

# NEWSLETTER

## No. 38 December 2002

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### Constitution

In our last newsletter we announced that there would be a general meeting of members on the 25th October for the purpose of changing the Constitution. The meeting took place and was attended by over a hundred members. The discussion was confined to the matter of proxy voting. The problem which we wanted to overcome was that the Constitution did not prevent people from collecting huge numbers of proxy votes, with which to control the outcome of voting. If that sort of electoral manipulation is allowed then there is little point in asking members to go to annual general meetings, or any other meetings for that matter.

Many views were expressed at that general meeting on how best to deal with the proxy situation but there was general agreement that proxy stacking must be prevented. It was left to the Committee to find a formula which would satisfy the general consensus of opinion. That consensus was that no-one should be able to exercise a proxy for more than one or two other members. We may decide that Executive Committee members should not be able to exercise anybody's proxy. With such restriction we should not be preventing bona fide proxies but would be preventing abuse of proxies. We shall be convening another general meeting in due course to formally approve changes but meanwhile you may care to express your views. Other changes may be proposed but we shall keep you informed about them. Probably via our web-page because they may be too extensive to include in a newsletter.

### Tribunal Costs

Section 200 of the Retirement Villages Act 1999 says that each party to a retirement village issue must bear the party's own costs of the Tribunal's hearing of the issue. Nevertheless, some scheme operators have been claiming that that relates only to the Tribunal fee and does not include the operator's other legal costs.

Let us look at a couple of Tribunal cases. In the case of Parkhaven residents v. Parkhaven Retirement Village the Orders included:

*"that the respondent's legal costs, if any, of or incidental to this matter not be included as expenditure or in any other way recovered from the residents through levies or otherwise but be borne by the Respondent solely"*

That order is quite unequivocal but, despite that, another village, on the Sunshine Coast, charged its legal fees in respect of a Tribunal hearing to the residents via their General Services Fund. The residents appealed to the Tribunal and at a mediation hearing set down by the Tribunal the Village operator agreed to repay the residents. Why, one might ask, did that village management try to charge the residents in the first place? Well, they came unstuck!

Whatever your contract or PID may say about legal costs, whatever "legal fees" provision may have been slipped into your budget, if you take a case to the Tribunal remember that, whatever the outcome, you do not have to pay any part of a scheme operator's legal expenses in respect of the Tribunal hearing and that includes Tribunal initiated Mediation hearings. So, the lesson to be learned is that if you have a case against your scheme operator, pursue it, if you can, through the Disputes Tribunal rather than through the Courts. It is cheaper.

## **Accounts**

In several of the cases heard by the Disputes Tribunal reference has been made by the Tribunal to the unsatisfactory presentation of villages' accounts to residents. They are not necessarily false, though in some instances they have been found to be so, but very often they are presented in a way which is unclear and misleading.

One of the problems for residents is that it is so often virtually impossible to determine whether or not charges have been increased in excess of the Consumer Price Index. It is extremely difficult if the presentation of the accounts does not distinguish between Sections 106 and 107 of the Retirement Villages Act. Broadly speaking, S. 107 items are those which are not determined by the scheme operator but by outside authorities (rates for example). Section 106 items are those which are within the scheme operator's control. The Tribunal has said that such distinction between Sections 106 and 107 expenditure should be shown in village accounts .

Often the accounts are inconsistent, one year with another and one year's expenditure with the following year's estimated budget. They should be set out on one document, together with the previous year's expenditure, and in consistent format so that we can make valid comparisons between what was spent last year, what was spent the previous year and what has been estimated for the following year. Unless this is done the accounts cannot easily be followed and lack transparency; a deficiency to which the Tribunal has drawn attention in a number of cases.

We hope, because it was a feature of our submission to the review of the Act, that an amended Act will follow the NSW example and require that residents are to be involved in the setting of village budgets; not merely informed , perhaps months after the year has begun. We need budgets from which there may be no significant departure without the agreement of residents. That sort of co-operative budgeting would make audit reports unnecessary. The audit reports we almost always get are what are called "special purposes reports" and hardly worth the

paper they are printed on. Full of reservations and disclaimers, they guarantee nothing. As a reading of those reports reveals, although it is the residents who pay for them, it is the scheme operator who decides on the nature and extent of the audit.

## Special Levies

Most of us will remember special levies. They featured in nearly all lease agreements and Public Information Documents and they may still feature in some newer, post 1 July 2000, PIDs even now. Their purpose was to provide against some major unforeseen expenditure, always capital replacement or repair or major infrastructure works which were often capital improvement. It was sometimes invoked simply because the scheme operator had not provided for something for which he should have provided but didn't want to pay for.

It is significant that the provision for Special Levies, which was featured in the 1988 Act, has not been continued into the 1999 Act. With the introduction of the Capital Replacement Fund and the Maintenance Reserve Fund the need for special levies disappeared. Scheme Operators may not rely on the 1988 Act to justify a special levy; that Act has been repealed.

If any residents have had or are having a special levy imposed let us know. We already know of one case, in a Gold Coast village, where a special levy has been imposed to make good a deficit in their operational account, that is the General Services account. It must be resisted, if necessary through the Disputes Tribunal. It is another example of trying to "get away with it." Some scheme operators expect their residents to indemnify them or their management companies against every eventuality, including their mismanagement.

