



## Recent developments in retirement villages law

Retirement Villages Association - Queensland Conference 2009

30 July 2009

Contact

**Robin Lyons** +61 7 3119 6440  
robin.lyons@minterellison.com

SYDNEY  
MELBOURNE  
BRISBANE  
CANBERRA  
ADELAIDE  
PERTH  
GOLD COAST  
DARWIN  
AUCKLAND  
WELLINGTON  
HONG KONG  
SHANGHAI  
JAKARTA  
LONDON  
www.minterellison.com

**MinterEllison**

LAWYERS

# Recent developments in retirement villages law

## Retirement Villages Association - Queensland Conference

Introduction	3
1. The Act	4
1.1 Act amendments	4
1.2 Ministerial Working Party and drafting issues	4
1.3 Queensland Civil and Administrative Tribunal	5
2. Recent case law	6
2.1 Introduction	6
2.2 Court decisions	6
2.3 Commercial and Consumer Tribunal decisions	10
3. On the horizon	15
3.1 Winding down of schemes - protection of resident rights and industry reputation	15
3.2 Increasing charges for general services	16
3.3 Recovering corporate costs through the general services charges	18
3.4 NSW Act amendments	19

# Introduction

My task today is to give you an overview of recent developments in the law relating to the operation of retirement villages.

In doing so, I will comment on the way those developments are likely to affect operators, residents and other stakeholders in the retirement villages industry and, where appropriate, suggest how operators are best placed to respond to those developments.

The overview falls fairly neatly into three areas:

- the current status of legislative review - the *Retirement Villages Act 1999* (Qld) (**Act**);
- decisions of the Courts and the Commercial and Consumer Tribunal that have industry wide implications;
- what may be on the horizon – forewarned is forearmed.

# 1. The Act

## 1.1 Act amendments

There are no significant amendments to the Retirement Villages Act to report. The last material changes made by the Government to the Act were those made in 2006 by the *Retirement Villages Amendment Act 2006* (Qld) (**2006 Amendment Act**).

## 1.2 Ministerial Working Party and drafting issues

On the legislative review front, the wheels of Government are turning slowly.

The last indication from the State Government that changes to the Act were under serious consideration was in June 2008 when the Department of Justice and Attorney General convened a Ministerial Working Party, comprising industry and resident stakeholders. The working party met on three occasions to discuss various issues relating to the Retirement Villages Act. Topics discussed included:

- (a) the problems created by the new definition of 'cooling off period' introduced in 2006 by the Amendment Act;
- (b) significant miscellaneous policy and drafting matters, including:
  - whether section 15(2) of the Act requires pro-rata calculation of exit fees;
  - whether the Act permits an operator to contract with a resident to require the resident to be responsible for the maintenance, repair and replacement of operator-owned items inside the resident's accommodation unit;
  - whether the Act permits an operator passing on the costs of insurance policy excesses to residents;
  - whether the Act should be amended to clarify how a budget 'surplus' or 'deficit' should be '*carried forward or taken into account*' under section 102A(6), which was a section introduced in the 2006 Amendment Act;
  - whether the Act should impose stricter controls on what is '*necessary reinstatement work*' to prevent operators actually upgrading the unit when a resident leaves.
- (c) possible legislative changes or other action to prevent the re-occurrence of the situation at Urimbirra Retirement Village at Hervey Bay where it is claimed that the operator is purposefully running the village down and making it difficult for residents to re-sell their units with a view to securing back the site for re-development.

At the Ministerial Working Party meetings the operator representatives also urged the Department to address in any review of the Act a range of drafting errors and problems arising directly out of the 2006 Amendment Act that have never been addressed by the Government despite repeated requests by the industry since the 2006 Amendment Act was passed.

Since the Ministerial Working Party concluded in July last year, there has been no official word from the Government about whether it intends to progress further amendments to the Act to address the issues discussed at the Ministerial Working Party meetings or the other drafting errors raised by the industry. Of course, since then we have had a Department and Ministerial re-shuffle which is likely to have delayed any legislative review process.

In the meantime, events have overtaken the Government in relation to a number of the issues on the working party agenda. As I will discuss shortly, some of the issues have since become the subject of Court or Commercial and Consumer Tribunal decisions.

## 1.3 Queensland Civil and Administrative Tribunal

On the legislative front, there is a development that will directly impact on the way disputes involving retirement villages are handled.

On 17 June this year the Queensland government passed the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* which will amalgamate twenty-three tribunals, including the Commercial and Consumer Tribunal which currently has jurisdiction to hear retirement village disputes, into a new Queensland Civil and Administrative Tribunal (QCAT). In December 2009, QCAT will become the primary tribunal in Queensland for resolving consumer and minor civil disputes under various pieces of legislation, including disputes under the Retirement Villages Act.

There are some likely benefits for operators and residents alike:

- (a) Firstly, we are likely to see an improvement in the standard of legal analysis in Tribunal decisions because QCAT will be made up of members, legally qualified members and judicial members, including a President who is a Supreme Court judge.<sup>1</sup> The minimum legal experience required for appointment as a member has been increased, although persons with special knowledge, expertise or experience of a relevant business or industry are still eligible to be members.

The President of QCAT must choose 1, 2 or 3 members to constitute the Tribunal for a particular matter.<sup>2</sup> In choosing the persons who are to constitute the Tribunal, the President must consider, among other factors, the need for the Tribunal hearing the matter to have special knowledge, expertise or experience relating to the matter.<sup>3</sup> This means that in each matter the composition of the Tribunal can be tailored to include members most qualified to hear that particular dispute.

