

# The guide to selling a management rights business





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The team at Hynes Legal can assist you with all of your management right needs.

We are different, not in what we do, but in how we do it - fixed fees, returned phone calls, accessible lawyers, no billing surprises and more.

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## *A bit about us*

We are a refreshing experience to most traditional law firms. As examples of how we operate:

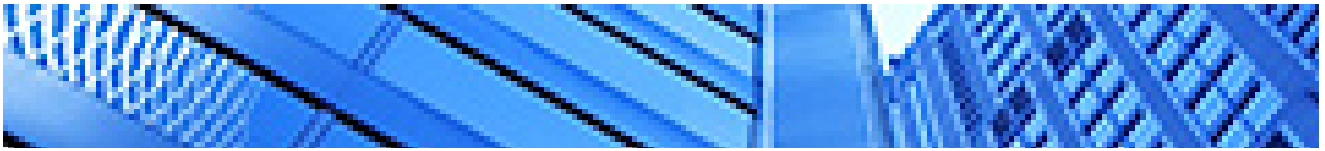
- **We are accessible** - We have direct lines and we don't hide behind secretaries and receptionists and filter phone calls.
- **We return phone calls and emails** - Simple. Yes we know. But it is surprising how many lawyers don't return phone calls. It frustrates us when we have them on the other side of a matter, and we aren't even paying them.
- **Our office is open plan** - Not even the directors have offices. We have cut the traditional law firm overhead substantially, meaning cost savings that we can pass on to you.
- **We are very much a 'plain English' firm** - You won't get verbose advices from us that include a lot of legal words that prove we have a law degree. We communicate very much on a layperson's level. Having acted for hundreds of clients new to the industry over the years we know what you need to know and present that in an easy to understand manner.
- **Lawyers find it very easy to recite the law** - What many lawyers cannot do is then apply that to your individual circumstances. We do that. If the law says you can do something, but we think you should not (for whatever reason) we will tell you. There is no point being legally correct but commercially wrong.

We are excellent value for money, and the proof of that is how many repeat clients we have. At any given point in time we would have somewhere between 30 and 50+ individual management rights transactions on foot. Some of these are new clients who asked around other firms, and the rest are repeat clients who trust us to do the right thing by them – which we do.

Just have a look at our website for the material we publish to both the management rights and body corporate industries.

Try us - you will be surprised at how different we are to the usual law firm experience.





## *Selling your management rights business*

The sale of a management rights business is not a simple process. Some people downplay the difficulty in a transaction of this nature. Occasionally a sale may transact seamlessly, but this is a rare thing, primarily because there are so many things that can go wrong.

Investing in the right advisors to support you through the management rights sale process is a form of insurance. You want experience around you just in case things don't go the way they should.

## *Why a sale can become difficult*

The main reason a sale can become difficult is because there are so many parties that are involved. There are potentially 14 other parties involved in the process, as well as your committee, which can be up to another seven people. It sounds like a lot, and it is, but here is who they are and what they do:

**Brokers** – potentially your listing broker and the buyer's broker (who might or might not be from the same agency).

**Accountants** – yours to get the profit and loss prepared and the buyer's to review it.

**Lawyers** – yours, the buyer's and more than likely, the body corporate's. Sometimes you also get a buyers bank's lawyer involved here as well.

**Banks** – the buyer will have one and you more than likely do too (and if not, well done!).

**Valuers** – perhaps you obtained a valuation on your unit when you listed it for sale. If your deal is a bigger one the buyer (or their bank) might need to value the unit, and/or, the business as part of the finance approval process. They will not be the same valuer.

**Body corporate manager** – just the one you know.

**Committee members** – any one of up to seven can have a say.

**Buyer** - you need a buyer to sell to!

The art of running a successful sale transaction from a legal perspective is being able to deal with all parties to a transaction. This guide deals with some of the issues that can occur on a sale, but it does not cover all of them.

The benefit of experience is knowing what are major issues and what are minor. Take the example of an issue arising in the verification of figures. The issue might be 10 missing letting appointments. The income might be there, but the ability to earn it might not quite be lawful. This can cause a chain reaction throughout the sale itself. This issue may well lead to a legal due diligence issue, and more importantly a finance issue because the valuer may lower the valuation, which then means the bank cannot lend what was applied for because its policy doesn't let it. This means that the buyer needs to put in more cash, which they might not have.

The art of running a successful management rights sale is managing that issue with letting appointments when it occurs. It is knowing that it can lead to those complications, and then identifying a course of action that will solve it for all parties when it first appears.

Ultimately, you have signed a contract because you want to sell and your advisors should be people who will help you achieve that with the least possible fuss. That comes from experience and there is no substitute for it.

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*"I have interests in multiple management rights businesses. I have dealt with the team at Hynes for more than a decade and I would not use anyone else for management rights. They are quick to respond to any of my issues and cost efficient when they do. Above all, they know what they are doing. When I ask them a question (no matter how complex) I know I am going to get the right legal answer – and also the right commercial answer taking into account their understanding of the issue and the management rights industry. They have become an important part of any decision I make."*

**Colin Burton, Director, Dreamtime Resort Group**

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## *Getting your business in order*

Before you list your business for sale there are some key things you want to make sure are reviewed. Surprisingly enough, buyers will accept lots of things that could otherwise be issues if they are handled properly and presented correctly the first time. Buyers will often get upset (and lose trust), if their due diligence reveals things that they believe you should have told them. Buyers do not like surprises.

