



Service Contract Review Tool Kit¹

Appropriate service contracts are an essential element of an effective strata scheme. It is common practice to incorporate separate management rights contracts into a single document. Whilst this allows for ease of access, it can make understanding and deconstructing these documents confronting and difficult. A Body Corporate should regularly review their service contracts and ensure that the duties and obligations being enforced are appropriate and in line with the needs of their specific scheme. One avenue for review may be the statutory review process under the Body Corporate and Community Management Act 1997. This Tool Kit explains that process.

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. Importance

Management rights contracts commonly comprise 2 documents – a Caretaking Agreement and a Letting Agreement. However, it has become common for both agreements to be incorporated in a single document called a Management Agreement or a Caretaking and Letting Agreement.

Most management rights contracts are prepared by developers and effectively “imposed” on the body corporate. Sometimes they are very favourable to the caretaker, as this can increase the price for which the developer “sells” the contract. This can result in either:

- (a) the caretaking duties being inappropriate for the particular building; or
- (b) the remuneration being too generous for the duties required to be performed.

The *Body Corporate and Community Management Act 1997* (“**Act**”) always gave the parties to management rights contracts a right to seek review of the remuneration payable, but not the actual terms of the contracts. In 2003 the Parliament amended these remuneration review provisions to extend them to the terms of the contract. Those amendments also set up a process and criteria which must be followed in relation to reviews. They also set up a rather complex time-frame during which a review must be “completed” which, in turn, determines when the review needs to start.

There is only one opportunity for a review to be undertaken under the Act and there can be only one review. It is therefore important that bodies corporate, particularly newly established bodies corporate, understand the timings and process involved. This tool-kit is intended to assist that understanding.

It should also be noted that, although this Tool-Kit deals specifically with management rights contracts, its provisions apply equally to all other service contracts entered into under the Act.

2. Which contracts qualify for review?

A contract qualifies for review if:

- (a) it was entered into after 1 December 2003;
- (b) the *original owner control period* was in force when it was entered into;
- (c) the term of engagement of the service contractor **has not** ended;
- (d) the original owner control period **has** ended;
- (e) it has not previously been reviewed under the statutory review provisions; and
- (f) the review can be completed within the “*review period*”.

The “*original owner control period*” is the period in which the original owner (developer) –

- (a) owns all the lots in the scheme; or
- (b) owns, or has an interest in, the majority of the lots in the scheme; or
- (c) in any other way, controls the voting of the body corporate.

However, it should be noted, if the remuneration terms of an otherwise qualifying contract have been reviewed before 1 December 2003 (most likely under the earlier provisions in the Act), then the contract terms can still be reviewed, but only as regards the functions and powers of the service contractor and not the remuneration.

A service contract which is combined with the authorisation of a letting agent or the engagement of a body corporate manager still qualifies for a review.

3. What can be reviewed?

The purpose of the statutory review is to:

- (a) review the terms of the contract (“*reviewable terms*”) that provide for –
 - (i) the functions and powers of the service contractor; and
 - (ii) the remuneration payable to the service contractor; and
- (b) help the parties to the contract decide –
 - (i) if those terms are currently fair and reasonable; and
 - (ii) if not, how those terms should be changed to ensure they are fair and reasonable.

4. Procedure to commence a review

A review may be commenced:

- (a) by a service contractor, by a request (preferably in writing) to the body corporate; or
- (b) by a body corporate –
 - (i) passing an ordinary resolution which authorises the making of the request; and
 - (ii) making a request (preferably in writing) to the service contractor.

It is very important that the timing of a request for a review takes into account the requirement for the review to be capable of being completed within the “*review period*”. To allow sufficient time for the review to be completed within the “*review period*” Bugden Legal recommends that the request be made within the **later** of:

- 2 years after the start of the term of the contract; or
- 9 months after the original owner control period ends.

(For a particular body corporate, it may be possible to extend those time-frames slightly, but this would need to be looked at on a case by case basis.)