- (b) Secondly, there are more flexible appeal rights from a decision of QCAT. Previously a tribunal decision could only be appealed with the leave of the District Court, and only on an error of law or a jurisdictional point. Under the new Act, the Tribunal has been granted jurisdiction to hear an appeal against a decision of the Tribunal. The President may also transfer a matter on appeal before the Tribunal to the Court of Appeal if the President considers it would be appropriate to do so. For example, if a related or similar action is pending before the Court of Appeal.<sup>4</sup>

Under the new Act a party dissatisfied with a final decision of the Tribunal exercising its appellant jurisdiction<sup>5</sup> can apply to the Court of Appeal for leave to appeal if the appeal is on a question of law. However, if a judicial member (a member who is also a Supreme or District Court judge) constituted the Tribunal that determined the proceeding, and the appeal is on a question of law, a party may appeal to the Court of Appeal **as of right**.<sup>6</sup>

---

<sup>1</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 8, Schedule 3 'judicial member'

<sup>2</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 165.

<sup>3</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 167.

<sup>4</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 144.

<sup>5</sup> Or in respect of the amount of costs fixed under section 107.

<sup>6</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 149.

## 2. Recent case law

### 2.1 Introduction

It is unfortunate that most of the significant legal developments in retirement villages law in the past year have played out in the Commercial and Consumer Tribunal or the Courts. That is unfortunate because it has necessarily meant that residents and operators have progressed an unresolved dispute to the Tribunal or a Court for determination, no doubt at the cost of significant time and expense for all parties concerned.

There has also been a clear trend for matters to advance beyond the Tribunal's decision on appeal to the Court system as operators or residents seek to have Tribunal decisions scrutinised by more legally rigorous District or Supreme Court judges. This has, of course, added significantly to the costs.

### 2.2 Court decisions

#### 2.2.1 *Saunders v Paragon* – calculation of exit fees

One of the most notable Court decisions during the last year is the decision of Justice Robin of the District Court of Queensland in *Saunders v Paragon Property Investments Pty Ltd*, which was handed down on 19 December 2008.<sup>7</sup> This was an appeal from a decision of the Tribunal handed down on 24 September 2008.<sup>8</sup>

The decision deals with whether section 15(2) of the Act requires exit fees to be calculated on a pro-rata daily basis. If it does the consequence is that an operator cannot charge a resident an exit fee payable under their residence contract for a full year of occupation where the resident has only occupied the village for part of the year. Instead, the exit fee for the relevant year must be apportioned so that it is only payable in respect of the number of days in that year for which the resident has occupied their unit, up to and including the date the resident 'ceases to reside' in their unit.

#### ***Tribunal decision***

In this case, the resident had occupied the village for 2 years and 1 day. The residence contract imposed an exit fee of 5% of the resale price for each year (or part year) of occupation, in which case the exit fee was 15% (the extra day being counted as a full year). The resident took the operator to the Tribunal seeking an order that she was not required to pay the extra full year rate of 5% for the last day of occupation, but rather the full year rate as adjusted to 1 day.

The operator argued that section 15(2) does no more than fix the resident's departure date as the "point in time" at which the resident's exit fee is to be calculated and does not prescribe the method of calculation itself. Accordingly, the matter of whether the exit fee is to be calculated on a daily basis is a matter for operators and residents to agree upon in each individual residence contract.

The Tribunal agreed with the operator's interpretation of section 15 (2) and dismissed the resident's application.

#### ***District Court decision***

The resident appealed the decision to the District Court, where Justice Robin found in favour of the resident and ordered the operator to refund approximately \$9,000 of over charged exit fee to the resident.

---

<sup>7</sup> [2008] QDC 322, 19 December 2008.

<sup>8</sup> See *Saunders v Paragon Property Investments Pty Ltd* [2008] CCT VH002-06, 24 September 2008.

Justice Robin arguably decided the appeal on his determination of the period of time for which the resident had occupied the village.

The resident's Public Information Document stated that her exit fee was to be calculated 'from' the date on which she commenced ownership of the unit. Justice Robin reviewed the existing case law on the meaning of 'from' and held 'from' has a similar meaning to 'after' and that the PID should be interpreted as providing that the exit fee began to accrue not on the date that the resident purchased the unit (on which basis the Tribunal had issued its decision), but rather the next day. Consequentially, the day on which the resident ceased to reside in the village was not the first day of her third year, but the last day of her second year (in which case the occupancy period was 2 years only, rather than 2 years and 1 day).

While, in view of this finding, it was not strictly necessary for Justice Robin to consider the issue of whether section 15(2) of the Act should be interpreted as requiring exit fees to be calculated on a daily basis, he did so. He found that section 15(2) requires 'a calculation on a daily basis for partial years of occupation, rather than a calculation by reference to the year in which the resident 'ceases to reside' and has the same meaning it would have if the section included the words 'on a pro-rata daily basis'.

### ***Discontinued appeal***

Shortly after the decision was handed down, the operator commenced an appeal to the Supreme Court of Queensland. It was decided to discontinue the appeal on advice from Senior Counsel, but only because of the likelihood that on appeal the Supreme Court would simply decide the matter on the period of time for which the resident had occupied the village (that is, for 2 years, or for 2 years and 1 day), without the need to address the interpretation of section 15(2) of the Act.

