign.

WHAT CAN A MANAGING AGENT DO FOR YOU?

You can get a managing agent to do some or almost all of the functions of your OC, committee or officers (treasurer, secretary). Generally this is the stuff of day-to-day management and administration. Here are some ideas:

- Preparing the financial reports
- Handling the levies, including issuing notices and banking the proceeds
- Preparing and issuing notices of meetings
- Issuing notices of contravention of by-laws
- Forwarding minutes of meetings
- Taking out insurance
- Managing the OC funds on trust for the OC
- Arranging an audit
- Paying invoices
- Investing OC funds
- Arranging and vetting contractors (electri-

cian, plumber, elevator and pool maintenance companies, etc.)

- Obtaining valuations of buildings, plant and other assets for insurance and sinking fund purposes
- Organising fire and other health/safety inspections
- Handling conflicts between lot owners/tenants
- Keeping the OC and committee up-to-date on relevant laws/regulations and changes in laws/regulations and workers compensation requirements
- Recommending appropriate by-laws and modifications where helpful to tune the by-laws to your scheme and its particular circumstances (eg. use of common facilities such as pool, tennis court, gym, car parking, jetty, laundry)
- Preparing certificates from the records for prospective purchasers and mortgagees.

Importantly, the agent can't do anything which actually requires a resolution of the OC or committee.

In Tasmania they talk in terms of anything which requires a unanimous resolution of the OC, and in NSW and Victoria a unanimous/special resolution. Once the necessary resolution is passed, however, the agent can get to work on that issue for you.

Meetings are an onerous task and while you might think that the agent is the logical person to run your meetings (after all, he or she is the expert you've paid to get things done around the place), it isn't always permitted.

The agent isn't supposed to chair meetings in the NT, SA, Tasmania, nor Queensland (unless the elected chair isn't present, there's a vacancy for the position of chair and the agent gets elected, or where the agent is necessary to form the quorum at an adjourned meeting). Nevertheless, the practice is common. It's one of those curious little facts about strata living

which are good to put away in the back of your mind.

In a meeting of the chaotic OC it's important to remember that the person at the front who seems to know all the rules (i.e. the agent) is actually subservient to the OC and carries out their role subject to limitations.

HOW IS A MANAGING AGENT APPOINTED?

The managing agent is appointed by your committee (ACT, NT and WA, or SA if this power is delegated by the OC to its committee). In the other states the appointment is made by passing an ordinary resolution of your OC (NSW, Queensland, SA, Tasmania, Victoria) in a general meeting.

The appointment should be by written

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contract setting out the terms of the arrangement and the powers/functions to be exercised, the length of the contract and the basis of payment.

It's generally unnecessary and probably unwise to make a long-term contractual commitment to any agent. Circumstances change and particular individuals may move on from the agency – remember, your OC's contract will most likely be with the corporate agency rather than with a named individual, unless that's how you arrange it.

Certainly it's prudent to start with no more than a 12-month contract as a trial for both sides. If things don't go smoothly or happily the pain will resolve simply on the expiry of the contract period without requiring any formal complaints or applications to regulatory

authorities. That neat dead end is incredibly valuable to you as you can be up for damages for wrongful termination of their contract. In Queensland the service contract can't be for a term of more than three years anyway.

FINDING A MANAGING AGENT

You can ask around, of course, but at some point you should check to see if they're a member of their state/territory professional association (see *Contacts* on page 74). That association, while not actually recommending any individual, might help steer you towards a firm which matches your requirements (eg. small/large firm, local/anywhere, male/female, experienced handling specifics such as a mixed residential/commercial scheme or a plan with shared recreational assets).

SETTING LIMITS

You are completely free to set limits on the functions and powers you're handing over to your managing agent. You can amend their contracts.

Usually these limits are set by a general meeting of the OC. Note that in the ACT and NT it takes a special resolution to impose conditions or restrictions on the authority of its committee to engage an agent.

