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# CONTRACT TIPS AND TRAPS FOR OWNERS CORPORATIONS

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In this article, we look at some common traps owners corporations fall into in their service contracts with building managers, caretakers, cleaners, and lift maintenance and fire safety services companies. Knowing what these traps are and addressing them before entering into contracts will save owners corporations headaches, time and money over the years that these contracts operate.

### **What is the contract?**

Ideally, there should be one document that contains all the contractual terms and conditions and the scope of works. However, we have come across many instances where this is not the case. It is possible for a contract to be made up of several documents including emails.

Often, a service contract may refer to another document such as a tender specification that is not part of the contract or consists of several documents that are not kept together. What typically happens as soon as the contract is signed, is it is put in the bottom draw of the desk and only taken out years later when a dispute arises. By this time, there has usually been a complete change in strata committee membership and perhaps even a change in strata manager. The new committee and strata manager cannot find the complete contract and the owners corporation does not know where it stands in the dispute, and this puts it at a disadvantage when negotiating a resolution with the contractor.

It's a good idea to make sure when you are considering entering into a contract that there is one contract document only that sets out everything (including a detailed scope of works) so that there is no need to refer to other documents to understand it. It's also a good idea to put together a contract register for your building which can be handed over to any new strata committee members and new strata manager.

### **Automatic rollover**

An automatic rollover usually occurs at the end of the initial term of the contract where unless the owners corporation gives written notice to avoid the roll over, the term is renewed for the same period as the initial term. And this can occur again at the end of the renewed term. This locks owners corporations into long term contracts that can go for as long as 10 years or even longer.

We see automatic roll over clauses that heavily favour the contractor and make it difficult for the owners corporation to avoid the roll over. For example, we have seen contracts that say to avoid the automatic rollover, the owners corporation must give 30 days' written notice of termination before the end of the initial term. The problem here is calculating the 30 days: get it wrong by being one day out and your written notice of termination has no effect. The problems calculating the 30 days include: do you count the last day of the term in the 30 days? Do you count the day you give the notice in the 30 days? What if the day that is 30

days before the end of the term is a Saturday, Sunday or public holiday, do you count it and, if so, do you make your strata manager go to the office on a weekend and pay additional fees for doing so?

These problems can be avoided if the contract sets out a period during which the owners corporation can give the notice, say between 30 and 60 days before the end of the initial term.

Often, an owners corporation will have forgotten all about its ability to avoid a roll over so it's also a good idea to include a clause along the lines of the contractor has to give the owners corporation notice about the upcoming end of the term and the owners corporation's right to avoid the roll over, and if it does not do so, then there is no automatic roll over.

It's also a good idea if there is a clause that sets out a maximum term beyond which there can be no roll over.

### **Annual fee review**

Everyone likes their pay to go up each year and so do contractors.

It is typical to see an annual fee review clause that provides for the contractor's fee to go up by the greater of CPI or a percentage such as 5%. Care needs to be taken with these clauses because they tend to be automatic and even if the contractor forgets to put up its fee, it is usually still entitled to send an invoice claiming back pay based on what the fee should have been after the annual fee review. One way to deal with this problem is to make the annual increase contingent on the contractor giving you notice the fee will increase and if they do not do so, they will not be entitled to the increase.

We also see annual fee review clauses that use complicated formulas often based on movements in industrial awards applying to the contractor's employees and are usually impossible for strata committees and strata managers to understand unless they spend a day investigating and researching industrial awards. Generally speaking, industrial awards are usually reviewed annually and cost of living increases applied, largely reflecting the CPI. So to make life easier, these types of annual fee review clauses could be replaced by a clause that provides for an annual increase to reflect the CPI increase.

### **Limitation of liability clauses**

Often, contracts limit the contractor's liability for a breach of contract to either damages equating to the cost of the service in question or the contractor re-supplying the service in question. These clauses are often difficult to interpret. For example, if the building manager forgets to turn off a tap and it floods the



foyer and the carpet needs to be replaced, is the building manager's liability limited to damages that equate to how much it would cost to turn off the tap or the manager's entire fee for the year in which the breach occurred? Drafting the clause to make it clear that the latter applies will avoid disputes in the future should something go wrong.

We have also seen limitation of liability clauses that require any claims to be made by an owners corporation against the contractor within 1 or 2 years of the contractor's breach of contract or negligence. This unfairly reduces the standard 6 year limitation period and can result in an owners corporation running out of time to make a claim against the contractor.

### **Conclusion**

Contracts are very important documents so it's best to get them right at the beginning. The way to do this is to get your contracts reviewed by a lawyer before they are signed. If you want to know more about contracts and the things we have discussed in this article, please contact us.

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JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with depth and unmatched experience in, and comprehensive knowledge of strata law, building defects and levy collection.

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