Despite the discontinuance of the appeal, there are strong arguments supporting the Tribunal's interpretation of section 15(2) and that Justice Robin erred in law in coming to his conclusion.

Indeed, if the Government intended that exit fees be calculated on a daily or pro-rata basis, the Parliamentary draftsmen certainly did not express that intention clearly. By contrast, the *Retirement Villages Act 1999* (NSW) includes a very clear provision stating 'A departure fee must be calculated on a daily basis'.

### ***Implications***

Whilst the District Court's decision on section 15 of the Act still stands, it is specific to its facts and there is no compulsion for operators of other villages to change any current practice of not calculating exit fees on a pro-rata daily basis in accordance with the strict terms of existing residence contracts.

Given the significant financial impact that pro-rata calculation of exit fees would have on village operations and values, operators will no doubt not be prepared to accept that outcome unless it is imposed by the Supreme Court or the Court of Appeal after full and proper legal argument.

Of course, the possibility remains that the Government will intervene sooner by amending the Retirement Villages Act to clarify the position one way or the other.

The matter of the proper interpretation of section 15(2) is clearly not over yet.

## 2.2.2 Jomal – capital maintenance and replacement spending

Another significant decision in the last year, this time in favour of operators, is *Jomal Pty Ltd v Commercial & Consumer Tribunal & Ors.*<sup>9</sup> This decision was handed down by Justice Douglas of the Queensland Supreme Court on 6 February 2009.

Jomal is the latest instalment of an ongoing battle that started in the Tribunal in 2006 about the ability of an operator to lawfully contract with a resident to require the resident to bear personal responsibility for the costs of maintaining, repairing and replacing operator-owned items *inside* or *affixed to* their accommodation unit.<sup>10</sup>

At the heart of the issue is the proper interpretation of the definition of '*capital items*' appearing in the Dictionary to the Act, which provides that **capital items** include the following:

*'(a) all buildings and structures located in the retirement village and owned by the scheme operator, including the communal facilities, amenities and accommodation units, other than items that, under the residence contract, are to be maintained, repaired and replaced by the resident;...'*<sup>11</sup>

Operators argue that the proviso in sub-paragraph (a) of the definition means that where the operator has contracted with a resident for the resident to assume obligations to *maintain, repair* and *replace* items that would otherwise be capital items, those items are excluded from the scope of the expression 'capital item' wherever it has application in the Act.

If that is the case, such items remain the personal responsibility of the resident and would not be subject to the general provisions of the Act which require the costs of:

- (a) the *maintenance* and *repair* of capital items to be paid out of the maintenance reserve fund (via contributions from residents in the form of general services charges); and
- (b) the *replacement* of capital items to be paid out of the capital replacement fund (via contributions directly from the operator).

This is the interpretation which operators have adopted since the Act was introduced. For this reason, it is common practice for operators to expressly contract with residents so they are responsible for maintaining, repairing and replacing items inside their accommodation units. This has obvious implications on the amounts of expenditure operators have budgeted for in the capital replacement fund, the maintenance reserve fund and the general services fund.

As an indication of the significance of the matter for the industry, research conducted by the industry in preparation for the original hearing of the Jomal dispute in the Tribunal revealed that in a sample of 133 villages reviewed, 101 villages had clauses in their lease or licence which sought to impose (in varying forms and to varying degrees) personal obligations on residents to pay for the maintenance, repair and/or replacement of items within or affixed to their units.

---

<sup>9</sup> Relevant Tribunal cases leading up to Jomal were *Holt v Eden Lea Retirement Village Pty Ltd* [2006] CCT VH004-06, 21 August 2006, *Galletly v Carlyle Gardens Pty Ltd* [2007] CCT VH002-07, 6 June 2007 and *Power & Certain Residents of Sunnymead Retirement Village v Jomal Pty Ltd* [2008] CCT VH003-07, 31 March 2008.

<sup>10</sup> Relevant Tribunal cases leading up to Jomal were *Holt v Eden Lea Retirement Village Pty Ltd* [2006] CCT VH004-06, 21 August 2006, *Galletly v Carlyle Gardens Pty Ltd* [2007] CCT VH002-07, 6 June 2007 and *Power & Certain Residents of Sunnymead Retirement Village v Jomal Pty Ltd* [2008] CCT VH003-07, 31 March 2008.

<sup>11</sup> The definition of 'capital items' introduced in the original 1999 Act was amended by the 2006 Amendment Act to replace the words '*other than items that are a resident's contracted responsibility*' with the current words '*other than items that, under the residence contract, are to be maintained, repaired or replaced by the resident*'.

### ***Tribunal decision***

The Jomal dispute involves a claim by the residents of Sunnymead Park Retirement Village against the operator, seeking an order that they were not personally responsible for the cost of repairing hot water systems forming part of the residents' accommodation units. The village Public Information Document and residence contract clearly required residents to pay personally for the repair and replacement of the items.

Against a history of extreme oscillation on the issue, the Tribunal decided in the Jomal dispute that any attempt by an operator to contract with a resident to make them *'responsible personally for the repair, maintenance and replacement during the course of the lease of fixtures owned by the scheme operator in the resident's villa'* was not permitted by the Act. It ordered the operator to pay the costs of repairing hot water systems from the MRF.

