Management Rights Agreements for Body Corporates in Queensland: Must They Expire, or May They Be "Topped Up" Indefinitely?

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ABSTRACT

There is a natural desire on the part of the holders of caretaking agreements to keep those agreements alive for as long as possible to protect the value of the asset embodied in such agreements. Term limits with respect to such rights are determined by statute, however, without any definitive authority on the interpretation of the statutory provisions that apply, caretakers and body corporates alike appear to rely purely on standard industry practice to allow unlimited extensions to such agreements. While standard industry practice is not an authoritative source of law, there unfortunately exists no definitive authority as to the interpretation of those term limits to settle the tension. May caretaking agreements be extended indefinitely, or do they have a set expiration date, notwithstanding standard industry practice or contracts that might suggest otherwise?

I. Introduction

There exists in Queensland a serious body corporate legal issue in the multi-million-dollar management rights industry regarding the expectant life of caretaking agreements. Caretakers naturally desire to ensure that their contract with a body corporate exists for as long as possible to protect the value of their agreement and body corporates are often presented with applications by caretakers to extend the life of these agreements. What appears to have developed is what is referred to as standard industry practice to support such applications.

Term limits with respect to such rights are determined by statute, however, without any definitive authority on the interpretation of the statutory provisions that apply, term limits of management rights appear to rely purely on standard industry practice, which is not an authoritative source of law.

Management rights are essentially comprised of the rights and obligations embodied with caretaking and letting agent agreements. The question to be answered is, may caretaking and letting agent agreements (collectively referred to as management rights) be extended indefinitely, or do they have a set expiration date, notwithstanding standard industry practice and contracts that might suggest otherwise?

A. The Body Corporate Statutory Regime

In Queensland, unit complexes, otherwise referred to as schemes, [1] are established upon the registration by the Registrar of Titles of a Community Management Statement and commonly referred to as the CMS. A scheme must consist of at least two lots, common property, a body corporate, and a single CMS. [2] Upon registration of the scheme, a body corporate, made up of the original owner or original owners of the land the subject of the scheme, comes into existence. The original owner then usually sells off individual lots and the body corporate is then constituted from time to time by the persons or entities owning the lots in the scheme. Once established, the body corporate may engage a caretaker and letting

agent to manage caretaking of the common property and letting of lots within the scheme [3] (collectively referred to as management rights in this article).

Schemes draw their legal existence from and are governed by the *Body Corporate and Community Management Act 1997* (Qld) (*BCCM Act*) and its various regulation modules. [4] Each body corporate complex must be subject to a particular regulation module of which there are five: the *Accommodation Module*, [5] the *Standard Module*, [6] the *Commercial Module*, [7] the *Small Schemes Module*, [8] and the *Specified Two-Lot Schemes Module*. [9] While it is not compulsory for a body corporate to engage a caretaker and letting agent, where there is such an engagement, the relevant regulation module sets out statutory rules that apply, including the authority to engage, and the form, duration, renewal, transfer and termination of engagements. [10]

This article primarily makes reference to the *Accommodation Module* in relation to caretakers where the initial maximum term of management rights is 25 years. [11] This article argues the view that the potential maximum life of management rights under the *Accommodation Module* is 30 years, and may not be indefinite. Similarly under the Standard Module that the maximum life of management rights is 15 years including any renewal rights in the first maximum 10-year engagement and one possible five-year renewal. [12]

B. Economic Value of Service Agreements

In 2012, it was reported by the Department of Justice and Attorney-General Queensland that management rights businesses, across Australia, potentially receive total revenue from letting activities of over $100 million per year, total income from caretaking activities of at least $56 million per year, that management rights businesses typically sell on a range between $200,000 and $6 million, and the total value of management rights agreements in Queensland range from around $2.5 billion to $6 billion. [13] These estimates related to members of the Australian Resident Accommodation Managers Association and are indicative only.

Typically, unit complexes with 20 or more lots might have management rights agreements in place. In 2018, there were approximately 473,838 lots across 48,083 schemes in Queensland. [14] Although 61% of

these schemes contained five or fewer lots, the remaining schemes with more than five lots contained 83% of all lots in Queensland. [15] Management rights agreements in Queensland have considerable value to the holder of those management rights, [16] and the financial impact of caretaking and letting agent services as reported in 2012 may be greater than those estimates.

As a consequence of the amount of money tied up in management agreements, it is extremely important to understand the true life of these agreements. Under the regulation modules, these management rights contracts have a maximum term, however, it appears to be industry practice to enter into top-up agreements whereby a holder of management rights may seek to extend the life of their agreement up to the maximum term, often to enhance the agreement's value so they can on-sell the rights to that agreement. [17]

C. The Issues to Be Addressed

The primary issue to be addressed is whether management rights agreements can be topped-up indefinitely, or whether they have set maximum expiration dates. This article will begin by setting out the relevant law on term limits and the power of bodies corporate. As management rights agreements are creatures of statute, [18] principles of statutory interpretation will be discussed, and then those principles will be applied to the relevant law on term limits. It will be seen that the current industry practice of topping up agreements indefinitely may not be sustainable on an appropriate interpretation of the *BCCM Act* and its regulation modules.

A related issue is with respect to term limit provisions of body corporate management agreements [19] and whether they may, by agreement, extend beyond the three-year term limit provided for in the regulation modules. [20] There is a distinction between a body corporate manager and a holder of management rights. A body corporate manager may be engaged to carry out the administration functions for a body corporate, [21] broadly construed. [22] On the other hand, a caretaker may be engaged to maintain and care for common property, often as a letting agent as well, who lets properties in the scheme. [23]

In March 2019, the Unit Owners Association of Queensland raised an issue about Hotel California clauses in body corporate management agreements. Such clauses provide self-executing renewal provisions whereby, if the body corporate does not renew the agreement earlier than a set period prior to the end date of the agreement, then the agreement will be automatically renewed from the agreed end date for a period of one year.

The agreement discussed by the Unit Owners Association of Queensland provided for a term of three years and the clause said:

> Should the Body Corporate not renew this Agreement prior to one year before the Expiry Date, the Company's appointment shall continue for a further term commencing at the Expiry Date on the prevailing terms and condition. [24]

As will be emphasised later in this article, it is not possible to contract out of the *BCCM Act* [25] and the intent of parliament in the case of body corporate managers is that it is clear and unambiguous that such an agreement that exists beyond three years (including any right of renewal) would be void from the last day of the three-year period, notwithstanding what may be agreed to. [26] Although this article does not intend to discuss body corporate management agreements at length, the issue is important to demonstrate how the *BCCM Act* and its regulation modules set definite term limits and impose a guillotine effect upon the expiration

of the term provided by the legislation, [27] as well as how unlimited top-ups and the Hotel California clause may offend the *BCCM Act* and its regulation modules.

II. The Relevant Law

The focus will be on caretaking agreements (service contracts) under the *Accommodation Module*. This is for two reasons. The first reason is that letting agent authorisations are subject to the same regulations as caretaking agreements, so any interpretation of one will necessarily affect the other. As such, these will be referred to as management rights agreements or simply service agreements as stated previously. The second reason is that the *Accommodation Module*, *Standard Module*, and *Commercial Module* contain identical term limit provisions, except whereas the *Accommodation and Commercial Modules* allow initial maximum terms of up to 25 years, the Standard Module allows initial terms of up to 10 years.