Make sure you address every one of the following issues before you go to sell.

### **Are your letting authorities signed by every owner?**

Missing letting authorities are still the bane of every transaction. At law, if you do not have them you cannot charge a commission to the owner of the lot. Buyers (and their accountants) will ask for them. If they are not all there, be ready to be asked why. Depending on the buyer's position you may be required to have them all signed by settlement or agree to an adjustment of the purchase price on settlement.

### **Are the letting authorities assignable?**

There are two separate forms under which letting appointments can be created. Before 1 December 2014 they had to be on a PAMDA20A. For those to be assignable you had to either:

- Have section 4.4 which dealt with assignment ticked and initialled by all of the owners; or
- If an earlier version PAMDA20A was used, the owners needed to agree to making the appointment assignable by a separate agreement or annexure.

If the appointment is on a PoA form 6 it is automatically assignable.

If an appointment is a PAMDA one and is not automatically assignable, that will remain the position under the PoA. For that appointment to be assigned you will need the consent of the owner, or to get a new appointment on a PoA form 6. If it is not assignable it may lead to the same issues as not having a letting authority form in place as mentioned above.

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*"We own a management rights business consisting of 7 schemes in North Queensland. We could not be happier with the advice and support Hynes Legal have given us in the 6 years we have owned our business."*

**Kevin & Melissa Speer, Managers, On The Beach, Cairns**

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## Do you have up-to-date sales figures?

Most buyers require a verification of figures to within two months of the date of the contract. It is very rare to find a financier that requires any less when assessing the income of the business for lending purposes. That is because there is little point assessing a deal on figures that are out of date.

Having sales figures that are (say) six months old means that there is more than likely going to be a discrepancy between what you think the net profit is and what it verifies to when investigated by the buyer's accountant. This may lead to a price renegotiation if the figures verify to less than what you suggested they would be in the contract. The other alternative is that if the income has increased, you may be selling for a lower price than you could be.

The other issue with having older sales figures is that buyers will sometimes lean towards making offers on buildings whose figures are more up to date. Put yourself in a buyer's shoes. Imagine if you were looking at similar buildings, that were for all intents and purposes alike, but one had current figures and one had figures that were 12 months old. Which one would you prefer to make an offer on?



## What is the status of the term of your management rights agreements?

You need to know the remaining term of your management rights agreements. This is very important to any buyer. If you do not have a long enough term left, you may need to top your agreements up as part of the sale which will lead to additional costs and a potential delay. Whether you have a long enough term left will depend on the market at the time and which Module you are regulated by. You will need to be guided by your broker around what this will be.

Make sure you have exercised your options and documented those with the body corporate. Failing to exercise an option can have substantial consequences.

Setting false expectations for a buyer on term can be fatal to a transaction. Know the term you have to sell and if you are not sure, check before you list your business for sale.

## Are there any body corporate issues?

Are you having a brutal battle with the committee? Are there building defects that have not been dealt with?

These issues will normally be revealed in the buyer's due diligence when they look at the body corporate records. If these types of issues are managed up front and disclosed to the buyer before the buyer finds these out on their own, then the outcome will usually be a lot different to the position where the buyer identifies it during the due diligence process and then asks the question as to why they were not told in the first place. The key lesson here is to be up front with any major issues.

## Are there any outstanding due diligence issues from when you purchased?

Were there certain things that your lawyers recommended should be corrected in the agreements when you purchased? Have you done these? If not, be ready to have that same conversation with the buyer. The commercial risk you accepted when you bought might not be acceptable to the buyer.

## Are your agreements caught by the Gallery Vie decision?

A relatively recent decision at the QCAT has caused some concern amongst management rights industry financiers. In general terms, if your management rights agreements include a right for the body corporate to terminate them as a result of the bankruptcy or liquidation of the manager entity, your agreements are caught by this decision. This may need addressing at either committee or general meeting if your buyer's financier needs it addressed. Negotiating these clauses is becoming very important in most sales.

## *In summary*

Understand what a buyer will look for and deal with it now. It is far easier to deal with the issue before you sign a contract rather than when you are half way through the sale process.





## The different types of listing

There are three types of listings that you can choose when placing your business on the market:

**Exclusive** – if the property and business are sold during the term of an exclusive listing you will pay a commission to the broker you have signed with no matter how the sale has come about. An exclusive listing should normally mean that the broker knows that they have the property to sell for a period on their own and that means they will usually then work harder to sell it. Sometimes a seller gives more than one broker a 'joint exclusive', with commission payable to the broker who ends up introducing the buyer. If you sell the property yourself you pay a commission under this type of appointment irrespective of whether or not the broker was involved with the sale.

**Sole** - if the property and business are sold during the term of the listing authority through a broker you will pay a commission (even if the broker selling it was not the one you signed with). If you sell the property yourself you do not have to pay a commission under this type of appointment.

