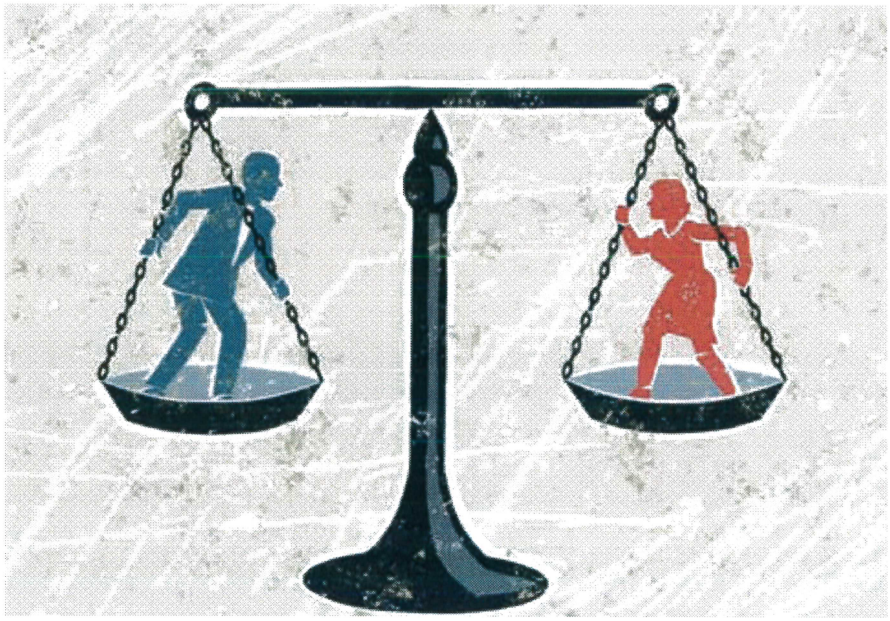
Testing time develops strong industry framework

THE GROWTH OF MANAGEMENT RIGHTS *continues ...*



John Punch - PARTNER
SHORT PUNCH & GREATORIX

BY CATIE LANGDON - **PART 2 OF A SERIES**

The business of management rights generates hundreds of millions of dollars in revenue annually, making it a major economic contributor to Australia's dynamic tourism sector. This thriving industry all began with one building in Surfers Paradise over 40 years ago!

After its entrepreneurial beginnings on the Gold Coast in the 1960s, management rights flourished along with Queensland's dynamic tourism and property industries. By the late 1980s, it had taken its place as a valuable industry in its own right.

Then came a period of challenge when management rights owners would find themselves defending their businesses. Some attacks, John Punch acknowledges, were well-intentioned. Others were borne of petty jealousies and power plays.

Initially, the sniping related mostly to whether managers were honestly declaring holiday rentals to absentee owners. "Even though they were obliged to bank every dollar into owners' trust accounts, suspicions of managers doing cash deals were easily fuelled," Punch said. "But, with the introduction of Fair Trading laws and better oversight of compliance by managers as licensed real estate agents, the situation was fairly easy to correct. There were a couple of prosecutions and these had a salutary effect."

As Punch rightly explains, if managers cheat owners by not declaring letting income, they destroy their own goodwill, eroding their business value. Agents, accountants and lawyers soon convinced any errant manager that goodwill value would pay them far more than any hidden deals.

But the next legal barrage was far more intense and of far greater consequence. "In the late eighties, began an extraordinary era of litigation," Punch recalls. "In particular, one lawyer and body corporate manager embarked on what could only be described as a mission to rid property owners of management rights."

Cases were well-researched to exploit loopholes, and a series of actions were mounted in an attempt to break down the management rights industry. While building managers struggled to individually fund their defences, body corporate committees financed their cases using the pooled resources of unit owners.

One defining case related to Ocean Breeze Noosa, represented by SP&G Lawyers. "The body corporate had allowed the manager to buy, consenting to assignment of the agreements, then six months later tried to kick him out, effectively saying his management rights were void. The manager had no choice but to take them on."

SP&G prevailed in court. "We proved that, as well as what was written as law, there were equitable principles involved, and that the body corporate's actions were inequitable," Punch explained. "The judgement in favour of the manager ordered the body corporate to pay over $1 million compensation, costing unit owners dearly."

