

Correspondence

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Introduction This page displays correspondence the Association has had with Government, Government Departments, Scheme Operators and residents (names withheld) which the Committee believes to have significant implications for residents of Queensland Retirement Villages.	Letters: To: The Hon Merri Rose MP To: Margaret Keech MP To: Margaret Keech MP To: Margaret Keech MP
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Letter to the Minister

The Honourable Margaret Keech MLA
Minister for Fair Trading
G.P.O.Box 1141
Brisbane 4001.
11 April 2005

Dear Minister

Retirement Villages Act 1999

Draft Bill of Amendments 2004

I have just read your letter of 4th April, about retirement Villages Act amendments, to Mr. Phil Reeves. For retirement village residents it makes appalling reading.

The committee, on which the ARQRV was represented, chaired by Mr Reeves met five times between November 2001 and May 2002 and then it all fizzled out. Then, Minister, in March 2005, you invited those then ARQRV members of that committee, who lost office in September 2002, to further discussion. That despite the fact that in October 2002 I notified the Minister, the Department and the Review Chairman of the change in the ARQRV representatives.

Those early review meetings were a good start to the review process. Though little of substance was achieved, several issues were canvassed and that always has to be a good start to a review of anything. But since May 2002 there have been but three further short meetings involving the ARQRV. The scheme operators' representatives certainly and the Department of Fair Trading apparently, decided that the new representatives of the ARQRV since September 2002 would not be as acquiescent as their predecessors. True, and since they were returned to office there has been a surge in membership of the Association. The ARQRV is the only body which represents the interests of retirement village residents and

neither Government nor the Department should treat with any other body claiming to do so.

To all but one of the amendments which you quoted to Mr Reeves, this Association is in virtually diametric opposition. They reveal either an almost complete ignorance of retirement village matters from residents' viewpoint, and a refusal to become acquainted with them, or the same lamentable disregard for residents rights and interests as scheme operators have. We accept only your second dot point because that is exactly what we shall be encouraging residents to do - to ignore Part 7 of the Act. My meeting with you last September led me to believe that you had a higher regard for residents' interests but I was apparently mistaken. I am, to put it mildly, disappointed in what seems to be Ministerial support of amendments which will further degrade the situation for residents. In the long run, the sustainability of the retirement village industry will depend largely on the protection afforded the consumer, the residents, but that is a path which Government seems to be shunning.

Far from improving the Act in respect of residents rights, those amendments will make their situation far worse. Do you not see, Minister, that by some of these amendments, particularly but not exclusively in relation to meetings of residents, you are introducing the elements of a totalitarian State. You are negating, not just you but the whole of the Government of which you are a member, the freedom and democracy for which tens of thousands of Australians have laid down their lives. Many residents of retirement villages, many members of this Association, have had their lives touched by those sacrifices. But Government seems bent on allowing retirement village operators to impose totalitarian style regimes on those who, years ago, fought against such regimes or are the parents, siblings or children of those who did.

The one thing in the 1999 Act which was of some benefit to residents was the Disputes Resolution Tribunal process but you are even trying to reduce its effectiveness for retirement village residents by reducing their access to the Commercial & Consumer Tribunal. That is you are, via a Retirement Villages Act back door, seeking to circumscribe a provision of that Act so as to prevent residents' representation by non-lawyers who are not also residents of their own village. Residents will hardly be excited that they can be represented by a lawyer, (which represents no change) at considerable, probably irrecoverable, cost but not represented by someone else of their choice at no cost. Why, Minister, do you see fit to put elderly people at such disadvantage?

Comfortably financed by the money they get from their residents, operators of retirement villages can well afford to send their lawyers to the Tribunal. Residents generally are unable to afford that and, being in their seventies, eighties and even nineties are mostly unable to represent themselves. You would now deny them the opportunity to be represented, at no or little cost, by some one more able to speak for them; a family member, adviser or person with Power of Attorney, or by a member of their Association. How is it that a Labor Government, traditionally on a platform to champion the needy and disadvantaged, and traditionally largely bankrolled by Unions, can be so dismissive of the views of retirement village residents as expressed by their Association, their Union?