The agent doesn't diminish the powers of the OC or the committee, nor remove ultimate responsibility from the OC for its legal responsibilities. In other words, the lot owners can't hide behind the acts, omissions and decisions of the appointed managing agent. Your OC or committee has to remain involved.

Also be aware that the managing agent

doesn't vote at meetings. However, the agent can hold proxies (except in Queensland) for lot owners.

The agent can't exercise proxies for personal financial or other material advantage, such as to increase their remuneration or extend their term of engagement. In some states this limitation comes direct from the legislation (eg. NSW) but elsewhere it may be inferred from the general ethical requirements imposed on agents by the regulations and the agents' code of practice. Bear this in mind when faced with an agent who has gathered a sheaf of proxies from absent landlords and others who don't wish to attend meetings. The agent should abstain from using the proxy votes they hold on any self-serving resolution.

In Queensland note that "at least two quotations must be given to lot owners if the cost of the proposed engagement is above the *relevant limit for major spending* (Standard Module Chapter 12 Dictionary). If more than one quotation is given, the motion must be stated as a motion with alternatives in the agenda and on a voting paper for the meeting."

In NSW the position of 'caretaker' has been formalised and the rules make it clear that the caretaker isn't the same thing as a managing agent. For example, a caretaker can't exercise the delegated powers of the OC, and can't knock on your door and try to enforce compliance with by-laws. The caretaker's job will often include supervising tradespeople and service providers, as well as handling maintenance and repairs. In a large complex it's important to see that the roles and authorities of caretaker and agent don't become entangled.

TRANSFER

It may come as a surprise to find out one day that your management contract has been transferred to another agency. It's prudent to check the agency contract and ensure there's a provision which requires the consent of your OC to any transfer of the service contract. In NSW the legislation requires consent of the OC to a transfer.

PROFESSIONAL INSURANCE

Professional indemnity insurance is essential: don't engage an agent who hasn't covered themselves against claims from lot owners, the OC and members of the public for their negligent acts and omissions. Although this is a legal requirement only in the ACT, NSW and Victoria at present, don't accept any excuses on this point.

FINDING OUT WHAT YOUR MANAGING AGENT HAS BEEN UP TO

If you have concerns about the managing

CONTACTS

ACT

Strata Managers Institute, www.smiact.com.au. Phone 02 6209 1527. Government information: ACT Planning & Land Authority, www.actpla.act.gov.au. Phone 02 6207 1923. ACT Department of Justice & Community Safety, Office of Regulatory Services, which looks after consumer affairs and business licensing www.ors.act.gov.au. Phone 02 6207 0400.

Northern Territory

There is no professional organisation. Licensing/supervision: Department of Justice – Consumer and Business Affairs, www.caba.nt.gov.au. Phone 08 8999 1999.

NSW

Institute of Strata Title Management, www.istm.org.au. Phone 02 9904 8499. Licensing/supervision: Office of Fair Trading, which administers the *Property, Stock and Business Agents Act*, www.fairtrading.nsw.gov.au Phone 13 32 20.

Queensland

Community Titles Institute, www.ctiq.org.au. Phone 07 3839 3011. Government information: the Office of Fair Trading, www.fairtrading.qld.gov.au. Phone 13 13 04. Commissioner for Body Corporate and Community Management, www.justice.qld.gov.au. Phone 1800 060 119.

South Australia

Community Titles Institute of South Australia, www.ctisa.org.au. Phone 08 8372 2777.

Licensing/supervision: Departments of the Attorney-General, Justice and Consumer Affairs, www.ocba.sa.gov.au. Phone 08 8204 9697.

Tasmania

There is no professional organisation. Contact the Office of the Recorder of Titles, Department of Environment and Land Management, www.dpiw.tas.gov.au. Phone 03 6233 2618. Also for information, the Office of Consumer Affairs and Fair Trading, www.justice.tas.gov.au. Phone 03 6233 2225.

Victoria

Owners Corporations Victoria Inc, www.ocv.org.au. Phone 03 9416 4688. Licensing/supervision: Consumer Affairs Victoria www.consumer.vic.gov.au. Phone 1300 558 181. Victoria's Business Licensing Authority, phone 1300 135 452 and you can search the public register at www.bla.vic.gov.au.