The Tribunal arrived at this decision by implying words into the definition of 'capital items' so that it read that the only items inside a resident's unit that a resident would be able to contract to personally repair, maintain and replace were those 'installed by a resident and removable by the resident at the termination of a residence contract'.

### ***Supreme Court decision***

The operator appealed the Tribunal decision directly to the Supreme Court.

On appeal Justice Douglas held that the Tribunal had erred in law in implying words into the definition of 'capital items' and reversed the decision of the Tribunal. He decided that, on its proper construction, the Act does not preclude an operator and a resident from agreeing in a residence contract that the resident is to maintain, repair and replace items owned by the operator which are within or affixed to the resident's unit.

Accordingly, on the basis of this decision, under a properly drafted residence contract, residents are able to be made personally liable to maintain, repair and replace items within or affixed to the resident's unit. In that case, such expenditure need not be funded out of the maintenance reserve fund (for repairs and maintenance) or the capital replacement fund (for replacements).

### ***Appeal to Court of Appeal***

Despite what was an unequivocal decision by Justice Douglas, the relevant residents have decided to appeal his decision to the Full Court of the Supreme Court. They are seeking to have the Tribunal's original decision reinstated. Currently the appeal is set down for a hearing in September 2009.

If the residents are successful in having the Tribunal's earlier decision reinstated, the result will be that any provisions in existing residence contracts in Queensland retirement villages which purport to make residents personally responsible for maintaining, repairing and replacing items owned by the operator which are within or affixed to a resident's unit will be void.

Accordingly, the *maintenance* and *repair* of such items will need to be paid out of the maintenance reserve fund (via contributions from residents in the form of general services charges), and the *replacement* of such items will need to be paid out of the capital replacement fund (via contributions directly from the operator).

The impact on operators should not be substantial in relation to the *maintenance* and *replacement* of such items, which will be paid for out of the maintenance reserve fund contributed to by residents. In effect, the cost will be borne by residents *collectively*, rather than individually. Of course, the maintenance reserve fund contributions payable by residents will have to increase but operators will not need to obtain the residents' consent for this to happen given that increases in the maintenance reserve fund contributions are an exception to the CPI capping of the general services charges under section 107 of the Act.

However, the very real financial impact on operators will be that the cost of funding the *replacement* of capital items within or affixed to units will be shifted to them from each resident personally. This is because such costs will need to be paid out of the capital replacement fund which the Act requires to be funded by contributions directly from the operator. The financial impact of this liability on operators going forward is undoubtedly significant.

At a practical level, if an appeal is successful, operators of affected villages will need to:

- (a) commission revised quantity surveyors' reports which reflect the need to incorporate into the surveys items owned by the operator which are within or affixed to the residents' units;
- (b) prepare revised budgets for the maintenance reserve fund and capital replacement fund; and
- (c) set new increased maintenance reserve fund contributions and capital replacement fund contributions.

Hopefully, the appeal will not succeed and the industry will not need to deal with these issues.

## 2.3 Commercial and Consumer Tribunal decisions

### 2.3.1 *Cossey & Pye v Australian Property Custodian Holdings Ltd – termination fees*

The Tribunal decision in *Cossey & Pye v Australian Property Custodian Holdings Ltd as Responsible Entity for the Prime Retirement and Aged Care Property Trust*<sup>12</sup> was handed down on 9 October 2008.

The dispute involved two residents of Bellflower Retirement Resort who argued that the operator had overcharged them on exit.

In addition to a standard 'deferred management fee' (calculated as a percentage of the ingoing contribution paid by the resident, which percentage increased incrementally with the duration of the resident's occupation of the village) the residents were required under their residence contracts to pay a 'termination fee', which was a flat fee of approximately \$5,000 increasing by 5% per year of occupation.

The residents challenged both the 'deferred management fee' charged by the operator (on the grounds that it was required to be calculated on a daily pro rata basis under section 15), and the 'termination fee' component on the basis that it was in breach of section 68 of the Act.

The Tribunal rejected the resident's argument as to calculating the exit fee on a daily basis (expressly endorsing its earlier views on section 15 in *Saunders* – note this occurred before *Saunders* was successfully appealed to the District Court).

In relation to the 'termination fee', the resident argued that the termination fee constituted either a:

- (a) 'cost of sale' under section 68(1) of the Act, in which case it was required to be shared between the operator and the resident in the same proportion as they shared the gross ingoing contribution on the sale of the right to reside; or
- (b) a 'fee for selling' the right to reside in the resident's unit, which could not be charged at all under section 68(3) of the Act.

The Tribunal found in favour of the operator and decided that:

---

<sup>12</sup> [2008] CCT VH005-06 & VH001-07, 9 October 2009.

- (a) the *termination* of the former resident's right to reside and the *resale* of the right to reside to a new resident were separate and distinct transactions;
- (b) the resident had agreed in their residence contract that the termination fee was separate and distinct from any fee for reselling the right to reside in their unit; and
- (c) the termination fee was a valid 'exit fee' charged to the resident under the Act as there is no actual requirement in the Act that an exit fee must be capped or it will be invalid.

This case clearly supports the ability of operators to charge residents a separate fee for terminating the right to reside as distinct from a fee to recover 'costs of sale' or a 'fee, charge or commission' for selling the right to reside.