We urge you, as a Queensland Government Minister, to look more closely at these punitive amendments, punitive of residents that is, which this Government seems to be espousing. We urge you also to take note of the much more resident supportive attitude of the NSW Government. If the Queensland government will not throw its weight behind residents'

struggle for basic freedoms and democratic and honest treatment, it will be impossible not to conclude, however reluctantly, that the Beattie Government has been completely suborned by scheme operators and formed an alliance with them to repress retirement village residents.

Yours sincerely

Phil Phillips.

Retirement Villages Act Section 110. - Village Insurance

We did an article on this subject in our March 2004 Newsletter. Following are copies of our correspondence with the Minister. The Department of Fair Trading is ducking yet another issue.

The Honourable Merri Rose MLA

Dear Minister.

Retirement Villages - Insurance

It has come to our attention that Forrester Kurts Properties (erstwhile Australian Retirement Homes) are breaching Section 110 of the Retirement Villages Act. They are doing so by not insuring to the fullest practicable extent as required by the Act.

In "The Parks" retirement village, at Earlville, a successful claim was made against the village's public liability policy. It transpired that Forrester Kurts had a policy with a \$10,000 excess clause. FKP are now trying to recover that \$10,000 by imposing a special levy on residents of the village. Will you now write to FKP and tell them that they may not attempt to recover their loss by imposing levies on the residents.

That level of excess also features, to our knowledge, in relation to the insurance at FKP's village at the "Domain Country Club". Almost undoubtedly, the same excess situation obtains at other of FKP's villages.

We hope, Minister, that you will cause these breaches of S.110 of the Act to be investigated in all FKP villages and, where they are found to have transgressed, FKP prosecuted as provided by the Act; not, as happened with Edenlea's insurance transgressions, simply told that they must comply in future. As we have remarked more than once in the past, scheme operators will not take you, the Department or the Act seriously until there have been prosecutions.

Yours sincerely

P.G.Phillips

Minister for Fair Trading

Dear Minister

Retirement Villages - Insurance

Thank you for your letter of 2 March 2004, and welcome as our new appropriate Minister.

The first thing we should say is that the \$10,000 excess which Forrester Kurts have on their policies was incorrect. We learn that it is \$25,000, see enclosed copy of their Insurance Certificate. The \$10,000 probably applies only to public liability.

With respect, Minister, we assert that Forrester Kurts does not only not appear to have complied with Section 110 of the Retirement Villages Act, it quite patently has not complied. With a \$25,000 excess or, for that matter, a \$10,000 excess the insurance is not to full replacement value or to the greatest practicable extent, as required by the Act. Nor, as has been demonstrated in the case of a claim in the Parks Retirement Village, Earlville, does such insurance cover full public liability. If an excess of such magnitude is acceptable then what about an even larger excess? Suppose the excess is such that the Insurance is only to 90% or 80% of the full replacement value? Where does one draw the line? Excesses are not usually *imposed* except sometimes in a very small amount to avoid vexatious claims; they are usually offered so that the premium may be less but the reduction in premium is only a fraction of the amount of the contingent excess. We are aware that some villages have an excess clause of two or three hundred dollars.

You refer to the decision to have an excess in order to minimise insurance costs as being a commercial decision for the operator. We disagree, it is not to be a commercial decision, the decision has been made at Section 110 of the Act. Forrester Kurts should be made to comply with the Act and, indeed, should be prosecuted for non-compliance.

You remark that there is no specific provision in the Act to allow an operator to recover the costs of an excess from residents and we agree entirely. But neither is there a specific provision nor even a general provision in the Act allowing scheme operators to insure for less than that prescribed by S.110. Notwithstanding Insurance Companies' practice of accepting reduced premiums in exchange for reduced liability. S. 110 does not give a scheme operator that discretion.