For the above reasons, regs 113 and 117 of the *Accommodation Module* will be predominantly referred to, and reference will be made to sub-sections of these Regulations unless otherwise stated. The interpretation of these Regulations will consequently affect the respective provisions in the other regulation modules.

It is important to understand the appropriate interpretation of regs 113 and 117, as they must be complied with for management rights agreements to be valid. This is because the body corporate is a statutory entity whose powers are granted only by statute, and not general law. This is important because, although a body corporate may be able to sue or be sued in its own name, [28] this is only to manage the scheme and carry out its functions. It is not a corporation under the *Corporations Act 2001* (Cth) (*Corporations Act*). [29] This is an important distinction to note as, although companies under s 124 of the *Corporations Act* have the legal capacity and powers of an individual, body corporates for a community titles scheme under s 33 of the *BCCM Act* may sue and be sued in its corporate name only and do not have the legal capacity and powers of an individual. This means that clear interpretation of the *BCCM Act* and the relevant regulation module are critically important.

A body corporate only has general powers to enable it to carry out its functions, [30] and being entirely a creature of statute, it may not contract in any way it wishes for any purpose. Therefore, if the body

corporate contracts in a way not authorised by the *BCCM Act*, that contract is necessarily ultra vires [31] and invalid ab initio. Likewise, any holder of a management rights agreement that was procured in a way not authorised by the *BCCM Act* will have no contractual rights, and thus there can be no contract. [32]

As the provisions of the *BCCM Act* cannot be contracted out of, [33] despite what the parties may agree to, such an agreement can only be binding if it complies with the relevant provisions in the *BCCM Act* and its regulation modules. This is important because, should a management rights contract contravene the *BCCM Act* or its regulation modules, it will be invalid because there would have been no power to enter into that contract. [34] This is relevant to term limits because if management rights agreements cannot be extended indefinitely, then those agreements must end at some point and a new agreement must be entered into.

A. Term Limits and the Unexpired Term

Regulation 117 provides for term limits of management rights contracts, and reg 113 provides the definition of unexpired term to aid in interpretation of the provisions of reg 117. The question here is whether these sections are permissive, or unambiguous. If they are unambiguous, then there is no need to make any further inquiry. However, if they are permissive, then further research is required as to the preferred interpretation, [35] which is what this article discusses. If the relevant Regulations are ambiguous, then authority should be turned to in order to see if their meaning has already been interpreted, and if that is not possible (which is what this article asserts) then it will be necessary to apply established principles of statutory interpretation to resolve any ambiguity.

The relevant text in reg 117 for the engagement of a service contractor is as follows:

(1) The term provided for in the engagement of a person as a service contractor (after allowing for any rights or options of extension or renewal) must not be longer than 25 years. [36]

(2) The body corporate may subsequently amend the engagement to include a right or option of extension or renewal (a subsequent right or option) only if: (a) the subsequent right or option is for not longer than 5 years; and (b) the unexpired term of the engagement, from the day the resolution approving the subsequent right or option is passed by the body corporate, is not more than 25 years; and (c) section 112 is complied with for the amendment. [37]

(3) If the unexpired term of the engagement purports to be longer than 25 years, it is taken to be 25 years.

(4) To remove any doubt, it is declared that at the end of the term: (a) the engagement expires; and (b) the person can not act again as a service contractor without a new engagement. [38]

The word engagement in sub-s (1) refers to the initial agreement for a term of up to potentially 25 years. The word engagement in sub-s (4) may refer to the agreement whether or not extended under sub-s (2), but the question is, how many extensions are

allowable under sub-s (2)? The phrase unexpired

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term is where the confusion lies in relation to topping up management rights agreements. The phrase unexpired term is defined in reg 113 as follows:

> [U]nexpired term, of an engagement of a person as a service contractor or an authorisation of a person as a letting agent, includes the term of:
>
> (a) a right or option of extension or renewal of the engagement or authorisation, whether provided for in the engagement or authorisation or subsequently approved by the body corporate; and
> (b) a subsequent right or option under section 117 or 118, for the engagement or authorisation. [39]

This definition, in combination with reg 117, regulates the term of a subsequent right or option added to the initial agreement. Current industry practice treats the text of these two regs as allowing agreements to be extended indefinitely, so long as any subsequent right or option is no more than five years, and so long as the length of the remaining term is no more than 25 years.

However, do these Regulations allow for only one subsequent right of renewal? Or do they allow unlimited renewals? If they allow unlimited renewals, then what is the purpose of sub-s (4) of reg 117 which, in order to remove all doubt, says that an agreement expires at the end of its term? What is the term that sub-s (4) refers to? The question to be answered is whether these Regulations permit unlimited top-ups, or whether the contract must expire, regardless of the parties' agreement to the contrary.

B. Further Discussion on the Issue

Given that management rights are a multi-billion-dollar industry, and that the *BCCM Act* has been in effect for at least 20 years, one would expect there to be cases that deal with the issue. Unfortunately, however, this is not the case at all. There currently exists no authority on the interpretation of regs 113 and 117. This means that, in over 20 years, the issue has never been tested before a Court or tribunal.

At best, there have been decisions regarding the initial term of an agreement. One example of this is in *Island Close* [40] where a maximum 10-year term under the Standard Module applied. The agreement in this case allowed for an initial term of five years and four five-year options, making the initial term potentially 25 years. The caretaker had continued to carry out the types of functions required of the caretaker in the agreement after the exercise of options and after the expiration of 10 years. The adjudicator held that the agreement which had commenced on 18 April 2000 had expired on 17 April 2010. The adjudicator further held that the agreement ended regardless of the provisions of the agreements or the conduct of the parties and the legal status of the caretaker ended upon the expiration of the 10-year period. [41] This is an example of the guillotine effect of sub-s (4) operating.

Another example is *K&A Property Pty Ltd as trustee for K&A Holding Trust v Body Corporate for Island Park Gardens CTS 20219* [42] The case concerned a failed motion to top up an initial 25-year agreement with a subsequent five-year option. The issue in question was whether it was reasonable for the body corporate to not pass the motion to top up the agreement given the body corporate's adoption of a no top-up policy. It was stated that committee members believed an unlimited number of top-ups could be granted, but counsel for the applicant caretaker argued that only one top-up could be granted, effectively a cap on top-ups, thus making the no top-up policy unreasonable. Unfortunately, the tribunal found it unnecessary to decide the question. [43] This case also only concerned one subsequent five-year option beyond the initial 25-year term which does not provide any authority, as such a top-up

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is still consonant with either a limited or unlimited interpretation of regs 113 and 117. This, then, is the extent of authority on the issue.

Unfortunately, the comment (without explanation) by the tribunal with respect to service contract term limits that it was not convinced that Section 117 does impose a cap on top-ups, but that it [was] not necessary to decide the question does not assist in resolving the issue at hand.