A word of caution however. The Tribunal noted that there was no evidence that the monies paid by the residents as the deferred management fee or the termination fee had been applied to pay commission to the operator's sales consultants involving the re-leasing of the residents' units. This suggests that while the Tribunal has adopted the approach that an exit fee (or any other fee for terminating a right to reside) is separate to and distinct from a fee for selling or cost of sale within the meaning of sections 68(1) or (3) of the Act, it may not follow this approach where there is evidence that the operator has charged a cost of sale or commission and merely concealed the charge as an 'exit fee' or 'termination fee'.

### 2.3.2 **Tew & Kelly v Masonic Care – village accounting**

The Tribunal decision in *Tew & Kelly v Masonic Care Queensland*<sup>13</sup> was handed down on 8 December 2008.

In this matter the Tribunal made a number of determinations about some key provisions of the Act dealing with village accounting and budgeting, and the preparation of annual and quarterly financial statements:

- (a) The accounts of a retirement village must be maintained in a separate accounting system from the accounts for other facilities that may be owned or managed by the scheme operator but are not part of the village (such as aged care facilities). In particular, funds relating to the retirement village and funds relating to other such facilities may not be held together in a single bank account.
- (b) When the Act requires the MRF and CRF to be kept in separate 'accounts', this is a reference to *bank* accounts – it is not sufficient for the funds to be kept in the same bank account and merely kept in separate 'financial' accounts, ie in a ledger system. Also, although the Act does not specify that the funds in the CRF are trust monies held on behalf of residents (as it does in respect of the MRF), the Tribunal found that this is the intention of the Act, as parliament inadvertently omitted the relevant words.
- (c) Budgets for general services charges must be set out so that the expenses that will require the consent of residents under section 106 of the Act in the event that the increase in the overall budget over the previous year exceeds the relevant CPI increase (ie section 106 items) are identified separately to other items that may increase without the consent of the residents (ie section 107 items). The intention is that residents will be able to identify each line item in the budget that will require their consent.
- (d) The requirements of sections 113 and 112 of the Act for annual financial statements and quarterly financial statements to list '*the expenditure involved in providing each general service*' means that the statements must list each separate cost or item of expenditure individually so that residents reviewing the statements can determine whether each expense is properly payable by residents. The grouping of expenses

---

<sup>13</sup> [2009] CCT VH005-08, 8 December 2008.

into categories such as 'gardening' and 'pool maintenance' do not allow residents to identify expenditure in providing each general service for a financial year.

This decision seems inconsistent with the meaning of 'general service' in the Act.

The level of detail required in the financial statements and how they must be presented to be 'in a form capable of being audited' continues to be a contentious issue and it seems likely that the Tribunal will be asked to reconsider the matter in the near future.

### 2.3.3 Residents of Kawana v Kawana Island Retirement Village – general services charges

The Tribunal decision in *The Residents of Kawana Island Retirement Village as listed in Schedule A filed on 10 September 2007 v Kawana Island Retirement Village Pty Ltd*<sup>14</sup> was handed down on 17 October 2008.

This dispute involved a claim by approximately 30 residents of Kawana Island Retirement Village on the Sunshine Coast for a refund of general services charges paid in the past on the basis that they included expenses for services that were not 'general services' within the meaning of the Act, and could not be charged to all residents collectively.

The village offered two types of accommodation – villas and apartments. All villas and apartments are independent living units. While the villas were separately contained units, the apartments were contained together in a single four-story apartment building.

The residents applying to the Tribunal were villa residents. They argued that certain costs incurred by the operator in relation to the apartment building were not payable by the residents at large (only by the apartment residents) as the costs were incurred as part of the management and administration of the apartment building only, rather than the village as a whole. Costs of the apartment building that were included in the general services charges payable by all residents included:

- (a) electricity to power lifts in the apartment building, fume-exhaust fans in the basement garage, video/audio call systems, and security lighting in the stairwells, lifts, lift lobbies and basement garage;
- (b) telephone rental for land-line emergency telephones in two lifts; and
- (c) cleaning inside the lifts, lift lobbies, gate entrances, foyers and stairwells.

Up until 2007, only apartment residents had direct access to the building, but villa residents could enter the building if access was allowed by an apartment resident via an intercom. From 2007, all residents in the village were issued with a special key for all communal facilities so that any resident could access the interior of the apartment building.

The definition of 'general services' in the Act reads as follows:

**'general services'** are services supplied, or made available, to all residents of a retirement village.

By contrast, 'personal services' are defined as follows:

**'personal services'** are optional services supplied or made available for the benefit, care or enjoyment of a resident of a retirement village.

The residents argued that a service cannot be a 'general service' unless it is a service from which all residents derive a benefit or advantage.

The operator counter-argued that the definition merely requires a service to be 'made available' to all residents and does not specifically require that each resident derive a particular benefit.

---

<sup>14</sup> [2008] CCT VH005-07, 17 October 2008.

The Tribunal found in favour of the operator and noted that the definition of 'personal service', by contrast, requires such a service to be 'made available for the benefit' of a resident, suggesting that parliament contemplated that a 'general service' may not be of benefit to all residents. The Tribunal also noted that the administrative burden on operators would be 'intolerable' if the parliament had intended that an operator enquire in relation to every invoice as to precisely how many residents were benefited by the relevant item of expense.

The lesson for operators from this decision is that, while services that are charged to residents through the general services charges need not actually benefit all residents, the services must actually be 'made available' to all residents, and any legal or practical obstacle to the 'availability' of the service to all residents may have the effect of disempowering the operator to recover the cost from the residents through the general services charges.