It is ducking the issue to suggest that residents should seek redress in the Disputes Tribunal against having to subscribe to an actual excess deduction imposed by the scheme operator as a result of a claim. We appreciate the opinion that the ability of operators to impose recovery is doubtful but it really is for the Department to decide what was intended by the legislation and then, if in doubt about the effect of the Act, seek a ruling from the Courts and, if necessary, amend the Act so that the intention is expressed beyond doubt. It should not be left for individual residents to pursue.

This reluctance by the Department of Fair Trading to take any initiative in relation to consumers does not bode at all well for the prosecution of "unfair contract terms" legislation being discussed by the SCOCA.

Yours sincerely

Phil Phillips

Letter from the ARQRV to the Minister Re the Review of the Act

The Honourable Margaret Keech MLA
Minister for Fair Trading

24th March 2004

Dear Minister,

I enclose a copy of proposed amendments to the Retirement Villages Act 1999 upon which, since they seem to have been selectively released during the recent State elections, we should make some comments before they become a draft Bill, in the hope that we may yet influence further the outcome of the review.

Departmental proposals are in italics. Our responses are in plain type. They are as follows:

Detailed outline of amendments to the Retirement Villages Act 2000 (in fact 1999) to be set out in draft Bill for consultation

Village meetings

Residents' meetings are an opportunity for informal dialogue between residents and the village operator, and are also used to pass resolutions to introduce new services or increase certain fees. Concerns have been raised as to the conduct of some operators at these meetings, and whether the present voting rights are fair. In response, the amendments proposed include the following:-

(Village meetings is a misnomer - it refers to residents' meetings.)

** Operators will be given a right to attend residents' meetings. but may be excluded by the giving of prior notification.*

ARQRV response

We are opposed to scheme operators having a right to attend residents' meetings even if there is provision for their exclusion. That onus should not be put upon residents. Scheme operators and their managements should be able to attend residents' meetings only by invitation. Their very presence intimidates many residents and inhibits discussion, especially discussion which questions management attitudes and practices. The Government and the Department of Fair Trading and its Minister simply must recognise the fear of retribution or reprisal by management which many very elderly residents have. Intimidation, to which this Association has repeatedly drawn attention and as found by a University of Adelaide study a few years ago, is widespread.

** Operators will no longer be able to cast proxy votes on behalf of residents*

ARQRV Response

We have always insisted that scheme operators should not be able to exercise proxies. We are gratified to see that it will be disallowed. We believe that a private member's Bill that will allow residents to appoint a proxy who is not a resident, someone to whom they have given a Power of Attorney for example, is to be introduced in the Parliament. We would applaud that.

** It will be clarified that residents are entitled to one vote per unit, thereby protecting single-occupancy residents. There has been a degree of resident stakeholder objection to this, although the alternative course (one vote per resident) received an almost equal share of criticism.*

ARQRV response

To legislate for one vote per Unit will not be a clarification, it will be a change because the Act at present quite clearly indicates that each resident has a vote, which is as it should be. What is meant, exactly, by "thereby protecting single occupancy residents"? We are adamantly opposed to one vote per Unit, as is clear from our previous submissions, because it is a denial of universal suffrage. Can the Department please explain how that one vote entitlement per Unit is to be determined; who gets the vote when there are two joint lessees without one of them being discriminated against. Even in freehold villages, where a lot entitlement features in body corporate matters, in other village matters, matters which are not subject to the BC&CM Act, it should be one person one vote. Many scheme operators prefer one vote per lessee and some try to impose it but that is because it gives them a stronger grip on what they consider to be their fiefdom, particularly on single elderly ladies. It has nothing to do with democracy, indeed it is counter democratic.

** It will be clarified that residents who have left the village, but have yet to sell their unit, will continue to have voting rights*

ARQRV response

The last of those four points is of very limited significance; how many ex-residents will be concerned.

The Budget setting process

One of the key issues raised has been the lack of scope for meaningful resident involvement in the annual budget-setting process. In response, the amendments proposed include the following:-

** Residents will be entitled to receive explanatory information to accompany quarterly financial statements*

ARQRV response

How explanatory are they likely to be? Presumably this is going to extend to operational expenditure which it does not at present. However that has nothing to do with preparation of budgets.

