

# **Association of Residents of Queensland Retirement Villages (Inc.)**

**Annual General Meeting - 27th September 2004 - 10.00 am**

**Bundaberg RSL Club, Quay St., Bundaberg**

## **President's Report**

Once again I am here to report to you on what we, your Committee that is, has been doing in your name over this last year.

We are an Association that represents the interests and aspirations, quite modest aspirations one would have to say, of residents of retirement villages in Queensland. We do that in any way that we can, providing only that it is legal and honest. Our main channel of communication with all our members is via our Newsletter and also, in more recent years, our web-site. [www/villagers.org.au](http://www.villagers.org.au) the web-site address of which is at the top of our Newsletters.

The thing which has exercised our minds more than any other this year, indeed for the last three years, has been the Review of the Retirement Villages Act 1999.

Unfortunately it does not seem to have exercised the mind of the Department of Fair Trading very much at all. We, or rather the Department, is now in the fourth year of review and there is little indication of substantial progress. Apart from five meetings from November 2001 to May 2002, there have been only little flurries of activity, in the form of proposed draft amendments of the Act and a meeting or two each year, separated by long periods of utter silence. We, your Committee, have been anxious that the review should not be hurried or slipshod. That there has been no hurry by the Department is abundantly evident but as to whether it has been slipshod we are still having to wait and see. It really is quite incomprehensible that such a comparatively small Act should take so long to review.

By and large the scheme operators have been content to have the review trundle along at its snail's pace because there isn't much in the way of legislative

improvement for them that they are desperate to get. Sure, they would like to see the watery Act made even more watery, increasing their grip on their residents and they are trying to do just that. The Department has proposed as many improved scenarios for scheme operators as they have for residents. They have proposed, for example, that the Act should require Residents' Committees to keep minutes of their meetings and make them available to their managements. Surprisingly, the Department has not proposed any penalty on the Committee if it fails to do so!

I say surprisingly because the 1997 draft of the Act, or Bill as it then still was, did just that. The Residents Committee was made responsible for passing certain information from the Department's Chief Executive Officer to residents, with a penalty of 40 penalty points for failing to do so. You may imagine this Association's reaction. The notion did not find its way into the Act.

Wherever the Department has proposed amendments to the Act which would reduce the financial unfairness to residents, and they have done so on issues like continuing monthly fees after leaving the village and reinstatement costs, the scheme operators have been quite horrified and wrung their hands bemoaning that it would upset all their forecasts on which they had based their future activity. Utter poppycock of course. They oppose any financial advantages for residents, however fair, however justifiable, simply for fear of it reducing their profits. They wouldn't want their return on investment to come down from fifteen percent after tax to a measly fourteen and a half. In the face of such Industry opposition to conceding anything to residents, the Department's resolve crumbled. We can only hope that it is glued together again.

Meanwhile, of course, the owners and their lawyers have been beaver away, as they have been for years, at making their contracts and PIDs for new residents ever more oppressive. They don't report to us residents on their progress but we do get pretty well informed. New residents are being made personally responsible for more

and more maintenance, repair and replacement in their Unit, during their residency and when they leave but particularly when they leave the Unit. Apart from day to day minor maintenance, Repairs and Maintenance are chargeable to our Maintenance Reserve Fund. That does not change when a resident gives notice of leaving the village; it does not suddenly become a personal expense. It remains a charge to the MRF.

Replacement of Capital items is always a charge to the owner's Capital Replacement Fund, whether replacement occurs during a tenancy or at the end of it. Like repairs and maintenance, residents do not suddenly become personally responsible for it. The only circumstances in which a resident has to pay for replacement is if he or she or they deliberately damage a capital item or subject it to accelerated wear. I love that phrase 'accelerated wear' Can you just see someone sitting at the stove with their foot on the wear accelerator pedal, or standing all day scuffing the carpet for all they're worth. It's in the same class as those other priceless phrases like 'buying the right to reside' and 'deferred management fee'. Denver Beanland's 1997 draft actually wanted to call the deferred management fee 'Balance of purchase price'

Before the 1999 Act was passed there were many meetings between representatives of owners, representatives of residents and officers of the Department of Fair Trading. An outcome was the Capital Replacement Fund, funded by owners, to meet the costs of capital replacement. Of course, one expected that to mean that capital replacement was to be at village owners' expense. How naive we were then. That wasn't the owners' intention, for new residents they just increased the Exit Fee; increasing the percentage or shortening the period over which it accumulated to its maximum or both.