In order to glean some insight into the purpose of regs 113 and 117, extrinsic material relating to the legislation may be of help. In particular, the transcript in Hansard for the *Body Corporate and Community Management Bill 1997* (Qld) raises concerns about managers who have an expectation of a right for life beyond their contract. [44] This concern was addressed in the original version of the *Accommodation Module* which was unambiguous in providing a maximum term of 25 years, after which the contract expires. [45]

However, this position was modified in 2003 to further limit extensions (the 2003 amendment). [46] This was because caretakers

would amend the agreement after some time to top-up the agreement to a maximum of 25 years in order to comply with the 25-year term limitation. The Explanatory Notes say that the body corporate has the ability to grant extensions to the term of the engagement that cause the engagement to end more than 25 years after its commencement date, [47] which may seem to support the view that indefinite top-ups are permissible. However, this view runs contrary to the reason why these term limitations were put in place. Immediately following this, the Explanatory Notes say that it is important that extensions are limited, because it is not uncommon for the service contractor to purport that, under the current section, the agreement could provide for it to be continually topped up while still complying with the term limitation and that the new wording aims to remove the possibility of that interpretation. [48] The current reg 117 has had little substantial change since the 2003 amendment beyond renumbering.

Surely the explanatory notes to the current *Accommodation Module* must be influential in the argument that caretaker service agreements have a limited life, notwithstanding any industry practice. The term of an engagement of a service contractor and the term of an authorisation as a letting agent must not be longer than 25 years, and [T]hese limits were put in place to prevent such agreement from being everlasting agreements over which the body corporate had no control. The limits set for the engagement of a service contractor and the authorisation of a letting agent were considered to be terms that allowed the service contractor/letting agent a reasonable prospect of obtaining a return on investment. [49] A close analysis here also highlights the importance of the singular form of the word engagement throughout reg 117 of the *Accommodation Module*, reinforcing the interpretation that there may only be one engagement.

C. Proper Interpretation?

From 1997, management rights agreements were intended to have a definite expiry date. From 2003, the Regulation was modified explicitly because managers were topping up their contracts and the Regulation sought to remove the possibility of that interpretation. How then can this be interpreted to allow indefinite extensions? While the intentions expressed in the Explanatory Notes may be the answer, they are still extrinsic material and may not be relied upon if the Regulations are unambiguous. What matters is that the appropriate interpretation of the Regulations be determined using the principles of statutory interpretation.

III. The Established Principles of Statutory Interpretation

Although the sheer quantity and complexity of today's written law has shifted the focus of statutory interpretation to purposive interpretation, [50] which is to promote interpretations that do not contradict civil and human rights, [51] the essence of statutory interpretation remains to find the true meaning of the text of the statute. [52] It is a cardinal rule of statutory interpretation that legislation should be construed according to the intention expressed in the piece of legislation under interpretation, and if the words are precise and unambiguous, then no more is necessary than to expound upon those words in their ordinary sense. [53]

Context is the cornerstone of the current approach to statutory interpretation, and understanding the context is an essential part of the process. [54] The current approach can be described as a three-step process that must be applied in order to find the meaning of a word in a statutory text. First, one must look at the text and examine whether a plain objective meaning can be found. [55] Second, one must consider the meaning of the word in its context, namely the words and paragraphs surrounding the word, or even in some cases, resort may be had to reading the legislation as a whole in order to find the true context in which the word appears. [56] Last, it must be examined whether the interpretation is in line with the objectives and intentions of Parliament. [57]

A. Plain Objective Meaning

The first step is to look at the word or phrase in question in isolation from everything around it. It is important to note that the starting point of any statutory interpretation exercise is to study the meaning of the text as it is written and not to find help from the common law. [58] One must examine what the ordinary meaning of the word or phrase is as if it appeared by itself. [59] In this regard, many judges and lawyers alike resort to looking up the definition from various widely recognised dictionaries. [60] As such definitions may vary from each other, it must be remembered that these definitions are not precise and cannot be taken to be conclusive. [61] These definitional variations only reinforce the notion that words may have more than one meaning and that words cannot be fully understood without knowing the context that they appear in.

An example of a plain objective meaning is the word engagement which appears in sub-ss (1) and (4) of reg 117. It is not defined in the *BCCM Act* or its regulation modules. The word engagement first appears to describe an arrangement between a body corporate and caretaker in sub-s (1). The *Oxford English Dictionary* provides that an engagement is an arrangement to do something ... at a fixed

time. This would suggest engagement means a mutual understanding to do something with a degree of formality. The *Cambridge*

Dictionary provides the definition of engagement as an arrangement to do something at a particular time which would suggest a similar requirement of formality surrounding the understanding of two people doing something. Engagement then refers to the initial service contract contemplated in sub-s (1) of reg 117. Similarly, as discussed earlier, management rights agreements may only exist by virtue of the *BCCM Act* and its regulations: the word engagement may have been chosen over contract specifically because management rights agreements may only be entered into by virtue of the *BCCM Act* and its regulations, and not general contract law.

B. Context

The second step in order to find the meaning of the word as it appears in a particular statutory text requires an examination of the context surrounding the word. [62] This exercise includes examining the surrounding sentences, paragraphs, and the adjacent provisions. [63] Further, it is preferable that the exercise of studying the context includes identifying the whole of the legislative text, [64] as understanding the text as a whole will aid in identifying the context. [65]

An example of context being used to determine the definition of a word is the Northern Territory case of *Isles v McRoberts*. [66] This case concerned the then ss 77 and 82 of the *Criminal Code Act 1983* (NT) [67] as they existed in 2011. [68] The question was whether a Police Commissioner, a holder of public office but not employed in the public service, could be subject to s 82 which concerned the offence of abuse of office. This offence concerned an act committed by someone employed in the public service in relation to abuse of the authority of his office. The use of the word office was important: did it include a holder of public office, or did it mean something else? To answer this question, s 77 was considered. This section concerned official corruption which related to someone employed in the public service *or* the holder of any public office. While s 82 concerned an abuse of the authority of his office, s 77 clearly contemplated that there is a distinction between employed in the public service and the holder of any public office. As such, as s 82 only referred to employed in the public service, the word office in abuse of the authority of his office in s 82 did not relate to the holder of any public office. The overall context clearly made a distinction between anyone employed in the public service and the holder of any public office, so office in s 82 referred to a position someone held while employed in the public service, rather than a holder of public office. [69]

The above example is related to a rule that will be important for this article which is that words appearing later in a statutory section must be read as having the same meaning as words appearing earlier in that section unless the statute says otherwise. [70] It follows that if a word is repeated in the same section of a statute, then unless expressly modified in that section, it will have the same meaning as it had when first used in the section.

Therefore, the word engagement in sub-s (1) of reg 117 will have the same context and meaning as engagement in sub-s (4) and in any intervening sections. The word appears in the exact same statutory context, whether reference is made to the surrounding paragraphs, adjacent provisions, or objectives

of the Act. There is nothing in the text itself and nothing appears from the context of the legislation to suggest that Parliament's reasons and purpose would have changed between drafting sub-ss (1) and (4). Therefore, it is reasonable to conclude that the meaning of the word engagement is the same in both subsections.