** Residents will be entitled to receive a copy of the draft budget, and to then make*

comment on it. To facilitate this, the operator will be required to hold the annual meeting prior to the budget being finalised.

ARQRV response

The annual meeting (S.131) cannot be called until the financial statements are available (S.113); that is often as late as November. So are we then to be finalising the budget when nearly half the year has passed? It is to be noted that this is not giving residents a role in setting the budget. Residents should have a proper role in setting a budget not simply be given a copy of a draft budget to "comment on". It is not necessary for annual accounts to be audited before a budget for the succeeding year can be estimated.

** It will be clarified that residents are entitled to have any budget surplus offset against their future expenses. Conversely, residents will also be liable for any deficit.*

ARQRV response

We are opposed to residents being liable for any deficit unless they have been a party to setting and agreeing the budget in the first place.

Capital & Maintenance

The most widespread concern has been the lack of consistency and certainty in classifying items of expenditure. The issue has major implications for both residents and operators, because maintenance costs are borne by the former and capital replacement costs by the latter. In response, the proposed amendments include the following:

** Guidelines for classifying items of expenditure will be introduced and the definitions of key terms in the Act will be expanded.*

ARQRV response

Guidelines, like voluntary codes of conduct, are unenforceable and scheme operators will pay them scant attention.

** It will be clarified that the recommendations of the quantity surveyor's report, upon which expenditure budgeting is based, must be implemented by the operator in the context of the overall village circumstances.*

ARQRV response

What exactly does that mean?

The General Services Charges

Many residents are on a fixed income, and therefore any increase in their ongoing general services charge ("GSC") may be a cause of distress. In response, the proposed amendments include the following:-

** A code will be introduced, outlining best practice guidelines for increasing the GSC.*

There has been some operator stakeholder objection to this course, on the basis that there is insufficient industry malpractice to warrant such a reduction in the existing decision-making flexibility.

ARQRV response

Any code will be ineffective. This is the scheme operators' lobby claiming a minimum of malpractice. Residents and this Association know very well that it is rife in many village; mostly a lack of transparency in financial matters.

** It will be clarified that where residents approve a new service, liability for the corresponding GSC only commences when the residents begin receiving that service.*

ARQRV response

This refers to S. 108. The fact that the Department feels a need to clarify what should be a matter of course is an acknowledgement of malpractice. There is evidence that residents have been required to pay in respect of services yet to be provided.

** Operators will be required to maintain a separate budget for the GSC .*

** Separate from what? The Maintenance Reserve Fund and the Capital Replacement Fund are supposed already to be separate Funds.*

** The liability of a former resident to continue paying the GSC will cease after nine months from vacation of the unit. There has been strong operator stakeholder objection to such a cap. as it is claimed that unsold units continue to accrue costs which should fairly be borne, at least partly, by the former resident.*

ARQRV response

We, ARQRV, fought very hard over this and will continue to do so. We do not see why the period should be longer than six months, as is the case in most if not all Church run Villages. However, from ad infinitum to nine months is a very welcome improvement for residents. Unsold Units do continue to incur costs, as does any unoccupied accommodation. Why should that not be borne by the owner? Why should it be borne, even in part, by the ex-tenant? The remedy is in the scheme operator's hands: do not cause an oversupply of Retirement Village accommodation and relet unoccupied Units without delay

Vacating the Unit

Even when a resident vacates their unit, they are not entitled to receive their exit entitlement payout until the unit is reinstated and then re-sold. In response to a range of post-occupancy issues, the proposed amendments include the following:-

It will be clarified that the purpose of reinstatement is to bring the unit to a marketable condition.

ARQRV response

What is a marketable condition? Scheme operators will define it as pristine condition. That they are already doing so is evidenced by some of the costs with which vacating residents are being charged. Repairs which are properly chargeable to the Maintenance Reserve Fund or, more usually, replacements which should be charged to the Capital Replacement Fund or improvements which are a charge to neither..