**Open** - Commission is only payable under this form of agency if the listing broker is the effective cause of sale. Proving (or denying that) can be a difficult legal argument. These forms of listing are usually seen when more than one broker is engaged or the business is put on the market via multiple brokers

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*"There is only one firm I use to advise me on management rights and that is Hynes Legal. Other lawyers can do the cottage conveyancing for my developments, but Hynes are the ones who act for me on the negotiation and sale of my management rights businesses off the plan. They know off the plan issues inside and out."*

**Steve Anderson, Managing Director, Hayman Homes**



## Using experts

You may well have heard this bit before, but we will repeat it again.

Use people who are experts in management rights to help you in your sale.

Management rights remains a very specialised legal area. Using someone who does not know what they are doing to assist you will be an experience fraught with frustration (through your advisor not knowing what is going on and not being able to assist you) and financial danger, which is usually the result of bad advice.

Many people call themselves experts. It is easy to advertise that. If they do, don't be afraid to ask for testimonials from other management rights clients. Ask them how many management rights transactions they are currently working on, or how many management rights clients they have advised over the last few months. Investigate how committed they are to the management rights industry. Ask the other industry professionals you are working with how often they have dealt with your advisors.

We see the consequences that come from not using management rights experts. They can be significant. Do not be lured into using someone who simply does not know what they are doing for a cheaper price. As evidence of our expertise in the management rights industry, we are panel lawyers to ARAMA, the peak management rights industry body. Many so called management rights "legal experts" are not.

The management rights sale process can be complicated. Some people may attempt to oversimplify it which can have negative consequences. In the right hands a management rights sale is streamlined and can be quite straight forward. Unfortunately you sometimes don't know what not having an experienced advisor on your side means until you run into trouble - and by then it can be too late.

### Do you need to use a management rights broker?

In a strict sense, no. The same applies to both accountants and lawyers, but there are good reasons for using all three.

You absolutely can try to sell the business yourself. You can do your own profit and loss for sale purposes and also try to do your own legals.

Leaving aside finding buyers, a good management rights broker helps set expectations of each party correctly from the start and ensures that each party knows where the other is coming from. That means when something goes wrong on the way through the sale the broker is a good intermediary to help solve the issue – no matter what it is.

In the absence of a broker, when something goes wrong, either you or your lawyer has to solve it. Ethically, a lawyer cannot communicate directly with the client of another lawyer. Communications via lawyers are always impersonal and are never as good as direct phone contact between the buyer and seller via the broker. If there is no broker your only solution may be a lawyer to lawyer conversation, or it may fall to you personally to talk to the buyer and solve the issue. Depending on what the issue is, these can be difficult phone calls.

If you do sell yourself, your lawyer can (and should) prepare contracts for your sale.

### Your management rights broker

List with someone who is deeply involved in the management rights industry. They will have the connections and access to buyers to find someone quicker than listing with a general real estate agent. They will also usually be able to give you a very good idea of the market value of your management rights business. Real estate prices can move about – and quite considerably in some price brackets and areas. A good broker will suggest a valuation of the real estate if they are not sure.

They will help you understand what is selling in the current market and why. They may also be able to give you some tips to ensure you present the unit and the business in the best possible light.

They will also be able to help troubleshoot on the way through the sale when something goes wrong. If the figures do not verify for some reason you want someone with experience in renegotiating prices to be able assist you through the inevitable to and fro.

A management rights broker's role on the sale is far from concluded when the contract is signed. The broker can work harder through that transaction than they did through the listing and initial negotiation process.

## Your accountant

The contract will normally be subject to the buyer verifying that a two person management team could obtain the net profit you have suggested. When preparing a profit and loss statement for sale purposes you need to make sure that your accountant knows what expenses to include and exclude so you list the business for sale with a realistic (and sustainable) net profit.

If there are one off items of income or expenditure, they should be qualified. If you employ staff, there is always the question of how much of their salaries you should add back to the net profit as being a lifestyle choice of yours (in that you could do the work but you have chosen not to). All of these things (and more) should be addressed in the profit and loss so that the buyer understands any immediate issues.

Nothing alienates a buyer more than the figures not verifying to what you have suggested they should. Rightly or wrongly, if the figures verify lower than you have stated (and especially if they are out by a significant degree) the buyer may think that you may have tried to mislead them – and that is not a good place to sit in a transaction that includes an element of trust.

## Your lawyer

Your lawyer needs to have real and extensive experience in dealing with all of the issues that may arise. That means any problems that occur on your sale should be able to be solved with minimum of fuss and expense.

There is also quite an art to managing all the moving parts of a management rights transaction. Things can, and quite often do go wrong. Being able address issues quickly and practically comes from experience and saves time and money.

Aside from managing the confirmation of the conditions to be satisfied by the buyer, your lawyer has to deal with the body corporate and the committee on the assignment. Knowing what to do and when to do it is critical. Assignments of management rights agreements are no longer the simple ‘tick the box’ exercise they once were.

In addition, your lawyer will facilitate the transfer of both the unit and the business and make sure the documents you are signing are correct and do not expose you to any additional risk. It is far from uncommon for buyer’s lawyers to include warranties and statements in the deed of assignment that go above and beyond what are in the contract. A good lawyer acting for you will make sure you only commit to what you have to.