Western Australia

Strata Titles Institute of Western Australia, www.stiwa.com.au. Phone 08 9481 5122. Real Estate and Business Agents Board, phone 08 9282 0843. Licensing/supervision: Department of Land Information, Landgate, www.landgate.wa.gov.au. Phone 08 9273 7373. Also for information, the Department of Employee and Consumer Protection, Consumer Protection Division, www.docep.wa.gov.au. Phone 1300 304 054.

Note: If your managing agent is also a real estate agent you may be able to use the dispute resolution processes of the Real Estate Institute.

agent you should attend the next annual general meeting (AGM) because you – as a lot owner – have a right to get certain information at the AGM. This would include appointment of the agent, changing the terms of the engagement and powers handled by the agent, dismissal and professional insurances held by the agent. Strata laws in NSW, for example, go the extra step and make clear that the OC can obtain information from their agent by *written request*, and that in turn the agent should be reporting to the OC in writing, giving details of what they've been doing. Financial information must also be provided to the OC at relevant general meetings and otherwise upon request.

Decisions made at the AGM override decisions of the managing agent and the commit-

tee. The OC is the seat of real power in a strata/community/unit title scheme.

HOW TO SACK YOUR MANAGING AGENT

If you're unhappy about an act or omission of the agent, or more generally just want to get the agent fired, your first call should be to the agent themselves. If you don't feel confident to do this, the next step is your committee (or any member of that committee) which can act more quickly and less formally than the OC where you either have to wait for the AGM or go through the steps necessary to convene a general meeting of the OC.

The general rule across most states is that dismissal requires just an ordinary resolution

of the OC at a general meeting. Your OC should follow any procedure laid out in the contract with its agent. In the NT all contracts appointing an agent "are subject to the condition that they may be terminated on fourteen days notice given within seven days after a general meeting..."

Potential reasons for dismissal include:

- Conviction of an indictable offence involving dishonesty or fraud or assault
- Contravening the code of practice
- Failing to carry out duties
- Transferring the service contract without approval of OC
- Failing to handle the finances as required by regulation.

Give your agent written notice specifying the default and time to remedy (at least 14 days in Queensland, for example).

Failing satisfaction you're then looking to outside assistance and here there are two ways to go. The first is to approach the professional organisation to which many managing agents belong (see *Contacts* on page opposite). If they won't get involved you'll have to go to the government agencies listed.

If you're set on dismissing the agent you should consider obtaining legal advice before you get started.

REGULATION AND PROFESSIONAL DEVELOPMENT

There are only three places where managing agents must be licensed: NSW, the ACT (commencing July 1) and the NT. It's rare that you see these three states/territories mentioned in the same breath on government regulation!

While Victoria doesn't require licensing as such, all managing agents must register with the state's Business Licensing Authority. Licensing is not the be-all-and-end-all of consumer protection – so much depends on the will and the resources of the supervising agency – but it does mean there's someone out there whose job it is to keep a check on the profession and to receive complaints from the public. Fortunately there is a concerted effort by the industry to set standards. If you go to the website of the national representative body – the National Community Titles Institute – you'll find a Code of Practice setting out what you can expect from your manager. Go

to www.ncti.org.au/conduct.html. It's a voluntary code – which means you can't demand compliance from an agent as a matter of law – but it does lay some important groundwork for the profession. For example, the code forbids the use of secret commissions, it requires agents to disclose to the OC any situation where the agent may have a conflict of interest in handling your OC's work, and it opens the way for disciplinary action.

While the code could be improved and the national network of state/territory-based practitioner associations could have stronger teeth, the existence of these organisations, their Code of Practice and their involvement in continuing education are all helpful things to those owners and investors who are swept up in corporate life within an OC. **api**

The information in this article is general in nature. It is a complex area where laws and policies differ substantially between the states and territories, regularly change and penalties may apply. You should seek expert advice for your situation before acting on anything contained herein.

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