5. Procedure for conduct of the review

STEP 1 – A party to the qualifying contract requests a review well before the “*review period*” will end.

STEP 2 – Within 2 months of that request, the party who made the request must:

- (a) obtain from an “*appropriate person*” independent written advice based on the “*review criteria*” about –
 - (i) whether the terms of the contract are currently fair and reasonable; and
 - (ii) if they are not fair and reasonable, how they should be changed to ensure they are fair and reasonable; and
- (b) give a copy of the advice to the other reviewing party.

STEP 3 – The review must be carried out having regard to the “*review criteria*”.

STEP 4 – The body corporate’s final decision about the outcome of the review must be made by ordinary resolution.

An “*appropriate person*” for the review provisions is a person, who in the ordinary course of their business, has knowledge of the functions and powers of service contractors and the remuneration for performing those functions and powers. They must also be independent (i.e. free from outside control or the authority of another).

6. When must the review be completed?

The review must be completed:

- (a) as soon as reasonably practicable after a copy of the review advice is given to the service contractor;
- (b) before the term of the contract ends; and
- (c) within the “*review period*”, which is the later of –
 - (i) 3 years after start of the term; or
 - (ii) 1 year after the annual general meeting next held after the original owner control period ends.

7. Review criteria

The point has already been made that the review must be restricted to the “*reviewable terms*” and carried out in accordance with the “*review criteria*”. The “*review criteria*” comprises each of the following:

- (a) the appropriateness of the reviewable terms for achieving a fair and reasonable balance between the interests of the reviewing parties;
- (b) whether the reviewable terms impose conditions that –
 - (i) are unreasonably difficult to comply with; or
 - (ii) are not necessary and reasonable for the protection of the legitimate interests of a reviewing party;
- (c) the consequences of complying with, or contravening, the reviewable terms and whether the consequences are unfairly harsh or beneficial to a reviewing party;
- (d) whether the reviewable terms are appropriate for the scheme (having regard, in particular, to the nature, features and characteristics of the scheme); and

- (e) the term of the engagement as service contractor and the period of the term remaining.

Item (e) suggests that the review may be an opportunity to consider whether the length of the term of the contract is appropriate. However, during the Second Reading speech in Parliament, when the Minister introduced the 2003 review amendments, it was made clear that *“the review is not a means of reducing the number of years remaining under the agreement nor can it be used as a mechanism to terminate the engagement”*.

8. How a body corporate should approach a review

The following approach is suggested for a body corporate contemplating a review of management rights contracts:

STEP 1: Consider whether it is too late to commence the review process, having regard to the need for it to be completed within the *“review period”*.

STEP 2: Examine the contract(s), with or without the assistance of a consultant, to determine whether there is a reasonable likelihood that:

- (a) changes can be justified; and
- (b) whether such changes warrant a statutory review having regard to the time, effort and costs involved.

STEP 3: Pass an ordinary resolution of a general meeting to authorise the request for review (see **Form A**).

STEP 4: Serve a request for review on the service contractor (see **Form B**).

STEP 5: Obtain independent written advice (*“review advice”*) from an appropriate person.

STEP 6: Within 2 months after requesting the review, serve a copy of the review advice on the service contractor.

STEP 7: Attempt to negotiate a mutually acceptable outcome with the service contractor (keeping in mind the timing for completion of the review).

STEP 8: If those negotiations are successful, set out the agreed changes in a Heads of Agreement and pass an ordinary resolution of a general meeting accepting those changes (see **Form C**).

STEP 9: If those negotiations are not successful, pass an ordinary resolution of a general meeting which accepts the outcome of the review and determines that either –

- (c) no further action being taken (see **Form D**); or
- (d) a dispute be taken to exist, to be determined by specialist adjudication or by the Queensland Civil and Administrative Tribunal (see **Form E**).