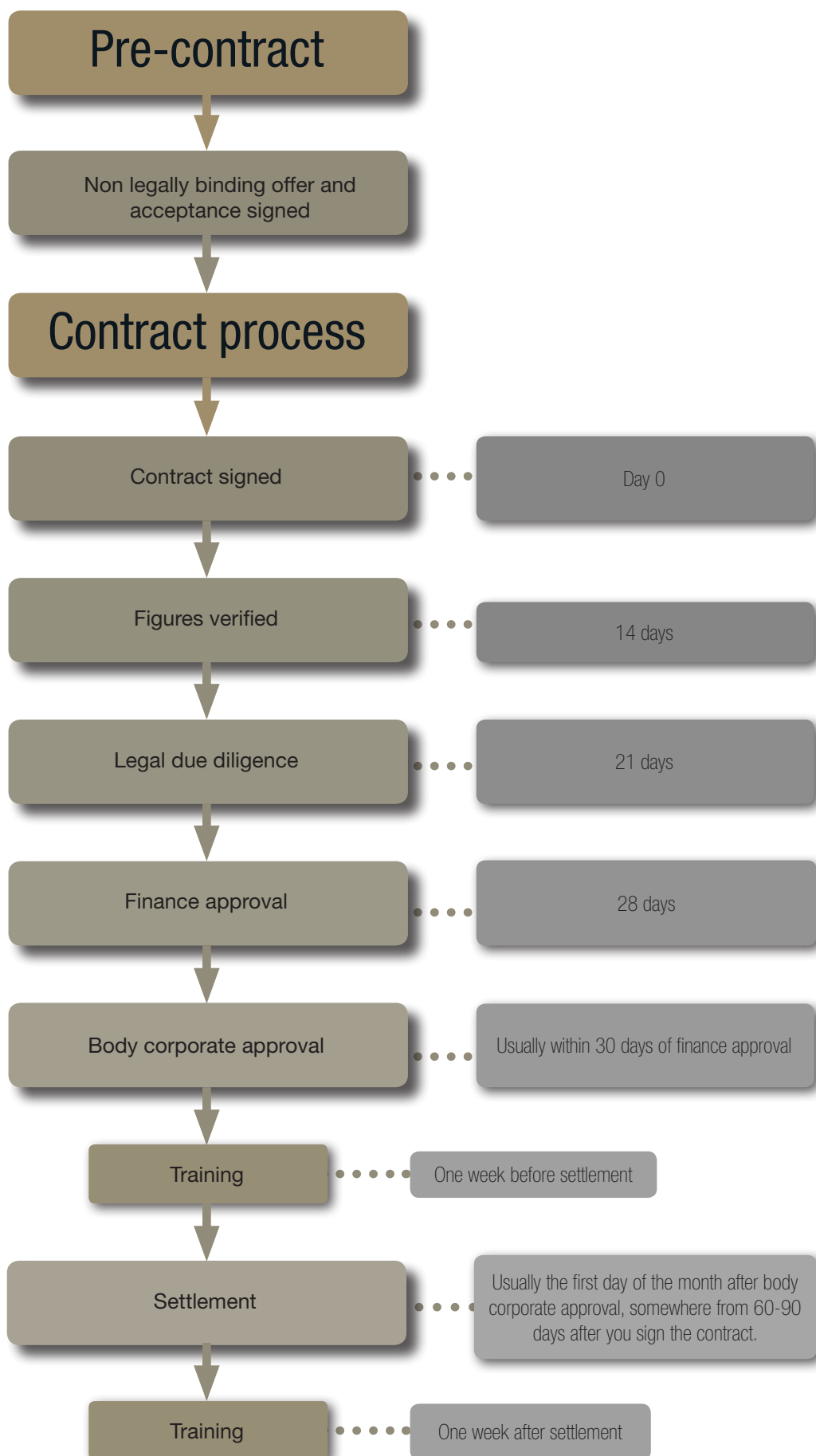


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*“I have used Hynes Legal for all of my management rights matters. I have also referred many of my friends to them as they do such a good job. I recommend them to anyone looking at buying or selling management rights.”*

**Kevin Gong, Wishart Views Villas**

## A typical management rights sale time-line





## Offer and acceptance

The first stage of most management rights transactions is the signing of an offer and acceptance. This is usually a one or two page document that sets out the essential terms of the deal. In general terms, it is safe to say this is not legally binding. Most offer and acceptance documents will include an express statement to that effect.

The offer and acceptance will set out the prices for both unit and business and the respective deposits. It will also usually list out in general terms the special conditions (like the contract being subject to verification of figures, legal due diligence, finance approval and body corporate approval). It will also list a settlement date.

Rest assured that if you get to contract stage, there will be a lot more detail included about each of these conditions and what they mean.

Agreeing terms on an offer and acceptance can become a bit of a game – you can go backwards and forwards initialising price changes until (hopefully) you get to an agreement. When that happens you move on to the next stage – which is preparation and signing of contracts.

### How much deposit should you get?

Usually a nominal deposit is paid on signing of the contracts of \$1,000 each. Then the deposit is usually topped up to 5% or 10% of the purchase price on finance approval. The deposit is security for you to ensure the buyer will settle. It is good to have a substantial deposit because that means there is a significant incentive for the buyer to complete the purchase and not walk away if they change their mind for some reason or find something they don't like after they are unconditional. Some sellers on bigger transactions want a substantial deposit up front as a sign of the buyer's financial ability. Ultimately, it is your decision as to how much deposit you want and you should be guided by your broker in this respect.

