



Australia - Hotel Management Agreements

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General

1. Are Hotel Management Agreements (HMAs) common in your jurisdiction?

Yes. HMAs are a common owner / operator structure used in Australia.

2. If not HMAs, what are the alternatives/what is commonly used?

Other alternative approaches are:

- Franchise agreements – operators enter into franchise agreements with well-known domestic or international hotel chains under which the chain provides a business system, services and licences the use of the brand and other IP of the hotel chain. The property at which the hotel is operated may be owned by the operator or another party (which may be an entity related to the franchisor). The fee structures may vary and may be made up of a number of components including royalties for the use of IP, other fixed charges, fees for services and/or fees based on revenue / performance of the hotel business.
- Leases – owners lease the underlying asset to an operator on a long-term basis (under which a fixed lease payment is payable), and the operator operates the hotel business autonomously.

3. Is it common or usual for the HMA to be governed by (i) local laws; (ii) the laws of one of the parties' country of incorporation; or (iii) an alternative jurisdiction?

HMAs are typically governed by Australian law. Australia is regarded as a relatively stable legal jurisdiction, such that the sovereign risk and legal risks associated with use of Australia law are limited.

4. Are there any significant or unusual points to note in respect of tax on HMA payments in your jurisdiction?

HMA payments made to the operator by the owner are subject to the Australian Goods and Services Tax (GST).

Term and Termination

5. Is there a standard contract period of an HMA?

The duration of HMAs depends in part on the bargaining position of the operator – for major operators, terms of 20+ years are not uncommon. The duration also depends on the nature of the assets, with landmark assets often attracting longer terms.

6. Is the term usually fixed? Are early exit or similar options included (contractual or implied)?

The term is usually fixed.

It is increasingly common to integrate early exit mechanisms where operators underperform for a sustained period. This is in addition to standard early termination rights, such as for an insolvency event (e.g., liquidation, receivership, statutory winding up) or where a third party brings any claim or commences proceeding relating to the owner's title to the hotel or land.

7. Is it usual to include fees/liquidated damages for early termination?

Exit fees for early termination for convenience (i.e., without cause) or on sale of the property by the owner, and excluding termination in the case of manager default, are common. The level of termination fees / liquidated can vary depending on a number of commercial factors (e.g. location, type of hotel, market position of brand) and the reason for early termination (i.e., for convenience vs. where the property is sold).

8. What is the usual position in respect of renewal?

It is common to have renewal periods that are subject to agreement between the parties; options that are exercisable unilaterally are less common. The typical renewal period is either 5 or 10 years.

Fees

9. Is there a standard fee structure for HMAs (e.g. base + incentive)?

Yes. HMA fee structures typically comprise a percentage of gross annual revenue (base fees), and a sliding scale percentage of the adjusted gross operating profit, where the operator meets profitability thresholds (incentive fee).

10. What other fees and charges are there (such as royalties, accounting, marketing, license fees, etc.)?

Depending on the parties and type of hotel, marketing contributions and / or fees for use of services such as accounting, software, reservation networks or intellectual property (including branding) may be payable.

11. Are owners typically required to set aside funds for fixtures and fittings?

Yes. Owners are typically required to make furniture, fitting and equipment (FF&E) contributions for general repairs and maintenance of the hotel, and any other budgeted capital expenditures.

Performance and Operations

12. What is the usual standard imposed on an operator in respect of the operation of the hotel?

Commonly, the standard imposed on the operator is that the operator will use the skill, effort, care and expertise reasonably expected of a prudent operator of hotels. KPIs and other prescriptive standards are less common, although the inclusion of such standards varies depending on the consequences flowing from failures to achieve such standards, the operator and the asset.

13. What performance measures are commonly used in your jurisdiction?

Common performance measures are generally related to performance against an agreed budget and / or Revenue Per Available Room (RevPAR) relative to a set of similar competitors. These measures are often linked to termination rights for failures to meet these standards.

14. Is an operator or owner guarantee common in your jurisdiction?

The inclusion of guarantees depends on identity and structure of operator and owner, including the financial position

and assets held by them.

15. What is the usual position in respect of employees? With whom does the liability for the employees sit?

With the exception of the General Manager, and possibly other key employees (e.g., executive chef), the owner employs all hotel staff and is liable with respect to:

- minimum wage obligations, work, health and safety (WHS) and discrimination law compliance;
- any penalties, damages, compensation or other order arising of unfair dismissal; and
- vicariously liability for the acts and omissions of employees.

For everyday management, owners usually give operators permission to direct and control its employees.

16. Is it usual to have a non-compete clause, e.g. that no other property with that brand can open within a certain radius?

Yes, based on a geographic radius.

17. Who is responsible for insurance?

The owner is typically responsible for obtaining insurance for:

- the property
- business interruption
- items owned by the owner or people other than the operator

The operator is typically responsible for the following insurances:

- public liability
- workers compensation
- motor vehicle
- employee fidelity
- other operating risks it is customary to insure against in the operation of hotels

18. Does the HMA give rights in real estate in your jurisdiction?

No.

19. Does the HMA need to be recorded against the property, if this is possible in your jurisdiction?

No.

20. Where financing is taken is it standard to obtain a Non-Disturbance Agreement (NDA) as part of a management or lease agreement?

Yes. The terms of NDAs vary depending on the parties.

21. What other agreements usually sit alongside an HMA in your jurisdiction?

There may be other associated agreements depend on the operator, which can include:

- IP licensing agreements
- Services agreements for the provision of services (e.g., accounting, software licensing, access to reservation networks)
- individual employment contracts for the general manager of the operator

Transfers and Assignments

22. What are the standard rights/restrictions in respect of transfer/sale of the hotel?

The rights and restrictions applicable to the transfer/sale of the hotel depend on the operator and the asset. For major operators and/or landmark assets, the consent of the operator is commonly required in order for the hotel to be sold or transferred. Otherwise, the owner is usually permitted to transfer or sell the hotel without the consent of the operator.

23. When a managed hotel is sold (either asset or share deal), is it usual in your jurisdiction that either the Operator's consent is required for the sale, or that the hotel may only be sold if the HMA transfers with the hotel?

In relation to the requirement for the consent of the operator, see above – it depends on the operator and the asset. It is not ordinarily the case that the sale or transfer is conditional on the HMA transferring with the hotel – there is often a right for the hotel to be sold or transferred with vacant possession, so that the HMA can be terminated on a sale or transfer of the hotel.

24. Do HMAs commonly include a right of first refusal for the operator to purchase the hotel?

It depends on the operator and the asset. Some operators also own hotels and therefore like to have a first right of refusal, while other organisations that are simply operators do not seek such a right.

25. Is it usual to include provisions which enable the sale of the property with vacant possession i.e. without the brand?

Yes.

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