#### **2.3.4 Filmer & Ors v Carlyle Gardens Retirement Village – limits of Tribunal's jurisdiction**

The Tribunal dealt with several cases in 2008 and 2009 which involved consideration of the extent of the Tribunal's jurisdiction to amend or vary the terms of a residence contract between an operator and a resident.

One of these cases was *Filmer & Ors per Schedule A as in Application Lodged on 24 November 2008 v Carlyle Gardens Retirement Village Pty Ltd*<sup>15</sup>, which was handed down on 2 March 2009.

In this case, nine residents at Carlyle Gardens Retirement Village took the previous operator of the village to the Tribunal on the basis that the previous operator had made representations, prior to their entering into residence contracts, that a 60-bed aged care facility was to be constructed at the village. In particular, the Public Information Documents issued to some of the residents from 2005 to 2007 contained a 'concept site layout' showing a 'proposed aged care facility' within the village boundaries and adjacent to the village caravan storage area.

Evidently, the operator had since made a decision not to proceed with building the aged care facility.

The residents sought orders that:

- (a) the current operator of the village (AMP Capital Meridien Lifestyle) provide a 60-bed aged care facility, 'as previously promised', within the village;
- (b) the residents' exit fees be reduced to zero unless and until the village was constructed, as compensation for the inflated ingoing contribution paid by the residents in the belief the village would contain an aged care facility.

The operator defended the claim on the basis that the Tribunal did not have any jurisdiction to grant the orders sought by the residents.

The Tribunal held that it did not have jurisdiction to grant the orders sought because:

- (a) the claim about misrepresentation in the course of contractual negotiations leading to the residence contracts was not a dispute about 'the parties' rights and obligations under the resident's residence contract' – while the claim *related to, or involved, a residence contract*, it was not a claim 'under' the residence contract and therefore not within the definition of 'retirement village dispute' in section 21(1) of the Act;
- (b) an order to build an aged care facility would exceed the statutory threshold of orders of the Tribunal (\$250,000); and

---

<sup>15</sup> [2009] CCT VH007-08, 2 March 2009.

- (c) there is no power of the Tribunal to amend residence contracts (for example, by reducing the residents' exit fees to zero) or issue mandatory injunctions (such as the order sought to construct the aged care facility).

This matter is a good illustration of the limits of the Tribunal's jurisdiction. Residents seeking to pursue such issues are faced with a decision whether to proceed through the Court system, at the risk of incurring significant legal costs of their own and, potentially, costs orders against them.

### 2.3.5 **Galletly v Carlyle Villages – variation of residence contracts**

The second Tribunal case involving an application by a resident to vary their residence contract was *Galletly v Carlyle Villages Pty Ltd*<sup>16</sup>, handed down on 13 February 2009. The resident failed in his application because the Tribunal did not accept his version of the background facts of the dispute.

Interestingly, however, part of the dispute involved a consideration of the resident's responsibility for reading and understanding the terms of a lease document he had signed (which formed part of his residence contract). The resident conceded that he had simply signed the lease and returned it to the operator without reading it, assuming the document was superfluous and did not require comprehension. The Tribunal found that a person's signature on a document is conclusive evidence of their agreement to, or acceptance of, the terms of that document, and that the fact that the resident had not read the document was immaterial to the question of whether he was bound to its terms.

Village operators should take confidence in the fact that residents will be held to the documents they sign. However, operators (and village managers and sales persons) should remain alert about possible issues affecting the resident's decision making processes that may negate the operation of this principle (such as potential incapacity or undue influence).

---

<sup>16</sup> [2009] CCT VH002-08, 13 February 2009.

## 3. On the horizon

### 3.1 Winding down of schemes - protection of resident rights and industry reputation

As the underlying attractiveness of retirement village land for alternative commercial uses escalates, a looming issue is the protection of both resident rights and the retirement village industry's reputation against the actions of developers who acquire retirement villages with the aim of winding down the scheme and re-developing for short term gain.

We have recently seen two examples of the difficulties those conflicting interests can create.

#### 3.1.1 Urimbirra

The first is the situation at Urimbirra Retirement Village at Hervey Bay where, by the operator's own admission in the village Public Information Document the operator has, for some time, intended to wind down the village and redevelop the land.

The remaining residents claim that:

- (a) the operator has intentionally allowed the village to fall into disrepair;
- (b) the operator has not complied with the major accounting and record keeping obligations in the Act for some years (in fact, the Tribunal found in late 2008 that no budgets had been passed since 2002-2003);<sup>17</sup> and
- (c) outgoing residents are finding themselves with little choice but to allow the operator to 'buy back' the right to reside in their unit for very low amounts given that there are no potential new residents as a result of the village being run-down and publicly earmarked for development. After buying back units, the operator is renting them to the public on casual tenancies pending the departure of all retirement village scheme residents.

The difficulty with this situation seems to be that there is no clear breach of the Act as it is currently drafted on which the residents can take action against the operator. The operator is not attempting to terminate the residents' rights to reside in the village, but rather to encourage residents to leave of their own volition and allow the operator to 'buy back' their rights to reside at significantly deflated prices. This does not appear to contravene the Act. For example, there are no limits in the Act on the ability of operators to buy back units, to rent units in the village scheme rather than enter into new residence contracts or to adversely influence market values of units by announcing future plans to wind down the retirement village scheme.