** Residents will be given the right to obtain their own quote for the reinstatement work, to challenge that of the operator. It will also be clarified that in certain circumstances, the operator may proceed with the reinstatement work even where the resident and operator do not agree on what work is required (subject to a resident's right to take the matter to the Tribunal).*

ARQRV response

It is an improvement for residents that they are able to get their own quote, which can be evidence to put to the Tribunal. However, all this is hypothetical as few ex-residents, or in the case of deceased residents their personal representatives, challenge what they have been charged and fewer still have the temerity to take a complaint to the Tribunal.

** It will be clarified that the valuer of the unit must be independent from the operator, and that any connection between the two must be disclosed by the operator.*

No ARQRV comment

** Once the unit is sold, the time within which the operator must pay the resident their exit entitlement will be changed from 28 days to 14.*

ARQRV response

Why not seven days? Why not three days, which is all it takes to clear a cheque? Why is the scheme operator allowed a margin for dilatoriness?

** The spouse or relative of a resident, living in the unit but not party to the residence contract, will be given a right to remain in the unit for three months after the resident dies or vacates the unit. In certain circumstances, the spouse or relative will also have first option to enter into a new residence contract over the unit.*

ARQRV response

This follows the NSW provision. We do not criticise it but it will affect few people.

PID and Contract

The rights and obligations governing a resident's occupancy in a unit are contained in the public information document ("PID") and the residence contract. In response, the proposed amendments include the following:-

** At the time the residence contract is signed, the operator will be required to provide the resident with a bound copy of both the PID and the residence contract. It will also be a requirement for any inaccuracies in the PID to be brought to the resident's attention at*

that time.

ARQRV response

The requirement at S.84 should not be overlooked. A certain period before the contract is signed should be specified (14 days at least). What inaccuracies? The PID given to any resident should be accurate; it is part of the resident's contract. If the inaccuracies are known and able to be brought to the resident's attention at that time then why is the PID not made accurate before giving it to the resident. As we have said in the past, Sections 36 and 37(2) of the Act seem to give operators the right to unilaterally alter contracts.

** It will be clarified that a PID must be specific to the village to which it relates, and therefore an operator with more than one village will no longer be permitted to use a generic PID.*

ARQRV response

The word generic is perhaps not a good choice. All PIDs have a generic part: the part that was developed by the Department of Fair Trading. Perhaps the words "to embrace all villages" might be used..

Freehold Villages

Residents may occupy their unit by virtue of owning the freehold title, or under a lease or licence arrangement, and whilst the Act is intended to cover all such situations, its drafting favours only the latter arrangements. In response, the proposed amendments include the following:-

** The Act will be revised to ensure it adequately addresses the particular issues and circumstances arising at freehold villages. There has been substantial resident stakeholder support for a retirement village-specific module under the Body Corporate and Community Management Act 1997, however the practicalities of simply amending the Act have been conceded*

ARQRV response

We do not understand "the practicalities of simply amending the Act have been conceded". Is it meant to be impracticalities? Is there then to be a BC&CM Act specific module?

** It will be clarified that the operator of a freehold village is not responsible for the maintenance and replacement of capital items owned by the body corporate.*

ARQRV response

Where, in the Retirement Villages Act?

Dispute Resolution

The dispute resolution process, particularly the final Tribunal stage, has presented an

intimidating prospect for many residents. Whilst many of the concerns raised have been addressed by the formation of the Commercial and Consumer Tribunal in July 2003, the amendments proposed in relation to the remaining issues include the following:-

- * Residents with a similar dispute will be entitled to bring a representative action.*
- * The option for a resident to call upon the chief executive to run a dispute on their behalf will be removed. However, where a resident is frail or intimidated by the dispute resolution process, another resident will be allowed to assume carriage of their dispute.*
- * It will be clarified that any costs awarded against an operator by the Tribunal can not be passed down to residents by way of an increase in charges.*

ARQRV response

It is recognised that the Commercial & Consumer Tribunal has addressed the first two points. However, from the third point a factor detrimental to retirement village residents has emerged:

Under the Retirement Villages Act, costs were not able to be awarded, each party paid its own costs regardless of the outcome. Under the C&C Tribunal, costs may be awarded, including against a resident. This is an immediate and significant deterrent for residents contemplating an application to the Tribunal.

