

KNOW YOUR OPTIONS AND HOW TO USE THEM

When describing a caretaking or letting agreement, it is quite common for people to describe them by referring to the total time remaining before the agreement expires. Typically this description also includes any option terms available in the agreement, e.g. something described as a “ten year” agreement might actually be an agreement with a five year term plus an option for a further five years.

If your agreements have option terms in them, it is important that you don't fall into the trap of assuming that there is nothing you need to do to activate and use the options. Not all options work the same and the way your options worked in one building isn't necessarily the same in the next. In management rights, the vast majority of option terms will fall into one of three types: an automatic option; an exercise prior to a key date option; or an exercise between key dates option.

Automatic options

The best case scenario for managers is a set and forget automatic option, e.g. an option that automatically exercises unless the manager chooses not to exercise the option. Automatic options used to be more common in older caretaking and letting agreements, but are becoming increasingly rare. If you have an automatic option in your agreement it is generally good business practice to provide the committee with a letter before the option term commences reminding the committee that your option term exercises automatically, but it is not essential.

Be aware that not all options in an agreement need to be exactly the same and an agreement that may have had automatic options at first might have different types of options later on. This is especially common in Queensland, where each time an agreement is topped up the type of option used can be unique. The second third or fourth options may all be completely different in how they work and how they are exercised.

Exercise “prior” options

Many caretaking and letting agreements have options that can be exercised if a notice is given to the Body Corporate prior to a certain date, e.g. any date prior to the expiry of the current term, or any date at least three months prior to the expiry of the current term. If your agreement has this kind of option it means you could exercise your option immediately, even if it is years before the current term ends. In some particular circumstances you might not want to exercise an option immediately, but for many managers it is far better to exercise this kind of option sooner rather than later and have one less risk hanging over your business.

Exercise “between” options

It is increasingly common for options to only be exercisable during a set period, e.g. between six and three months prior to the current term expiring. This means that the manager must wait to exercise the option until closer to the end of the term, and then has a limited window of time in which to send notice to the Body Corporate. It is very important for managers with this kind of option to track these dates and be ready to issue the necessary notices during the set period.

Sending a notice just one day too early or one day too late can mean that the option term has not been exercised correctly and will have no effect. Failing to exercise an option correctly ends your agreement, even if you still have several other options yet to be exercised.

Breaches of duties

In addition to paying attention to how you must exercise your options, it is also relevant in many agreements that you must not be in breach of the agreement when the option is exercised. For example, if you are in breach of the agreement when you send a notice to exercise your option, or in breach at the time the new option term is due to commence, it might prevent your option term from having any effect and bring your agreement to an end. There is never a good time to drop the ball when running your business, but failing to be on top of your duties when it comes time to exercise an option is particularly risky and managers should make extra effort to avoid this.

What is considered a “normal” option has been evolving over the years. Automatic options were common twenty years ago but rare to find these days. In my recent experience, if you are asking a Body Corporate to approve a new agreement or add a new option term, it is very likely that the Body Corporate will want an option term that is only exercisable between a limited date range and is subject to the manager not being in breach of the agreement in any way.

No matter what kind of option term you have, it is important that you are familiar with how it works and what you need to do to exercise it. It is never safe to assume that all your options are exactly the same and even caretaking and letting agreements that operate together might be different from each other. If you are ever unsure on how and when to exercise an option you should seek legal advice.

Article Written by Ben Ashworth of Small Myers Hughes Lawyers

Liability limited by a scheme approved under Professional Standards Legislation
Disclaimer – This article is provided for information purposes only and should not be regarded as legal advice.