9. Need for legal assistance

These statutory review provisions are complex, and aspects of the Act can be difficult to interpret. The advice provided in this Tool-Kit is general and a body corporate contemplating

the initiation of a statutory review of duties or remuneration under a management rights contract should obtain competent legal advice before proceeding. Undertaking the review solely with the assistance of this Tool-Kit is not recommended.



Form A

Motion for General Meeting Resolution

Motion for Ordinary Resolution (Proposed by the Committee)

THAT the body corporate is authorised pursuant to sections 130(2) and (3) of the *Body Corporate and Community Management Act 1997* to request a review of the relevant terms of the [describe the contract(s)] dated [date of the contracts] with [name of service contractor in the contract(s)] under Division 7 of Part 2 of Chapter 3 of the Act,

AND THAT a notice of review be issued forthwith to the service contractor under the seal of the body corporate, to be attested by the Chairperson or Secretary and one other member of the committee.

Form B

Request for review

To:

[name of service contractor]
[address]

TAKE NOTICE in accordance with section 130(2) of the *Body Corporate and Community Management Act 1997* the Body corporate for [name of scheme] community titles scheme [number of scheme] hereby requests a review of the relevant terms of the [describe the contract(s)] dated [date of the contracts] with [name of service contractor in the contract(s)] (“**Agreement**”) under Division 7 of Part 2 of Chapter 3 of the Act.

A copy of the review advice about the relevant terms of the Agreement will be made available to you in due course.

DATED 20 .

THE COMMON SEAL of BODY)	
CORPORATE FOR [name of scheme])
COMMUNITY TITLES SCHEME [number)	Chairperson/Secretary
of scheme] was duly affixed in the)	
presence of:)
		Committee Member

Form C

Motion for General Meeting Resolution

Motion for Ordinary Resolution (without the use of proxies)² (Proposed by the Committee)

THAT in relation to the [describe the contract(s)] dated [date of the contracts] with [name of service contractor in the contract(s)] ("**Agreement**") the body corporate hereby:

- (a) makes a final decision for the purposes of section 132(3) of the *Body Corporate and Community Management Act 1997* to accept the outcome of the review of the Agreement under Division 7 of Part 2 of Chapter 3 as set out in the attached heads of agreement ("**HOA**");
- (b) authorises the preparation of a Deed of Variation of the Agreement, the final terms of which are to be approved by the committee, to give effect to the amendments set out in the HOA; and
- (c) authorises execution of the Deed of Variation under seal of the body corporate, to be attested by the Chairperson or Secretary and one other member of the committee.

² The exclusion of proxies is to comply with the requirements of the Modules for amendment of management rights agreements. If an extension to the term is also being included, then a secret ballot will also be required.

Form D

Motion for General Meeting Resolution

Motion for Ordinary Resolution (Proposed by the Committee)

THAT in relation to the [*describe the contract(s)*] dated [*date of the contracts*] with [*name of service contractor in the contract(s)*] ("**Agreement**") the body corporate hereby:

- (a) makes a final decision for the purposes of section 132(3) of the *Body Corporate and Community Management Act 1997* to accept the unsuccessful outcome of the review of the Agreement under Division 7 of Part 2 of Chapter 3; and
- (b) determines that no further action is to be taken.

Form E

Motion for General Meeting Resolution

Motion for Ordinary Resolution (Proposed by the Committee)

THAT in relation to the [describe the contract(s)] dated [date of the contracts] with [name of service contractor in the contract(s)] ("**Agreement**") the body corporate hereby:

- (a) makes a final decision for the purposes of section 132(3) of the *Body Corporate and Community Management Act 1997* to note the unsuccessful outcome of the review of the Agreement under Division 7 of Part 2 of Chapter 3;
- (b) determines that the reviewable terms of the Agreement are not currently fair and reasonable;
- (c) determines that a dispute exists in relation to that review; and
- (d) authorises an application to a specialist adjudicator for the purpose of resolving that dispute; and

authorises the engagement of [name of law firm] to act for the body corporate in relation to that application, in accordance with section 133 of the *Body Corporate and Community Management Act 1997*.