The scheme operator may make an "offer" and if the resident does not accept he immediately puts himself at risk of an adverse costs order and scheme operators and their lawyers are not slow to take advantage of that.

Either way it is sufficient to deter elderly residents from embarking upon or continuing an action. Apart from costs awarded for making vexatious or capricious applications to the Tribunal, which elderly retirement village residents are most unlikely to make, there should be no potential deterrent, financial or otherwise, to residents applying for Orders from the C&C Tribunal. For the purposes of the C&C Tribunal, the Retirement Villages Act is an empowering Act. It seems to us that in one way or another the erstwhile provision of Section 200 of the original Retirement Villages Act should be resurrected.

Residence Contracts entered into before the Act commenced

When the Act was introduced, some resident obligations under the previous law continued where a residence contract was already in force at that time. This created a divide between the law applicable to "existing residence contracts" and contracts entered into after the Act commenced. The amendments proposed in relation to these disparate rights include the following:-

- * The distinction between "existing" and post-Act residence contracts will be removed. The most significant flow-on changes from this will be:-*

The exit fee paid to operators will be calculated as at the date a resident vacates their unit. and will not continue to accrue until the unit is sold;

Where the unit is held under a lease or licence arrangement, the resident will no longer have any liability for the cost of reinstatement, although contrary residence contract

provisions will continue to be recognised.

Any residence contract provision requiring a resident to contribute to capital replacement will no longer be valid; and

After 90 days from vacation of the unit, the operator will assume a proportionate liability for the ongoing general services charge.

There has been very strong operator stakeholder objection to this course, on the basis that the changes not only go behind the terms of validly entered-into contracts, but also jeopardise forward budget planning prefaced on the expected income provided for by such terms. To address these objections, it is proposed to allow a lead-in time (of, say, six months) before the amendments commence, and to make the amendments apply prospectively (that is, if the event that, triggers the provision, such as vacation of the unit for the purpose of calculating the exit fee, has already occurred, then the existing distinction will continue to apply).

ARQRV response

We welcome this removal of the distinctions between “existing” and post Act contracts for which, as the Department knows, this Association was campaigning when the 1999 Act was but a draft Bill. The pity is that those distinctions were ever made in the first place. Scheme operators have enjoyed the distinctions for almost four years now.

However, what is being proposed seems to be that these amendments will be effective only after a “lead-in period” (suggested to be six months) has elapsed following the commencement of the Act. The last sentence of this part is not at all clear. Is it saying that trigger events occurring during that lead-in period will be ignored so far as the amendments are concerned? This would just be allowing scheme operators to cling on for a further period to what was always an unwarranted distinction and we are opposed to it. Scheme operators already know what amendments have been proposed and therefore already have a lead-in period. They should already be moving to accommodate them.

In relation to reinstatement, the Department appears to be saying that the amendment will only apply if the contract is silent on who pays for reinstatement. Contracts are never silent on the issue of reinstatement; for the last few years, certainly in commercially operated villages at least, they have quite pointedly made the resident responsible. What is proposed here is an invitation (though unnecessary) to scheme operators to ensure that contracts make residents responsible for reinstatement and the amendment would therefore represent no change at all in the status quo.

Of course scheme operators object to these amendments but it is not because of jeopardising their forward budgetary planning; it is quite simply because it will reduce profits. Scheme operators complain that the amendments “go behind validly entered into contracts” but they are not necessarily fairly entered into contracts; indeed they seldom are. Retirement village contracts are replete with the sort of unfair terms that have been contemplated by the Standing Committee of Officials of Consumer Affairs. There is in this review of the Retirement Villages Act an opportunity to remove or at least to mitigate some of those unfair terms.

P.G.Phillips

ARQRV
22nd March 2004

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