### GST

The business and associated real estate should be able to be sold as a going concern which allows you to avoid having to pay GST on the sale. This means both you and the buyer have to be registered for GST and you must supply all things necessary to operate the business to the buyer. This can be complicated sometimes by the way management rights business transactions are structured. It is common for there to be different entities that own the unit and the business. There is certain documentation you need to sign to ensure you comply with all of the requirements of a going concern, which an experienced management rights lawyer should be able to provide for you.

### Are you being realistic on your settlement timing?

Almost all management rights contracts are subject to verification of figures, legal due diligence and finance approval. These usually take about 28 days from the day the contracts are signed to complete. You then need to seek body corporate consent to the assignment of the management rights agreements.

A body corporate is allowed up to 30 days from when it receives everything reasonably necessary to consider the assignment. The 30 day time frame is not hard and fast. An assignment can be approved inside that time-frame if the committee agrees.

Signing a contract and expecting settlement in under two months (unless you have a great working relationship with your committee), is potentially unrealistic. Making sure you have the right time-frames from the start of the transaction will usually save a lot of panic come the proposed settlement date.

There are a lot of moving parts in every management rights transaction and the unfortunate reality is that it is rare to have one that is straight forward. It is common for conditions to drift a bit past when they were due, meaning potential delays to the original settlement date if you have set a tight time-line.

### Contracts

Once the offer and acceptance is signed, formal contracts need to be prepared. There will usually be a contract for the unit and a contract for the business. They will probably be in a similar form to the contracts prepared when you purchased and will almost certainly include a linkage together so that both unit and business sales stand or fall together. You won't end up selling one without the other.

Your lawyers can prepare contracts if needed, but depending on who you sell through, the broker will probably prepare them. Most expert management rights brokers prepare their own, but the odd one doesn't and asks your lawyer to do it. It is not a big issue either way, other than preparing contracts usually comes at an additional cost if your lawyer does it.

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*'We have used Hynes for our NSW management rights matters. Due to circumstances beyond our control we unfortunately found ourselves in a very difficult situation with our Owners Corporation and Executive Committee. Hynes have been instrumental in resolving the dispute and they have been great to (and for) us in what has been an incredibly stressful time. We cannot recommend them highly enough.'*

**Jeremy and Julia White, The Oasis Apartments Byron Bay**

One thing is for sure though – if you have sold your business direct, or you have sold through an agency that is not a management rights specialist, then you should arrange for your lawyer to prepare the contracts. There are many things that standard REIQ contracts do not contemplate when it comes to a management rights transaction that need to be addressed.

You will need to obtain the disclosure statement for the unit from your body corporate and also prepare an inventory of equipment included in the sale owned by you. If you want, you can include an inventory of body corporate equipment, but if you do, make sure it is noted as being owned by the body corporate to avoid any later confusion about who owns what.

## When do you tell your body corporate you are selling?

Conventional wisdom in the management industry is not to tell your body corporate you are selling until your contract is unconditional. This is put forward for a number of reasons, which include:-

- if the sale does not proceed, the committee might regard you differently in terms of work ethic, supervision etc; and
- there could be costs incurred which are payable whether the sale proceeds or not.

There is no ‘one size fits all’ approach to dealing with bodies corporate. Each committee has a different personality and it is really up to you to decide what is best for your particular circumstances.

Some sellers may take their committee into their confidence when they list their business for sale. This helps the committee members feel informed about what is going on, which can help simplify the assignment process through when a contract subsequently arrives. This is usually more the case when you have been there for a reasonable period – usually a few years at least.

Talking to your committee early will help remove the risk of the committee feeling ‘ambushed’ with the request to consider an assignment, especially when that request is delivered a month or more after a contract is signed and especially where the proposed settlement date is 30 days or less away.

It really is a question for you about how and when you think it is best to tell your committee you are considering selling. There are certainly circumstances which will exist which mean bringing the committee into your confidence will better serve your interests.

## The transfer fee

Your body corporate must impose a transfer fee if it consents to an assignment of management rights within two years of the date of settlement of your purchase. The transfer fee is 3% of the value of the management rights business if you sell within 12 months of the date of settlement of your purchase, or 2% if you sell within two years of the date of settlement of your purchase.

The transfer fee is not imposed on the value of any real estate associated with the transaction.

Imposition of the transfer fee by bodies corporate is compulsory. Committees have no discretion to waive the transfer fee for good service.

However, a body corporate cannot charge the transfer fee if you are transferring the management rights because of genuine hardship that was not reasonably foreseeable by you at the time you purchased.

The rules around transfer fees can be complex. It is simple enough to say that if you are selling inside two years from when you purchased you should get advice on your prospective liability on the transfer fee before you sign a contract. If it is payable, you need to factor it in like any other transaction expense.

The transfer fee includes GST, so you automatically get 1/11th of it back if you and your body corporate are registered for GST.