But that wasn't enough. In relation to maintenance, repair and replacement of capital items, the Act, in its Dictionary, describes capital items quite well but then goes on, stupidly or at owners' behest, to qualify their description of capital items by

reciting: 'that are not a resident's contracted responsibility'. Well, scheme operators and their Machiavellian lawyers then started writing PIDs and lease agreements that made all fittings and fixtures in or on the Unit a resident's contracted responsibility. That, in my view, is quite clearly in defiance of the spirit of the Act. How do they get away with putting it in their PIDs and leases when each change of substance to a PID has to be submitted to the Department of Fair Trading? The answer is that the Department, in the form of the Registrar of Retirement Villages, very likely doesn't even bother to look at them or even care what the owners do. Given the indifference displayed by the Department to residents' complaints, that wouldn't be surprising.

However, all is not lost. One little Section of the Act, S96, deals with when a resident must pay for replacement: if its replacement results from the resident's deliberate action or accelerated wear to which I have already referred. This will have to be settled at the Tribunal, unless the Department of Fair Trading wakes up and stops scheme operators from trying to make residents pay personally for repairs, maintenance and replacement.

The Tribunals, first the Retirement Villages Tribunal and then, from July of last year, the Commercial and Consumer Tribunal, have given us a mixed bag of results. We have had some favourable decisions from both, demonstrating that the best thing about the 1999 Act is the provision for such Tribunals. Carlyle Gardens had a significant win which I refer to later and Wishart Village had some very firm orders made against their scheme operator, which was an Incorporated Association of which the residents were members. The Residents Committee there are now the scheme operator; a very, very involved case which the residents are winning. But there have also been some disappointing outcomes. In a number of cases the lawyers for the scheme operators have avoided decisions by pleading that the Tribunal didn't have jurisdiction to hear the case. So inadequate is the Retirement Villages Act in its provisions for resolving disputes that the Tribunal has had to agree.

In one respect, the Commercial and Consumer Tribunal is inferior, for residents, than the Retirement Villages Tribunal. Under the latter there was no provision for awarding costs. Each party bore its own costs, even though some scheme operators still tried to pass their costs on to residents by charging them to the General Services Fund. The C&C Tribunal can award costs and in a couple of cases the scheme operator has tried to get costs awarded against the resident; to the best of my knowledge, none has so far succeeded. I am confident that the Tribunal would be reluctant to award costs against a resident but the C&C Tribunal Act allows it to do so. This could happen, for example, when a scheme operator offers a financial settlement to the resident but the resident does not accept the offer. If, in the outcome, the Tribunal's decision is not more favourable to the resident than the offer, the Tribunal might have to award against the resident costs incurred by the operator after the offer was refused. This would best be remedied if we reverted to the earlier tribunal's provision that each party paid its own costs. We shall make representations to the Minister about it.

We, that is your Association's Committee, has also been caught up in a process of change. For some years we have steadily been becoming more militant; we do not shrink from the word. So long as we did not name any village in drawing attention to what we believe to be malpractices, the owners did not make a fuss. But over the last year we have been naming names. As a result, the proverbial has really been hitting the fan. We are being threatened by all and sundry in the Industry. You know about a couple of the threats from the September Newsletter. Latest is from the association of village owners, Aged Care Queensland, telling us to retract what we have said about how increases should be calculated. They did have the honesty to admit that having been presented to the District Court the Order did become a public document.

They are all so anxious to tell us that the Carlyle Gardens orders were confidential and applicable only to Carlyle Gardens; so they were until Primelife tried to appeal the Tribunal's decision. But they simply ignore the Tribunal's discussion and

findings which I think were not confidential; do they think that the reasons for the Tribunal's decision, its view of the philosophy of the Act in relation to Section 106, do not apply generally. Do they simply ignore that the District Court, in refusing leave to appeal, thought that the Tribunal's decision was consistent with the Act and its relevant Sections.

Now, you see how we have been going, we have not been pulling too many punches. I have to say that we have been encouraged by an increasing number of members writing, phoning and e-mailing us in support of the attitude we have been taking. We should like to continue that 'we won't roll over' attitude but it is for this Annual General Meeting to decide. I hope that someone will move that we continue the thrust of the past year. We can all then discuss, question and ultimately decide.

You have been very patient, thank you for your attention.

Phil Philips