A raft of cases tested various aspects of the law: Was the manager's agreement subject to the same term limitation as the body corporate manager's? Did body corporates have the power to make letting agreements? Were agreements limited in time?

Decisions came down on both sides, appeals followed and some, including the watershed Surfers Palms North case, went all the way to the High Court. "I think the whole process confused judges at the time," Punch said. "And the tourism industry, which just wanted to get

people into buildings, was the meat in the sandwich."

It was the catalyst for management rights owners to unite for the first time, thanks largely to John Gardner who formed QRAMA (later ARAMA). It was 1991, and a fighting fund was raised to lobby the government for better laws.

"Everyone saw the need – body corporate managers, banks investing in the industry, the REIQ, developers. The Queensland Government had to act, so they issued a Green Paper to study what was needed generally in strata title laws."

During a long process, all parties came to the table. Eventually the Body Corporate and Community Management Bill 1997 was presented to Parliament. Though, not without drama on the floor of the House. An independent MP moved an amendment to bring in transfer fees, giving the body corporate a cut of the consideration if management rights were sold within three years of agreements being extended or assigned. The Government needed the Independents' votes to get the legislation through.

The Bill was finally passed, after eight years of work to satisfy all interests, providing a legislative framework which accommodates the establishment, operation and management of community titles schemes. It was unique in Australia and led the way.

It did more than just serve and protect management rights. It enshrined the rights and entitlements of all owners, and clarified the position of body corporates in regard to appointing contractors, committees, bankers, insurers and the like.

It produced for the first time a 25-year term for management rights and brought in modules of legislation recognising different types of buildings. It gave depth to developments by allowing the layering of schemes (principal and subsidiary body corporates).

These laws, so well thought out over time, set the scene for prosperous times ahead in tourism and property development. And they provided the stable platform for a new era of investment in management rights, which we will look at in our next issue.

Another successful remuneration review

BY JOHN MAHONEY, PARTNER - **MAHONEY LAWYERS**

I have in previous articles written about increasing a resident manager's remuneration pursuant to the statutory review mechanism. Whilst we have run a number of successful actions, a recent one in which we were involved has helped to create certainty about how these reviews will be treated by the Queensland Civil and Administrative Tribunal ("QCAT") in the future.

In this particular case our client manager was successful in securing an increase in the annual remuneration from around $135,000 to around $220,000 as at the hearing date after allowing for CPI increases since the time the increase took effect. The Tribunal also ordered the payment of back pay and interest for the almost 2 years it took to conduct the statutory review.

The particular section of the Act sets out the requirements for a statutory review. Paraphrasing the relevant parts of that section, it applies if -

- a Caretaking Agreement was entered into after March 4, 2003;
- the Agreement was put into effect while the developer had control over the Body Corporate;
- the developer no longer has control over the Body Corporate; and

- the review is instigated within 3 years of the Agreement commencing.

Typically, as was the case here, it is the manager that instigates a review.

In this case the expert we engaged was the well known and respected Barry Turner of Building Management and Consultancy Services. Barry's report recommended an increase in remuneration to around $224,000, whereas the expert engaged by the Body Corporate argued that the figure should be just over $170,000.

At the hearing, both experts were extensively cross examined about their reports and methodology used to arrive at their proposed remuneration. The Tribunal member preferred Barry's evidence and methodology and seemed to place weight on Barry's past experience as a resident manager, the time he spent at the complex to better understand the nature and extent of the duties and his views about the standards to which the duties should be performed.

Managers and Bodies Corporate can take a number of lessons from the Tribunal's decision. Firstly, in engaging an expert to prepare a report, it is essential to engage one who is truly independent, adopts sound methodology and has a thorough knowledge of the relevant complex and the duties in the Agreement.

Secondly, successfully pursuing such an increase requires sound legal advice from an experienced lawyer with a good understanding of the legislation and the process. Thirdly, the parties should engage in meaningful settlement negotiations and try and reach an acceptable outcome without the risks and expenses of a hearing. In this case the Body Corporate no doubt regrets its rejection at mediation of a settlement offer for an amount well below that which was ordered by the Tribunal.