C. Objectives and Intentions

The third step may involve a review of the preamble of the legislation in question, as this approach has been recognised as being a crucial part in understanding the context of the whole Act. [71] The preamble may be used as a constructive tool in finding the meaning of a word where ambiguity exists by clarifying any such ambiguity by reference to the preamble. [72] The preamble is also a useful tool in confirming the ordinary meaning of statutory text. [73] This theory is known as the contextual role of the preamble and it supports the notion that it is incorrect to consider statutory text in total isolation, [74] and the true meaning of words is found when considered in their statutory context. [75] It is incorrect to go beyond what the text permits and a consideration of the text as a whole is imperative. [76]

An example of this is the preamble in the *BCCM Act* and the primary and secondary objects of that legislation. [77] The primary object of the Act is to provide for flexible and contemporary communal based arrangements for the use of freehold land, [78] and the secondary object is to provide for the promotion of economic development by establishing sufficiently flexible administrative and management arrangements. [79] Unfortunately for the topic of this article, the preamble in this situation does not appear to be of much assistance in determining the maximum term limits of management rights agreements.

As with any text, in order to understand the true meaning of the text, consideration must be given to all the aspects surrounding the drafting of that text. [80] In the framework of statutory interpretation, this means a close examination of the purpose of Parliament. [81] Understanding the purpose of the legislation will serve as an aid in understanding the legislative context of the statutory text in which it appears. In order to understand the objective of Parliament in drafting the legislation, consideration must be given to the

public policy reasons behind the legislation or regulation. [82] The context and purpose of the legislation will aid in understanding what the legal meaning of the text is, as opposed to the general meaning. [83] While the general and legal meaning may in most cases be the same, this cannot be known without consideration of the context of the text, and also of the context in which the legislation was created. [84] In the case of *Carr v Western Australia*, [85] the High Court had to examine the meaning of an interview of an accused criminal. Kirby J made comments on the public policy reasons of the enactment of the

provision that required all admissible confessions to be contained in videotaped interviews. [86] In the law reform process, somewhat conflicting public policy reasons were considered, including the integrity of the police force in contrast with the accessibility of an interview. [87] A distinction must be drawn between public policy and public concern. Public policy is relevant to understanding and drawing from the intentions and objectives of Parliament before and at the time of drafting the legislation, whereas public concern in terms of an outcome is not to be taken into account. [88]

Looking at the public policy reasons will aid in deriving the meaning of statutory text. However, such public policy arguments cannot be taken to extend the meaning of the written law in a way as to allow for an interpretation that goes beyond the text. [89] The words and phrases chosen by Parliament are chosen for a reason, and that reason was to bring effect to its objective. [90] This is why these three steps of statutory interpretation must be seen as a combined exercise [91] in finding the true meaning of legislative text. This view was shared by French CJ, Hayne, Kiefel and Bell JJ in the case of *Australian Education Union v Department of Education and Children's Services* where their Honours stated that the process of construction begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose. [92]

Of further note is the *Acts Interpretation Act 1954* (Qld). Section 14A requires an interpretation that would best achieve the purpose of the statute in question, and s 14B allows extrinsic material to be used in interpretation where a provision is ambiguous or obscure, its words would lead to a manifestly absurd or unreasonable result, or it is necessary to do so to confirm the interpretation of an ordinary meaning of the provision.

As the modern approach highlights the importance of context, it is important to understand that while the textual context of the statute may be found by having regard to the whole of the statute, the legislative purposes and objectives of Parliament may also be considered to give context to the statutory text. [93] This reinforces the need to regard statutory interpretation as a combined exercise as noted by Kirby J, and that context must be understood in its widest sense. [94] This includes consideration of the existing state of the law, its defects, and its legislative history. [95]

IV. Interpreting Regulations 113 and 117

Regulations 113 and 117 will be examined in relation to the above principles of statutory interpretation. The approach to be taken is to look at the ordinary meaning of the words in question, and where that is not sufficient, the overall context of the *BCCM Act* and its regulations. As the preamble provides no

substantial assistance, if the ordinary meaning of the word and the context it appears in is insufficient, resort will be had to explanatory material to identify the intentions of Parliament. [96]

What will be important is the definition of words and phrases and their use in context. The definition of engagement was discussed in the previous part as an example of where, if a word appears multiple times in the same part, unless there is a reason to depart from its meaning when it initially appears, it should maintain the same definition when used subsequently. The same principles may apply to the definition of term and subsequent right or option. These principles, along with assistance from explanatory extrinsic material, will be used to examine regs 113 and 117.

A. Term and Unexpired Term

In the *BCCM Act* and the *Accommodation Module*, there is no definition for the word term. It is first used in sub-s (1) and then again only in sub-s (4). When it is first used, it refers to the length of an engagement. Sub-section (1) makes it clear that the term of an engagement must not be longer than 25 years. This includes any rights or options of extension or renewal within that initial engagement, and not any subsequent right or option.

The word term then appears in sub-s (4). It follows that the definition of term in sub-s (1) should be used in sub-s (4). However, this is complicated by the fact that sub-ss (2) and (3) refer to a subsequent right or option and the phrase unexpired term. Do these sections affect the definition of term in sub-s (4)?

On the face of it, if sub-ss (2) and (4) were removed, and if sub-s (3) referred to term instead of unexpired term, then reg 117 would

have a substantially similar effect to its original incarnation in 1997 where the purpose was to unequivocally provide a limited life for these agreements. As explained by the Explanatory Notes to the 2003 amendment, the new sub-sections in reg 117 were to prevent an interpretation that allowed continual top-ups. [97]

With sub-s (1), it can be seen that the word term relates to the term provided for in the initial agreement, including rights of renewal in the initial agreement. Sub-sections (2) and (3) deliberately use the phrase unexpired term which is defined in reg 113. Regulation 113 has two sub-sections, being (a) and (b). The unexpired term says it includes sub-ss (a) and (b), but it does not say the definition is limited exclusively to what is contained in those sub-sections. The phrase unexpired term is therefore a modification of the word term, meaning whatever length of time that has not yet expired, plus the included definitions under sub-ss (a) and (b).

Sub-section (a) includes rights of renewal, whether in the agreement or subsequently approved. As such, it would seem that the phrase unexpired term when including sub-s (a) is consonant with the definition of term as explicable from the text in sub-s (1) of reg 117, but not including the amount of time that has already passed in the term. The definition of term may also be assisted by the context of sub-s (a) of reg 113, as sub-s (a) clearly contemplates that the term may be extended after the initial agreement is entered into. It would follow that the term under sub-s (1) of reg 117 may be up to 25 years but may include extensions agreed to after the agreement was initially entered into, so long as those extensions do not take the term beyond 25 years.

This must be the case, as these subsequent extensions are referred to in sub-s (a) of reg 113 and are explicitly distinguished from a subsequent right or option under sub-s (b). Therefore, a subsequent right or option under sub-s (2) of reg 117 is an entirely different beast compared to any rights under sub-s (1) within the initial term of up to 25 years.

Therefore, the phrase unexpired term is a modification of the word term, which not only includes the term of an agreement that has not yet run, but also any subsequent right or option approved under sub-s (2) of reg 117.

This interpretation would then have the following consequences. Under sub-s (1), term means the length of the engagement including rights of renewal, whether initially in the engagement or not, up to a maximum of 25 years. The phrase unexpired term is then explicitly distinguished from the word term to mean term, minus any amount of time already passed, plus a subsequent right or option.

The consequence of this is that the phrase unexpired term is used in sub-s (3) meaning that the term, minus any amount of time already passed, plus a subsequent right or option, is taken to be 25 years if it would otherwise amount to more than 25 years. This is different to the original 1997 wording which simply used term rather than unexpired term in what is now sub-s (3).