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*“Our family has owned multiple management rights businesses both alone and in partnerships. We started in holiday letting building on the Gold Coast, then moved into to a corporate let complex in Sydney, and then a long term letting complex in partnership on the Gold Coast. We are currently involved in a partnership in a very large corporate letting building in Brisbane CBD. We have used Hynes Legal exclusively throughout the years and recommend them to anyone investing in any management rights business. Their accessibility and advice is second to none.”*

**Pam Ryall, M on Mary**

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# *Working through the conditions*

## **Verification of figures**

The contract is subject to the buyer verifying that a two person management team could obtain the net profit you have suggested. This is in item K from the management rights contract and normally occurs within 14 to 21 days of the contract date.

The buyer's accountant may well send you a list of things they want you to have available for them on their inspection. This will more than likely include all of your letting appointments, tenancy records, trust account records and general account records.

They will need to be able to determine the revenue for the business (which comes from the trust account and the body corporate remuneration) and the expenses for the business (which comes from your general account).

If you use your general account for more than just your management rights business it will be important to dissect this properly and in an open and transparent manner so you can explain which costs go where.

Hopefully the buyer's accountant will agree with the figure you suggested the net profit was. If not, you can expect to be asked to renegotiate the price. There is an art to this, and while it is primarily the role of the broker to resolve the issue, experienced advisors will have been through it countless times (like us) and will be able to help you through the dynamics of a renegotiation.

The standard management rights contract allows two business days for the buyer to notify the outcome of figures. Sometimes buyers use this.

## **Legal due diligence**

The legal due diligence is normally special condition two of the management rights contract and normally occurs within 21 days of the contract date.

This is where the expertise of the lawyer who acted for you on your purchase is tested. Also tested will be the validity of any variations and extensions to your management rights agreements since you purchased.

Lawyers are paid to provide opinions. Sometimes there can be differences of opinion. When that happens you need to have someone with real management rights expertise to be able to navigate the issues of opinion that can be raised.

## **Finance approval**

The buyer will usually need finance to complete their purchase. Usually this condition is due within 21 to 28 days of the contract date.

The finance process remains the same. The bank will get all the information – usually the verification of figures report and a legal due diligence certification and then assess the loan.

Hopefully this happens within the time frame under the contract. If not, it can be because there are issues with the valuation or something else.

The standard management rights contract allows two business days for the buyer to notify the outcome of finance approval. Sometimes buyers use this.

## **Do you grant an extension to a condition date?**

It is not unusual for a buyer to need an extension to one or more of these conditions during the contract process. Extensions can be needed for any number of reasons. Sometimes the buyer or their advisors are busy and simply slow. Other times it may be because the buyer or their advisors have identified an issue during their due diligence that may affect the sale.

Either way, there is no reason to get upset about a requested extension. This is because the answer is pretty simple – grant it, and the sale process rolls on. Refuse to grant it and the contract drifts meaning either party can terminate it. The buyers failure to confirm satisfaction with a condition means you can also probably terminate the contract yourself if you choose. The buyer is spending money on their due diligence, meaning they have a real incentive to proceed. Not granting a requested extension (especially for a short period of time) also sends a relatively bad message to a buyer.

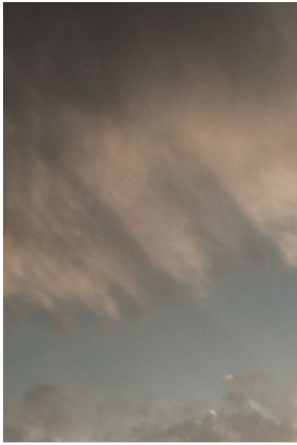
## **Body corporate approval**

Once all of the conditions within the contract within the buyer's control have been satisfied you move on to the next stage of the sale process. This is seeking the consent of the body corporate to the assignment of the management rights agreements.

In effect, the buyer needs to step into your shoes under the management rights agreements. The consent of the body corporate must be sought to allow this to occur.

What must be provided to the body corporate in seeking that consent depends on the BCCM Act and related Modules (which are identical every time), and what you have in your management rights agreements (which is different every time). You need to make sure that you tick all the boxes so that your body corporate has everything it is entitled to from the start.

At law a body corporate has 30 days from the date it receives all information reasonably necessary to consider an assignment. If you do not give the body corporate everything they are entitled to, then their 30 day period to consent to the assignment does not start. Getting this component right is critical especially in matters where the relationships are strained.



## Can the body corporate refuse to consent to an assignment?

The assignment process is not like a job interview with multiple applicants. There is only one person 'applying' for the role of caretaker and letting agent. That is your buyer.

At law, the body corporate cannot unreasonably withhold consent to the assignment. This means that it cannot refuse consent to the assignment unless it has very good reasons to do so. An example would be where a director of the buyer company has a criminal conviction for trust account fraud. Obviously that is an extreme situation, and the basis for refusing consent gets harder the less serious the circumstances.

It is becoming more common for committees to be more 'difficult' on an assignment. In the 1990's and early 2000's assignments were, by and large, a 'tick the box' exercise. They were not scrutinised too heavily and generally they were easy. That is no longer the case – perhaps as result of the heightened sensitivity in every commercial transaction in the post GFC world.

Either way, even though a body corporate cannot unreasonably withhold consent to an assignment, it does not mean it cannot be difficult. You need to handle the process with care, and this is where making sure you have a lawyer who can recognise the warning signals of a potentially difficult committee is very valuable.