#### 3.1.2 Gleneagles

The second example involves Gleneagles On the River Retirement Village, in New Farm, a matter which recently attracted a lot of media attention.

A property developer purchased an operational retirement village scheme from an established Church operator and commenced redeveloping the site into residential apartments.

The developer purported to terminate the rights to reside of approximately 30 residents who lived in an existing multi-storey apartment building on two grounds:

- (a) that there were fire safety issues with the building that were unable to be adequately addressed by expenditure on the building; and

---

<sup>17</sup> *John Sheppard and the Residents of Urimbirra Retirement Village as Listed in the Application Lodged 21 August 2007 v Milstern Retirement Services Pty Ltd* [2008] CCT VH009-07, 18 December 2008.

- (b) in the developer's opinion, the residents were no longer capable of living independently.

The residents contended that neither of these were grounds for termination by the operator permitted under section 53 of the *Retirement Villages Act*.

With the assistance of legal aid and pro-bono legal services, the residents made an application to the Tribunal for relief. In the weeks following that application, the residents reached a confidential settlement with the developer.

The Urimbirra and Gleneagles matters raise a number of important issues for the industry:

- (a) they have demonstrated that the Office of Fair Trading takes a conservative approach to intervening in potential breaches of the Act. In both cases, the residents were unsuccessful in their attempts to obtain the intervention of the Office of Fair Trading, beyond referring the residents to the Tribunal and recommending that they obtain legal representation. Whilst the Act gives the Chief Executive some quite extensive powers to investigate potential breaches of the Act (including the power to enter and search a place, obtain information from persons, seize evidence and apply to the District Court for an order that a person be appointed as manager of a village to protect the interests of residents), history shows that the Office of Fair Trading is unlikely to exercise those powers or intervene to protect residents' rights except perhaps in the most extreme circumstances;
- (b) the practical reality is that residents will rarely have sufficient financial means to effectively defend their rights, even in the Tribunal;
- (c) the media attention that will be generated if more matters like these occur is likely to severely damage the retirement village industry's reputation; and
- (d) the possibility that re-occurrences will eventually force the Government to legislate to better regulate the winding down of retirement village schemes in these circumstances. As mentioned, the Office of Fair Trading were sufficiently concerned with the Urimbirra situation to include it on the Ministerial Working Party agenda last year.

### 3.2 Increasing charges for general services

For some years now there have been views expressed by residents that for the purposes of applying section 106 of the Act dealing with increasing general services charges, the general services budget for a new financial year cannot be increased by more than CPI over and above the previous financial year's *actual general services expenditure*, as opposed to the previous year's budgeted costs for general services charges.

These rumblings continue and it may well be a matter that comes before the Tribunal before too long.

The answer to the issue turns on the meaning of the words 'general services charges' in sections 102A (which requires the village operator to prepare a general services budget) and 106 (which restricts the amount that general services charges can be increased).

The question is whether, when the expression 'general services charges' is used in those sections, it means:

- (a) the charges calculated in the general services budget and levied on each resident periodically during the relevant year (**First Interpretation**); or
- (b) the actual expenditure by the operator on providing the general services during that year (**Second Interpretation**).

The phrase 'general services charges' is not defined in the Act, nor is there any assistance as to its meaning given by the Explanatory Notes to the Act.

It is clear for a number of reasons that, on its proper interpretation, the First Interpretation is the correct one.

- (a) If the Second Interpretation was to be adopted, a number of provisions of the Act would be unable to be complied with or would not make sense. For example:
- Section 106 of the Act essentially requires a comparison between the last years' general services charges and next years' proposed general services charges. The words 'general services charges' can only have one meaning. If 'general services charges' was to mean the actual expenditure by the operator on providing the general services, section 106 could not make any sense. That is obvious as the actual expenditure for the upcoming financial year is not ascertainable.
  - Section 102A of the Act requires the operator to provide the draft budget for general services charges at least 14 days before the beginning of the financial year. If the operator was required to use the *actual expenditure* for the previous year as the basis for calculating the percentage increase, it would not be possible to comply with the Act and provide the budget before the end of the financial year. That is because the actual expenditure is not known until after the conclusion of the financial year. Accordingly, the only practical interpretation that can be used is the First Interpretation.
- (b) The phrase 'general services charges' has been used in other parts of the Act to have the meaning outlined in the First Interpretation. For example, in section 63 of the Act, when a resident leaves the village, the operator must, at the time of settlement of their unit, give the former resident a written statement showing how the exit entitlement was calculated and the particulars of 'any accrued general services charges'. If 'general services charges' was to have the meaning outlined in the Second Interpretation, and the settlement occurred before the end of the financial year, it would be impossible to comply with the Act and provide the written statement at settlement. Such a written statement could only be provided after the financial year was completed.
- (c) When referring to actual general services expenditure in other sections within the Act, the legislature has used the phrase '*expenditure involved in providing each general service*', not '*general services charges*'. For example, see sections 112 and 113 of the Act. It is clear that in doing so, the legislature has drawn a clear distinction between the two concepts. Had the legislature intended that the actual expenditure be used as the comparator in section 106 of the Act, it could have easily done so by drafting the section to say:

*'A scheme operator must not increase the total of general services charges for a retirement village for a financial year above the previous years' total actual expenditure involved in providing the general services by more than the CPI percentage increase for the financial year.'*

It is clear that the legislature has deliberately intended to not refer to 'expenditure involved in providing each general service' in section 106 of the Act.