What does that then mean for sub-s (4) which states that the engagement expires at the end of the term? Sub-section (4) explicitly uses the word term which has a clear meaning in sub-s (1). This is because the statute explicitly uses the different phrase unexpired term. If sub-s (4)'s usage of term had the same effect as sub-s (1), then a subsequent right or option under sub-s (2) would be ineffective if it took the term of the agreement beyond 25 years, which is not only contrary to current industry practice, but also runs counter to the example that sub-s (2) itself provides.

It would seem that term in sub-s (4) may have a different effect than term in sub-s (1). Term therefore seems to have changed in definition from sub-s (1) to sub-s (4). So what does term mean in sub-s (4)?

There are two potential answers to this question. The first answer is that term in sub-s (4) actually means unexpired term. However, this is an odd proposition given the explicit definition of unexpired term encompasses far more than the original definition of term does, and the word term was explicitly chosen by Parliament in sub-s (4), not unexpired term.

The second answer is that term in sub-s (4) does not mean unexpired term, but in fact means the full length of the term as contemplated by sub-s (1), plus a subsequent right or option under sub-s (2). This may mean that an agreement may expire if the term of the agreement runs out, meaning up to 25 years plus a subsequent right or option of five years as modified by sub-s (2). The question then arises, how many top-ups under sub-s (2) are allowable? If indefinite top-ups are allowable, then term under sub-s (4) really means unexpired term. If only one top-up is allowable, then term under sub-s (4) really means up to potentially 30 years, comprising the initial 25-year term plus a subsequent right or option of five years.

B. A Subsequent Right or Option

The appropriate definition of term under sub-s (4) will determine whether a management rights agreement is limited and must expire, or whether it may be indefinitely topped up. In examining reg 117, the use of singular and plural words is important. The words rights in sub-s (1) and a right in sub-s (2) are critical to determining the maximum term of a service contract and how an engagement may be amended. The word rights in sub-s (1) confirms that there may be multiple rights of renewal in the initial

engagement, provided that the sum of those rights together with the term of the initial engagement do not take the initial term beyond 25 years. [98] This interpretation is bolstered by reg 113 making a distinction between subsequent rights to take the agreement up to a maximum of 25 years, and a subsequent right or option taking the agreement beyond 25 years under sub-s (2) of reg 117.

However, the phrase a right in sub-s (2) means only one right of renewal. It is used in the singular form, not plural. Further, in the *Macquarie Dictionary,* a is an indefinite article that may refer to one individual of a class. For example, a dog means one dog without limiting the identity of the dog to any dog specifically. Therefore, a subsequent right or option means one right or option for renewal. Further, sub-s (2)(a) refers to the subsequent right or option. In the *Macquarie Dictionary*, the is a definite article and now explicitly refers to the subsequent right or option the subject of sub-s (2). Here, the singular form of subsequent right or option is used.

The careful use of the plural rights in sub-s (1) and the singular a right and the right in sub-s (2) is not coincidental. Whereas it is envisioned that the term of an engagement may encompass many rights of renewal up to 25 years, there may only be a subsequent right of renewal – singular. This intention then displaces the presumption in s 32C of the *Acts Interpretation Act 1954* that the singular includes the plural and vice versa. [99]

Another interpretation is that the use of the singular subsequent right of renewal means just one subsequent right of renewal. This interpretation is valid because sub-s (2) does not refer to multiple rights in the plural, nor does the example provided in sub-s (2) contemplate multiple subsequent rights. It would seem that, if multiple subsequent rights were possible, then the text of the statute would say that.

If sub-s (2) was designed to allow multiple rights, it would be drafted differently. For example, sub-s (2) could instead read the body corporate may subsequently amend the engagement to include *rights* or *options* of extension or renewal, and sub-ss (2)(a) and (2)(b) could read *a* subsequent right or option.

To allow multiple subsequent rights of renewal, the wording above should be adopted. This is because sub-s (2) discards the indefinite article a in favour of the plural form, indicating any number of subsequent rights may be included by amendment. Further, sub-ss (2)(a) and (2)(b) discards the definite article the in favour of the indefinite article a, which may refer to any singular right subsequently introduced by amendment. This means that, despite any number of subsequent rights that may be added, each singular right must be for not longer than five years and must not take the unexpired term beyond 25 years.

Unfortunately for that interpretation, it is not the current drafting of the statute. Sub-section (2) clearly contemplates a singular right or option, and sub-ss (2)(a) and (2)(b) refer to that singular right or option that is introduced. On the face of the above analysis, the industry practice interpreting reg 117 as authorising unlimited subsequent rights is contrary to law and cannot be sustained. The allowance of only one subsequent right would also seem to accord with Parliament's original intentions in providing a maximum life for service contracts in 1997, and in removing the interpretation of unlimited top-ups in the 2003 amendment. [100]

C. Contrast with the *Small Schemes Module*

The definition of term under sub-s (4) is still uncertain as to when an agreement might expire. This question may be answered with a comparison to the *Small Schemes Module*. The deeming provision in sub-s (3) will also be important and will be discussed later.

The *Small Schemes Module* only allows caretaking agreements, not letting agent authorisations. Further, it only allows such an agreement to last for one year. Regulation 63 of the *Small Schemes Module* provides:

(1) The term of the engagement of a person as a service contractor (after allowing for any rights or options of extension or renewal, whether provided for in the engagement or subsequently agreed to) must not be longer than 1 year.
(2) If the term purports to be longer than 1 year, it is taken to be 1 year.
(3) To remove any doubt, it is declared that at the end of the term: (a) the engagement expires; and (b) the person can not act again as a service contractor without a new engagement.

There are a number of interesting contrasts with the wording in the *Small Schemes Module* compared to the *Accommodation Module*. Unlike the *Accommodation Module*, the definition of term in the *Small Schemes Module* includes subsequent rights of renewal which are otherwise dealt with separately in the *Accommodation Module*. Further, under the *Small Schemes Module*, such subsequent rights are also referred to in the plural. However, these subsequent rights do not take the agreement beyond the one-year limit. This is because of the deeming provision which says that a term that purports to be for longer than one year is taken to be one year. This is in contrast with the *Accommodation Module* which refers to the unexpired term, rather than just term.

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It seems that the *Small Schemes Module* reflects the original intention of Parliament when it introduced the *BCCM Act*. All that seems to have been added is the final sub-section to remove any doubt. Given that this sub-section is identical to the *Accommodation Module*, it seems that sub-s (4) of reg 117 in the *Accommodation Module* may have just been a general addition across the modules, and it may not have been modified to reflect how subsequent rights under sub-s (2) may interact with the unexpired term. However, this is only one interpretation.

It is important to note that sub-s (1) in the *Small Schemes Module* explicitly includes a subsequent right. It is also clear that the guillotine provision in sub-s (4) of the *Accommodation Module* and sub-s (3) of the *Small Schemes Module* are intended to operate in the same way. It seems then that unexpired term in reg 117 is not intended to substantially modify the effect of term in sub-s (4). The term in the *Small Schemes Module* clearly includes a subsequent right, which is similar to reg 117 in the *Accommodation Module*. In that regard, reg 117 must be the same – the effect of sub-s (2) and the separate definition of unexpired term are designed to expand upon what might be included in the definition of term given the ability to extend an agreement under the *Accommodation Module*. The term under sub-s (4) of reg 117 of the *Accommodation Module* is then any original term agreed to up to a maximum of 25 years, plus a subsequent right or option. On this article's interpretation, that would be a maximum of 30 years, whereas the current industry practice is that an agreement might never expire.