## Can the body corporate vary your agreement as a condition of the assignment?

No. What a body corporate must do on an assignment is say 'yes' or 'no.'

Sometimes a body corporate might seek to use some commercial leverage to seek concessions from the buyer about duties or related issues. They might seek concessions from you too.

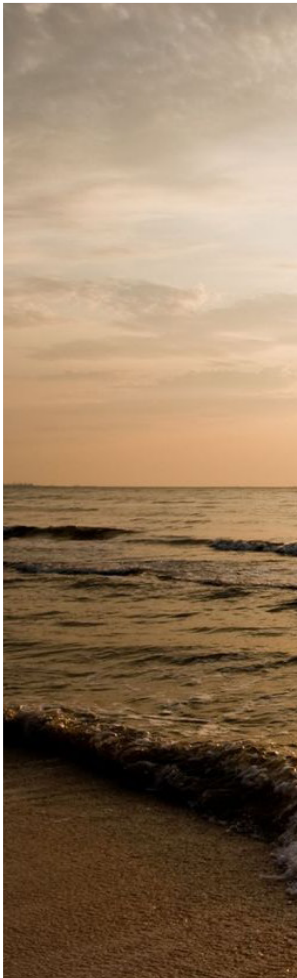
While the law says one thing, what happens in commercial reality can be another. How you handle this is important. Again, making sure you have a lawyer who can recognise the warning signs of an issue like this is critical and invaluable.

## The body corporate lawyer and other costs

The body corporate does not have to get legal advice on an assignment. Most do though – and they are entitled to because they are being asked to sign legal documents (being the deed of assignment).

You have to pay the body corporate lawyer's costs. You will also have to pay the body corporate manager's administrative costs of dealing with the assignment.

Depending on what goes on, these costs may actually be more than you pay your own lawyer to act for you on the sale.



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*'We have used Hynes for our NSW management rights matters. Due to circumstances beyond our control we unfortunately found ourselves in a very difficult situation with our Owners Corporation and Executive Committee. Hynes have been instrumental in resolving the dispute and they have been great to (and for) us in what has been an incredibly stressful time. We cannot recommend them highly enough.'*

**Jeremy and Julia White, The Oasis Apartments Byron Bay**





## How do banks get protection?

In Queensland management rights matters financiers to the management rights business have certain statutory protections under the BCCM Act. In New South Wales (and other states), those same protections do not exist.

In other strata jurisdictions this means that financiers to management rights businesses need to have the body corporate / owners corporation enter into what is known as a 'deed of consent to mortgage' (or similar) to protect their interests. These can sometimes be contested documents, but the costs for that contest are paid by the buyer. Negotiations over this agreement can complicate the assignment process substantially.

## Settlement adjustments

Your lawyer will attend to adjustments for rates and levies for the unit on settlement. You are only obliged to pay for the rates and levies for the time you actually own the lot.

From a business perspective there are further adjustments that may need to be made. Depending on who your body corporate manager is, and how they operate, you may need to make provision for adjustments of:

- The caretaking salary – like rates, you are only entitled to this income while you are operating the business;
- Rent paid in advance – you will need to account for commission earned on this to the buyer (the same as the buyer has to account to you for commission on rent in arrears); and
- Bonds and other trust account matters – once you sell the business you need to hand all of these over to the buyer.

If you are not comfortable doing this, you may choose to get your accountant or a bookkeeper involved. These operational adjustments are not usually the domain of the lawyers on the settlement statement.

## After settlement

As the dust settles, you will need to complete your final tax documents and you may even wind up your company or trust.

If you are potentially looking to move into another management rights business you should consider keeping your licence current. You should talk to the Office of Fair Trading about this.

In addition, there may be certain capital gains tax implications for you that you should seek advice from your tax advisor on. You may be able to reduce or limit capital gains tax payable through superannuation transfers or reinvestment in another management rights or other business. It is worth getting some expert financial advice.

Finally, you should consider your own estate planning position. Now that you have time to sit down and assess where you are at with life it is worth the time to understand what will happen when you do pass away. A proper estate plan deals with contingencies while you are alive and in the event of your passing. Powers of attorney should also form part of this assessment. We can assist you with a no obligation discussion around this part of your personal planning when you have caught your breath after the sale.

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*Thanks to the team at Hynes Legal for their professional advice and expertise over the 8 years we have been in the Management Rights industry. It has been most reassuring to tap into their knowledge on various aspects and successfully embark on the purchasing and selling processes utilising sound advice.*

**Heather and Peter Jones**

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## Some terms you need to know

**20A / PAMDA 20A / Form 6:** These are the common terms for a letting appointment, which is an appointment that a resident manager holds from an owner to let their lot for them. They are also called 'management appointments.' They are on a 20A form if signed before 1 December 2014 and on a Form 6 if signed after 1 December 2014.

**BCCM Act:** This is the *Body Corporate and Community Management Act 1997*. This legislation covers almost all community titles schemes in Queensland.

**By-laws:** These are body corporate rules relating to the use of common property. By-laws detail the responsibilities of the body corporate and apply to everyone entering the complex including owners, tenants and guests. These are contained in the CMS.

**Body corporate:** The body corporate is a separate legal entity - similar to a company, that is created to control common property. All owners are members of the body corporate. An elected group (like a board of directors) form the committee.