Therefore, in sections 102A and 106 of the Act the words 'general services charges' must mean the charges calculated in the general services budget and levied on each resident periodically during the year.

The practical effect of that meaning is that when determining (for the purposes of section 106 of the Act) whether the increase in the 'total of general services charges' is more than the CPI percentage increase for the financial year, the operator is required to compare the general services charges proposed for the new financial year with the general services charges calculated in the previous financial year's budget and levied on each resident periodically during that previous year. The comparison is not to be made with the actual expenditure incurred in the provision of the general services during that previous financial year.

### 3.3 Recovering corporate costs through the general services charges

In the current climate of financial uncertainty an important concern for operators will be cost recovery.

An important part of this for large operators, or operators with multiple villages or operating in multiple states, will be the recovery (through the general services charges) of corporate or 'head office' costs, and other overhead and administrative costs, which are not incurred for any one particular village but relate to the portfolio or head company as a whole. This is often at odds with the view of residents that costs passed on to residents through general services charges should relate only to the particular village in question and should not relate to the internal operations, establishment or structure of the scheme operator (notwithstanding the potential benefits to residents in the operator incurring these costs – for example, the achievement of economies of scale to minimise the cost of other services provided to all villages owned by the operator).

The last decision on this issue in Queensland was handed down by the Tribunal in 2004 in *The Residents of Forest Place Retirement Village Durack as Named in Application filed 30/10/03 v Forest Place Group Limited*.<sup>18</sup> In that case, the operator recovered from the residents, as part of the general services charges, part of the payroll tax incurred by the holding company of which the operator was a wholly owned subsidiary. The head company had incurred the payroll tax because its corporate structure exceeded the threshold for payroll tax liability in Queensland. The residents sought an order from the Tribunal that the payroll tax incurred by the holding company and apportioned to the village was incurred only because the operator was a member of a group of companies (the wages for all member companies having aggregated to give rise to the payroll tax liability) and was not a cost of running the village. The Tribunal found in favour of the operator and accepted that the payroll tax was a component of the management and administrative costs of the village as contemplated within the definition of 'general services' in the Act.

The New South Wales Consumer, Trader & Tenancy Tribunal has recently also decided that in the context of the *NSW Retirement Villages Act 1999*, an operator is not prevented from passing on to residents payroll tax incurred as a result of its corporate structure exceeding the threshold for payroll tax liability in NSW.

In *Australian Retirement Homes (No. 2) Pty Ltd v Minkara Retirement Village Residents Committee*<sup>19</sup> (decided on 20 May 2009), the operator included in a statement of proposed expenditure for one of its retirement villages part of the payroll tax incurred by the holding company of which the operator was a wholly owned subsidiary. Again, the head company had incurred the payroll tax because its corporate structure exceeded the threshold for payroll tax liability in NSW. The residents refused to pass the budget with this item included.

The operator successfully obtained the consent of the Tribunal to include the payroll tax item in the statement of proposed expenditure. The Tribunal considered that, 'The *Retirement Villages Act* and Regulations envisage that a person may be the operator of more than one village and can apportion the expenditure between the villages as long as the method of calculation of apportionment is disclosed.' The Tribunal then approved the budget as submitted by the operator.

While the issue would appear settled, given the current economic climate, operators should be alert that, notwithstanding the 2004 decision of the Queensland Tribunal, the fact that this issue has been raised recently in the NSW Tribunal could well signal that the issue is likely to be raised again in Queensland.

---

<sup>18</sup> [2004] QCCTRV 7, 30 July 2004.

<sup>19</sup> [2009] NSW CTTT 275, 20 May 2009.

### 3.4 NSW Act amendments

As operators with villages in NSW will no doubt be aware, the NSW parliament passed amendments to the *Retirement Villages Act 1999* (NSW) in December 2008.<sup>20</sup> Many of the amendments bring the New South Wales provisions into line with Queensland.

However there are other significant amendments that are not features of the Queensland Act, including:

- (a) the introduction of a 90 day 'settling in period' within which a resident can rescind their residence contract and get back their ingoing contribution without having to pay certain charges (including recurrent charges and departure fees);
- (b) rights of former residents to apply to the Tribunal to re-calculate their exit entitlement where the conduct of the operator has unfairly had a 'negative financial impact' on the former resident;
- (c) rights of residents to conduct alterations to their units in certain circumstances;
- (d) an obligation to make good any deficit in the village budget and not carry it forward into the next financial year or recover it from the residents;
- (e) enhanced requirements to improve village safety, hold annual safety inspections and report to residents on the findings;
- (f) obligations to maintain capital items for which the operator is responsible in a 'reasonable condition' having regard to the age and prospective life of each capital item and the money paid to the operator by residents under residence contracts (including ingoing contributions);
- (g) a penalty provision for operators who amend a residence contract without a solicitor's certificate, with a maximum penalty of \$11,000; and
- (h) penalties for not ensuring there is vehicular access for emergency and care services vehicles.

These amendments are clearly intended to regulate operators more tightly in certain areas that are very contentious in NSW (such as the rights of residents to conduct alterations on their units, and the right of a resident to terminate a residence contract after moving in to the village).

There is an obvious risk that comparisons with the New South Wales Act will eventually result in similar amendments being introduced in Queensland.

---

<sup>20</sup> See the *Retirement Villages Amendment Act 2008* (NSW).