D. The Deeming Provision

The deeming provision under sub-s (3) of reg 117 is problematic for the industry standard of unlimited top-ups. If the unexpired term purports to be longer than 25 years, it is taken to be 25 years. What does this mean for agreements that purport to be much longer?

For example, assume an agreement was entered into for 25 years, beginning on 1 July 2010 and ending on 30 June 2035. Five years pass, and on 1 July 2015, an amendment is agreed to that includes six five-year options. This takes the term of the agreement to 50 years, being from 1 July 2015 to 30 June 2065.

At that point on 1 July 2015, the unexpired term of the agreement is 50 years. Therefore, pursuant to sub-s (3), the unexpired term is deemed to be 25 years and the agreement expires on 30 June 2040. Any reliance on options beyond 30 June 2040 would then be invalid – only options valid as at the date of the resolution approving the amendment would be able to be exercised. [101]

This is fine for the interpretation that this article supports, which is only one subsequent right or option of five years beyond the initial 25-year maximum term. However, this poses a problem for the industry practice of unlimited top-ups. Assume the above example continues. Here there is an agreement that has already run for five years, and due to the deeming provisions under sub-s (3), this agreement is deemed to have a life from 1 July 2015 and terminates on 30 June 2040. However, the agreement contains a number of invalid five-year options that would potentially take it to 30 June 2065.

Clearly, the five invalid five-year options cannot be relied upon. But what if, on 1 July 2020, the caretaker, relying on the unlimited top-ups interpretation, amends the previous agreement with one right of five years, without removing the previous invalid options, taking the agreement to 30 June 2070? Pursuant to the deeming provisions, the unexpired term must not be longer than 25 years, and if longer than that, the unexpired term is taken to be 25 years.

Clearly, the option to extend the term from 1 July 2065 to 30 June 2070 is invalid – but is the previous invalid option between 1 July 2040 and 30 June 2045 still invalid? Or, because that option no longer offends the 25-year unexpired term limit, and because it is in an amendment agreed to, does it now have legal effect despite it initially being deemed invalid when made on 1 July 2015?

An example of this is *Island Close*as discussed earlier in this article. That was an agreement of 25 years under the Standard Module. The agreement clearly was deemed to be 10 years. However, what if five years into the agreement the caretaker sought to include a further option of five years, taking it to 30 years? Clearly, any unexpired term in excess of 10 years would be invalid – but at five years in,

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would the first five-year option in excess of 10 years regain validity? It was once deemed invalid, but with the new amendment, does that once-invalid option regain validity by virtue of no longer offending the unexpired term limit of 10 years?

This poses a problem for the future. It would seem to offend the spirit of the *BCCM Act* and its regulation modules if an agreement could be entered into for 50 years, and continually top-up in five-year increments, only to have the previously invalid options become valid over time. Although one response might be buyer beware in that a potential assignee of management rights must conduct their due diligence, the unlimited top-up interpretation might still offend the spirit of the *BCCM Act* and its regulation

modules. This interpretation effectively pre-empts sub-s (3) by potentially allowing the introduction of decades of invalid rights of renewal, so that these invalid options may regain validity with a stroke of the pen by the body corporate. The unlimited top-up interpretation may then potentially sow a minefield of legal uncertainty which seems contrary to the secondary objects of the *BCCM Act*. [102]

E. The Middle Ground: One Right at a Time?

However, there may be a middle ground interpretation. Regulation 67 of the *Accommodation Module* and its equivalent regulations across the other modules regulates how agenda motions may be submitted at general meetings of the body corporate. In particular, sub-s (4) provides restrictions on certain motions that limit them to being submitted no more than once per body corporate financial year. Sub-sections (4)(a), (b) and (c) respectively deal with a change of regulation module, changing remuneration payable to a service contractor, and amendments to a service contract or letting agent agreement that would include a right of renewal. These restrictions were introduced in the 2003 amendment and were designed to prevent the cost and harassment that results from continually calling new meetings whenever a motion related to these three topics was defeated. [103] These three topics were considered to be the most problematic.

The wording in sub-s (4)(c) refers to a motion that would amend a service contract to include a right or option of extension or renewal. Again, the indefinite article a and the singular form of right or option are used. This may mean that, whether only one subsequent right or option is allowed or if the industry practice of unlimited top-ups is allowed, sub-s (4)(c) of reg 67 may limit how these rights of renewal are introduced.

Sub-section (2) of reg 117 may then only allow top-ups to one option per year. Whether or not an amendment is sought, either to include a right or option to take it up to 25 years or to include a subsequent right or option beyond that 25-year limitation, there may only be one option per motion. This is because both sub-s (4)(c) of reg 67 and sub-s (2) of reg 117 refer to a singular right or option.

An example of this is a 10-year service contract under the *Accommodation Module*. The maximum term is 25 years. The agreement begins on 1 July 2010 and ends on 30 June 2020. On 1 July 2015, the unexpired term is five years. The interpretation of industry practice might say that, as the unexpired term of the agreement is only five years, it may be topped up to 25 years. However, the interpretation of reg 67 above would disallow this, as both reg 67 and sub-s (2) of reg 117 refer to a right or option in the singular, not plural.

This would mean that, on 1 July 2015, the caretaker may only seek to include one right of renewal for a maximum of five years. Therefore, on 1 July 2015, the agreement may, at the discretion of the body corporate, be extended to 30 June 2025. On 1 July 2016, the motion may be submitted again, extending the unexpired term of the agreement to 30 June 2030. Once again, on 1 July 2017, the motion could again be submitted to extend the agreement to 30 June 2035.

V. Conclusion

The words in sub-s (4) of reg 117 to remove any doubt, it is declared that at the end of the term: (a) the engagement expires; and (b) the person can not act again as a service contractor without a new engagement are clearly purposive and mandatory, in the sense that such agreements are to have a limited life. The life of agreements under the *Accommodation Module* may be for an initial term of up to 25 years (including rights of renewal within that 25-year period), with a subsequent right or option for a further five years, meaning a potential maximum term limit of 30 years (or 15 years under the *Standard Module*).

The practical effect of this can be demonstrated by reference to the *Standard Module*. Assume a caretaking agreement commences on 1 July 2002. The agreement provides for an initial term of 10 years with a right of renewal of 10 years and a further right of renewal of five years. The term of the agreement when entered into was 25 years. This agreement would expire at the end of the initial 10-year term, 30 June 2012, because the maximum possible term provided for in the *Standard Module* is 10 years, plus a subsequent five-year option assuming the requirements of reg 119(2) of the *Standard Module* were complied with. However, reg 119(2) was not complied with, and as no amendment was made to include that option, the guillotine effect of regs 119(3) and (4) cause the agreement to terminate after 10 years. Further, a resolution of the body corporate to ratify the agreement would have no effect, as there is no power for a body corporate to ratify an invalid agreement.