**Body corporate manager:** Although it may be confusing, what is known under the BCCM Act as a body corporate manager is the person who administers the financial and secretarial side of the body corporate. This person issues levy notices, chases arrears, records total minutes of meetings and undertakes other related duties.

**Commissioner's office:** This is the office that decides the vast bulk of body corporate disputes.

**Committee:** Effectively the board of directors of the body corporate, who are elected every year.

**Committee meeting:** These are meetings of the committee held at different times throughout the year to discuss body corporate issues. These can occur monthly, or not at all. It all depends on how active the committee is.

**Common property:** This is property shared by owners and tenants. This may include foyers, hallways, swimming pools, gardens, tennis courts, gymnasiums and entertainment areas. It is everything other than the lots in the scheme. Maintaining common property is the primary obligation under the caretaking component of the management rights business.

**Community management statement:** Commonly referred to as a 'CMS' this is the document that contains the by-laws, a description of the real property in the scheme as well as the lot entitlements for the lots in the scheme.

**Community title scheme:** What was a single property title, when owned by the developer, which has since been subdivided into separate titles or lots (units or townhouses) and common property.

**General meeting:** This is one of two types of meetings where all owners can vote on issues. The first type (held once a year) is the annual general meeting. This is where, amongst other things, the committee is elected. Any other general meeting held during the year is called an extraordinary general meeting (or EGM). Annual general meetings are held to address financial and other aspects of the body corporate as well as direct the committee. Extraordinary general meetings may be called at any time to address specific issues. Owners attend meetings in a similar context to company shareholders.

**Lots:** The pieces of property in a community titles scheme that belongs to the individual owners. This is what the letting authorisation component relates to.

**Manager / letting agent:** The owner of the management rights. Other terms include RAM (residential accommodation manager) or RUM (resident unit manager) or onsite managers. The BCCM Act uses the terms caretaking service contractor and/or letting agent.

**Modules:** There are more detailed rules for different community titles schemes under the BCCM Act. Standard, Accommodation, Commercial and Small Schemes modules cover various types of body corporate structures, but it is safe to say that management rights businesses deal almost exclusively with Standard and Accommodation modules. The big difference between the two for management rights purposes is that under the Standard Module a management rights agreement is limited to a term of 10 years while under the Accommodation Module, an agreement can run for up to 25 years.

**QCAT:** This stands for the Queensland Civil and Administrative Tribunal, which is responsible for determining complex caretaking disputes between resident managers and bodies corporate.

**Specialist adjudicator:** A person that determines caretaking disputes through the Commissioner's Office. Specialist adjudicators were quite common in the past, but nearly all caretaking disputes now go through the QCAT.

**PAMDA:** This is the acronym for the legislation that used to regulate real estate agents which was the *Property Agents and Motors Dealers Act*. From 1 December 2014 it is the PoA that regulates real estate agents.

**PoA:** The legislation that regulates all real estate agents in Queensland is the *Property Occupations Act 2014*.



## *Why you should choose Hynes Legal to act for you*

Management rights is a very specialised area of law. We have the largest team of specialist strata lawyers in Queensland, acting across both the management rights and body corporate industries. This means we live and breathe the issues that affect management rights and bodies corporate on a daily basis.

Our lawyers regularly present at both local meetings for management rights owners and body corporate managers up to state and national conferences on strata issues. Additionally, we present webinars over the internet on a range of topical issues to ensure you can stay informed regardless of your location and in the convenience of your home or office.

We are one of the few panel lawyers for ARAMA (the peak management rights body) and who are also involved with SCA (Qld) which is the peak body for strata managers.

### **So what does that mean for you?**

1. The sale of a management rights business involves a business that you have invested significant time and money in developing and you need to ensure you are able to see the benefit of the sale of that business.
2. Dealing with a body corporate can be a frustrating exercise as there can be up to seven committee members, a strata manager and their lawyer. We can assist you in understanding how to manage these stakeholders effectively and efficiently, working collaboratively with you at all times. As we act for so many bodies corporate, we can assist you to understand their position and provide perspective that will help you get to where you want to be.
3. The depth of our practice means we are a one stop shop for management rights matters. There is nothing we cannot do for you meaning that we will not have to refer you away to another firm to help if something goes wrong.
4. We know what many inexperienced lawyers don't about the management rights and strata industries. That means we can deal with all issues in a management rights matter and sometimes even cut them off before they arise. This is particularly the case in purchase and sale transactions.
5. Fees are always very important and we offer fixed fees for all types of management rights matters. Engaging us is like engaging a high quality builder. We scope the project, define what needs to be completed, include everything that will need to be delivered, and then fix a price for that so you have certainty. On the occasions where we cannot fix a price our standard hourly rates are very competitive.

Our specialisation allows us to be incredibly efficient as our management rights practice is the single largest practice area of our firm. This means we have tailored management rights content for everything you need, from the questions (and suggested answers) at the body corporate interview to fact sheets that help you understand your choices if certain issues arise during a sale.

We understand that the purchase of your management rights may be your first purchase of a business. We recognise that this process can be daunting and having acted for hundreds of first time sellers of management rights businesses, we know what you will need to know and understand. We pride ourselves on making the purchase process as informative and stress free as possible for all of our clients.



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