It is clear from the initial introduction of the *BCCM Act* in 1997 is that it was always intended for management rights agreements to have a limited term, and upon the expiration of that term a new agreement would be required, assuming the body corporate even wished to have a new agreement at all. It is also clear from the 2003 amendment that there was a recognised problem with the legislation where caretakers would seek continual top-ups to their agreements, effectively making their agreements indefinite despite the concrete term limits. The 2003 amendment then sought to remove the possibility of that interpretation in what is now known as reg 117.

It must be remembered that these management rights agreements only exist by virtue of the *BCCM Act*, and the provisions of that Act and its regulations cannot be contracted out of. Management rights holders also do not have a right of renewal: [104] not only was it Parliament's intention to prevent such lifetime tenures, [105] but the use of the permissive word may in reg 117 of the *Accommodation Module* makes it clear that such an amendment to extend the agreement is at the body corporate's discretion, subject to procedural requirements.

When taking into account that the current statutory regime commenced in 1997, and the maximum term limits in the *Accommodation Module* including the initial term and a subsequent right or option may be up to 30 years, management rights agreements entered into under the *Accommodation Module* shortly after the *BCCM Act* was introduced will not have much time left to run as at the date of writing. Agreements entered into under the *Standard Module* may have already expired.

There may be significant consequences if top ups may not be unlimited. Least of all the economic impacts discussed at the beginning, if an agreement has expired at law, what is the position of work undertaken under an invalid agreement? As the parties should be taken to know that the agreement will end at a specific date, [106] would there potentially be a claim for quantum meruit for services performed? If so, would the value of services rendered after the expiration date be equal to the amount paid or payable after the expiration date? Or will management rights holders be obliged to refund any amount paid by the body corporate after the expiration date? Caretakers, letting agents, and body corporates alike should review their service agreements to assess their true expiration dates.

Footnotes

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1 *Body Corporate and Community Management Act 1997* (Qld) s 10.

2 *Body Corporate and Community Management Act 1997* (Qld) s 10(2).

3 *Body Corporate and Community Management Act 1997* (Qld) ss 4, 30. Where both a caretaker and a letting agent are engaged, they are often the same person or entity.

4 See *Body Corporate and Community Management Act 1997* (Qld) s 122 which prescribes that each module may contain certain provisions about service contracts, including their term.

5 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 3(3). For this module to apply, the complex must predominantly contain accommodation units, which means a lot that is either part of a hotel or subject to a lease or letting for accommodation for long- or short-term residential purposes, or immediately available for that purpose, including serviced apartments and resorts; see also Kimberly Everton-Moore et all, "The Law of Strata Title in Australia: A Jurisdictional Stocktake" (2006) 13(1) Australian Property Law Journal 1, 5–6.

6 *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) reg 3(2). This module applies where no other module applies and is usually adopted for residential ownership or letting. See also Everton-Moore et al, n 5, 5.

7 *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) reg 3. For this module to apply, the lots in the scheme must predominantly be commercial lots including retail or industrial use.

8 *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld). This module applies where there are no more than six lots in the scheme. There is no letting agent for this scheme and it is a basic scheme.

9 *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2008* (Qld). There is no capacity for lot owners under this module to appoint a caretaker or letting agent.

10 However, the Small Schemes Module only allows the engagement of a caretaker and not a letting agent, and the Specified Two-Lot Schemes Module does not allow the engagement of a caretaker or letting agent.

11 See *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 117.

12 *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) reg 119.

13 Queensland Department of Justice and Attorney-General Office of Regulatory Policy, Management Rights in Community Titles Schemes (Discussion Paper, 2012) [1.4].

14 Hazel Easthope, Caitlin Buckle and Vandana Mann, "Strata Scheme Size by State and Territory: Supplementary Material for the Australian National Strata Data Report 2018" (City Futures Research Centre, University of New South Wales, May 2018) 4.

15 Easthope, Buckle and Mann, n 14, 4.

16 See *Palm Springs Residences* [2007] QBCCMCmr 380, [23] where the management rights in question were said to have a value of $1.9 million.

17 In practice, a typical comment by management rights holders when drafting explanatory notes in support of a motion of the body corporate to extend the life of their agreement is the current manager has applied to extend the life of the

service agreement by adding a further renewal period in accordance with the usual practice in the industry. This example is drawn from the authors' personal experience in the industry.

18 It must also be noted that there is no contracting out of statutory provisions: see *Body Corporate and Community Management Act 1997* (Qld) s 318.

19 See Ross Anderson, Body Corporate Manager's Contract and Hotel California Renewal Clause (8 March 2019) Unit Owners Association Queensland <https://uoaq.org.au/2019/03/bcm-hotel-california-renewal-clause/>.

20 *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) reg 118; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 116; *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) reg 83. However, the remaining regulation modules provide a term limit of only one year for body corporate managers: *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) reg 62; *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2008* (Qld) reg 13.

21 *Body Corporate and Community Management Act 1997* (Qld) s 14.

22 See *Nobbys Outlook* [2002] QBCCMCmr 253.

23 *Body Corporate and Community Management Act 1997* (Qld) s 15.

24 Anderson, n 19.

25 *Body Corporate and Community Management Act 1997* (Qld) s 318.

26 See *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 116; see also *Park Breeze Luxury Apartments* [2018] QBCCMCmr 481, [27].

27 *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) reg 118(2), (3); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 116(2), (3); *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) reg 83(2), (3); *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld) reg 62(2), (3); *Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2008* (Qld) reg 13(2), (3).

28 *Body Corporate and Community Management Act 1997* (Qld) s 33(2).

29 *Body Corporate and Community Management Act 1997* (Qld) s 32.

30 For example, to enter into contracts: *Body Corporate and Community Management Act 1997* (Qld) s 95(1)(a).

31 Daniel Greenberg and Frederick Stroud, *Stroud's Judicial Dictionary of Words and Phrases Vol 3* (Sweet & Maxwell, 9 ed, 2016) 2661, definition of ultra vires: Some act by an entity when it is done not within the scope of the powers of that entity; Trischa Mann and Audrey Blunden (eds), *Australian Law Dictionary* (OUP, 2010) 585, definition of ultra vires: An Act or decision beyond the legal power of the person or institution making it and thus invalid.

32 *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1874–75) LR 7 HL 653.

33 *Body Corporate and Community Management Act 1997* (Qld) s 318; see also *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 which dealt with a similar provision in the *Building and Construction Industry Security of Payment Act 1999* (NSW) s 34 provided the provisions of this Act have effect despite any provision to the contrary in any contract.

34 This would be the situation even if all the lot owners ratified a contract entered into by the body corporate contrary to the terms of the relevant module, eg, *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 117; see also *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653.

35 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 321–322 [103] (Kirby J); [2001] HCA 14, citing *Emanuele v Australian Securities Commission* (1997) 188 CLR 114, 140 (Kirby J).

36 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 117(1).

37 This section of the *Accommodation Module* provides that a body corporate may only enter into a service contract if it passes an ordinary resolution approving the engagement, with no votes cast by proxy.

38 This may be referred to as a guillotine effect.

39 This section of the *Accommodation Module* relates to letting agent authorisations whose provisions are substantially identical to caretaking agreements under reg 117.

40 *Island Close* [2015] QBCCMCmr 123.

41 See *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) reg 119(1), (4).

42 *K&A Property Pty Ltd as trustee for K&A Holding Trust v Body Corporate for Island Park Gardens CTS 20219* [2016] QCAT 308.

43 *K&A Property Pty Ltd as trustee for K&A Holding Trust v Body Corporate for Island Park Gardens CTS 20219* [2016] QCAT 308, [36].

44 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 9 May 1997, 1790 (Heinrich Palaszczuk).

45 *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) reg 80.

46 *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003* (Qld).

47 Explanatory Notes, *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003* (Qld) 60.

48 Explanatory Notes, *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003*

(Qld) 60.

49 Explanatory Notes, *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) 5; see also the identical wording (apart from the 10-year term limit rather than a 25-year term limit) in Explanatory Notes, *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) 5.

50 See Dan Meagher, "The Modern Approach to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?" (2018) 46(3) Federal Law Review 397, 401.

51 Michael Kirby, "Statutory Interpretation: The Meaning of Meaning" (2011) 35(1) Melbourne University Law Review 113, 115.

52 Kirby, n 51, 114.

53 Daniel Greenberg, Craies on Legislation (Sweet & Maxwell, 11 ed, 2018) 741–743.

54 Jeffrey Barnes, "Contextualism: The Modern Approach to Statutory Interpretation" (2018) 41(4) University of New South Wales Law Journal 1083, 1086.

55 Kirby, n 51, 124; Greenberg, n 53, 742–743; *Victims Compensation Fund Corp v Brown* (2003) 77 ALJR 1797, 1799–1800 [13]–[14] (Heydon J); [2003] HCA 54; *Greg v Pearson* [1857] 6 HLC 61, 106.

56 Kirby, n 51, 116.

57 Kirby, n 51, 116.

58 Kirby, n 51, 116; see generally *Visy Paper Pty Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 1; [2003] HCA 59.

59 *Victims Compensation Fund Corp v Brown* (2003) 77 ALJR 1797, 1799–1800 [13]–[14] (Heydon J); [2003] HCA 54.

60 Kirby, n 51, Pt V; *R v Peters* (1886) 16 QBD 636, 641; *Inland Revenue Commissioners v Marquess of Camden* [1914] 1 KB 641, 647; see also *John While & Sons Pty Ltd v Changleng* (1985) 2 NSWLR 163; *FAI General Insurance Co Ltd v Maracorp Financial Services Ltd* [1994] 1 VR 455.

61 Kirby, n 51, 124.

62 Kirby, n 51, 116; Meagher, n 50, 404.

63 Kirby, n 51, 116.

64 Kirby, n 51, 116; *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 91 (Kirby J); [2002] HCA 18.

65 See generally Barnes, n 54, Pt C; Anne Winckel, "The Contextual Role of a Preamble in Statutory Interpretation" (1999) 23(1) Melbourne University Law Review 184, 194 citing *Bywater v Brandling* (1828) 7 B & C 643, 660; 108 ER 863.

66 *Isles v McRoberts* [2011] NTMC 1.

67 *Criminal Code Act 1983* (NT) Sch 1.

68 Prior to the *Independent Commissioner Against Corruption (Consequential and Related Amendments) Act 2018* (NT).

69 *Isles v McRoberts* [2011] NTMC 1, [18].

70 *D'Aguilar Gold Ltd v Gympie Eldorado Mining Pty Ltd* [2008] 1 Qd R 56, 62 [26] (Williams JA); [2007] QCA 158, citing *Courtauld v Legh* (1868–69) LR 4 Ex 126, 130.

71 Winckel, n 65, 186.

72 Winckel, n 65, 186.

73 Winckel, n 65, 188.

74 Kirby, n 51, 116; *Canada Southern Railway Co v International Bridge Co* [1883] 8 App Cas 723, 727; *Hounslow LBC v Thames Water Utilities Ltd* [2004] QB 212; [2003] EWHC 1197 (Admin).

75 *Thiess v Collector of Customs* (2014) 250 CLR 664, 671–672 [22]–[23]; [2014] HCA 12.

76 Winckel, n 65, 187.

77 *Body Corporate and Community Management Act 1997* (Qld) ss 2, 4.

78 *Body Corporate and Community Management Act 1997* (Qld) s 2.

79 *Body Corporate and Community Management Act 1997* (Qld) s 4(b).

80 Meagher, n 50, 401, citing *Thiess v Collector of Customs* (2014) 250 CLR 664, 671; [2014] HCA 12.

81 See generally John Middleton, "Statutory Interpretation: Mostly Common Sense?" (2017) 40(2) Melbourne University Law Review 626, Pt III.

82 Kirby, n 51, 127.

83 Dale Smith, "Is the High Court Mistaken about the Aim of Statutory Interpretation?" (2016) 44(2) Federal Law Review 227, 234; Meagher, n 50, 401.

84 Greenberg, n 53, 817–818.

85 *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47.

86 *Carr v Western Australia* (2007) 232 CLR 138, 164 [82] (Kirby J); [2007] HCA 47.

87 *Carr v Western Australia* (2007) 232 CLR 138, 164 [82]–[83] (Kirby J); [2007] HCA 47.

88 Kirby, n 51, 130–131.

89 Kirby, n 51, 132.

90 *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23]; [2014] HCA 12; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 643–644 [27] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J); [2000] HCA

33, citing *Cabell v Markham* , 148 F 2d 737, 739 (1945); Barnes, n 54, 1091.

91 Kirby, n 51, 116.

92 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ); [2012] HCA 3.

93 Jacinta Dharmananda, "Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation" (2014) 42 Federal Law Review 333, 341.

94 Dharmananda, n 93, 341.

95 Dharmananda, n 93, 341, citing *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124]–[125] (McHugh J); [2005] HCA 58; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 599 [98] (Heydon and Crennan JJ); [2006] HCA 50; see also Greenberg, n 53, 847, citing *H Young & Co v Royal Leamington Spa Corp* (1883) 8 App Cas 517, 526.

96 This approach is used when interpreting sections of the *Body Corporate and Community Management Act 1997* (Qld): see *Silva Care Australia Pty Ltd v Body Corporate for Indigo Blue Beachside Residences CTS 30961* [2009] QCCTBCCM 23.

97 Explanatory Notes, *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003* (Qld) 60.

98 The effect of this is that, at the time the initial engagement is entered into, the engagement may be for 25 years or for a lesser term with rights of renewal to a maximum of 25 years. There is no obligation on a body corporate to agree to renewal clauses after the initial engagement is entered into: see *Castaway Cove* [2010] QBCCMCmr 279.

99 See *Acts Interpretation Act 1954* (Qld) s 4; *C & E Pty Ltd v CMC Brisbane Pty Ltd* [2004] 2 Qd R 244, 249 [17] (McMurdo P); [2004] QCA 60.

100 Explanatory Notes, *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003* (Qld) 60.

101 See *Sanderling* [2010] QBCCMCmr 420.

102 *Body Corporate and Community Management Act 1997* (Qld) s 4.

103 Explanatory Notes, *Body Corporate and Community Management Legislation Amendment Regulation (No 1) 2003* (Qld) 60.

104 See *Castaway Cove* [2010] QBCCMCmr 279.

105 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 9 May 1997, 1790 (Heinrich Palaszczuk).

106 See, eg, *Island Close* [2015] QBCCMCmr 123, [51].