## Repair and Replacement

In terms of the Act, these words refer to the **repair** of capital items, chargeable to the Maintenance Reserve Fund, into which we residents alone are required to pay, and to the **replacement** of capital items, chargeable to the Capital Replacement Fund, into which only the scheme operator pays. One of the deficiencies of the 1999 Act, to which we have frequently drawn the attention of successive Ministers is that the Act makes no attempt to define what is repair and what is replacement.

The Act simply refers one to a series of Income Tax rulings. Those rulings are all very well for what they were meant for, which is to instruct taxpayers as to what they may or may not claim against their tax liability. But they do nothing to enlighten us as to what is capital replacement and what is repair in the context of retirement village residents. That is to say: what residents pay for through their contributed funds and what the scheme operator pays for.

In what has to be seen as an attempt to repair that deficiency, Aged Care Queensland Inc. (a scheme operators' association) has issued to its members, village operators, a set of guidelines which purport to show how distinctions

should be made between capital improvement, capital replacement, maintenance, repair and operational expenditure.

It is important that you know that those guidelines, which your village management may quote to you, are not issued pursuant to the Retirement Villages Act. They have no legal force whatsoever. They were drawn up by Aged Care Queensland eighteen months ago. They were criticised by the ARQRV then and we are hardly less critical now.

The thrust of those guidelines is to have residents pay for as much as possible, as repairs, even where the need for repair is the scheme operator's fault. We refute such obviously biased guidelines.

We do not see why, for example, residents should have to pay to remedy defects which are attributable to poor building practices. Why should we pay to repair paths that have collapsed or subsided because they were not properly reinforced to begin with? Why should we pay for the repair of underground pipes which were carelessly laid in the first place? Why should we tenants pay to protect the landlord's property against termites? In our submission to the review of the Act we have made it quite clear that we residents should not be expected to accept responsibility for every fault or negligence for which we are not to blame.

## **Ingoing Contributions**

In the two years preceding the 1999 Act, a series of meetings took place between representatives of owners and representatives of residents, resulting in a document titled "Heads of Agreement", in which the owners agreed that there should be a Capital Replacement Fund to which they alone would contribute, (except in limited circumstances relating to residents already in the village before the 1st July 2000). But commercial operators fully intended that, one way or another, residents were going to have to pay. It was not going to be allowed to erode the operators' profit margins.

Section 14 of the Retirement Villages Act 1999 defines an ingoing contribution. Whatever a resident pays to secure the right to reside in a Village (excluding freehold and some other rare types of tenure) is the ingoing contribution and that's that. No qualifications. And S.91(2) of the Act describing the Capital Replacement Fund says:

***"the scheme operator is solely responsible for contributing to the fund".***

Nevertheless, some scheme operators are telling their prospective residents, and even blatantly putting in new PIDs, that part of that ingoing contribution is the new resident's contribution to the Capital Replacement Fund. This reflects how scheme operators are reneging on the agreement they reached with the ARQRV before the 1999 Act went to the Queensland Parliament.

It also reflects, to its discredit, on the Department of Fair Trading, to which all new PIDs have to be submitted for approval. The Department has approved something

which runs counter to the Retirement Villages Act and is therefore unlawful.

There is absolutely no legal requirement for any resident with a contract dated on or after the 1st July 2000, to make any sort of contribution, when going into a village, on leaving the village or at any other time, into the scheme operator's Capital Replacement Fund. Indeed it is unlawful for a scheme operator to require a resident to do so. If any post 1st July 2000 residents are being required to make any such contribution, please let us know. It must be stopped.

## **Stop Press**

Literally so. We all know, those of us who live in commercially operated leasehold or loan/license villages at least, that when we leave our village we may have to wait a very long time for any pay-out and that we shall have to continue to pay the recurrent fees for an equally long time, although the ARQRV has been pressing Government for a very long time to impose a limit.

We have just heard of a little ploy at a village on the Sunshine Coast which other smart operators may also be trying to put across residents. The scheme operator of this particular village is advising residents that in their own interests they should sign an agreement to include an additional clause in their contracts. A clause which would impose a limit on that waiting period. Bravo, one might cry, until one realises that the waiting period proposed by the scheme operator is.....

## **Five Years.....Five Blooming Years!!**

Why is the scheme operator doing this?. He is probably fearful that in the review of the Retirement Villages Act the Government may impose a limitation much shorter than five years. He probably believes that such shorter Government imposed limitation might not apply to existing contracts which already contain a limitation. So, perhaps he is trying to pre-empt that possibility by changing residents' contracts now, in the hope that, whatever shorter period Government may provide, his residents will be stuck with five years. Whichever village you are in, do not be duped by any such ploy. Agree to nothing of the sort.

## **Accreditation**

Most members will remember that the June newsletter, published by the previous Committee of our Association, contained an extra page featuring an article from Aged Care Queensland. That article dwelt, to some extent, on issues which the ARQRV has been addressing for some years, particularly in relation to the GST and serviced apartments, in submissions to Federal Government. The next contribution from them was to be about accreditation. Accreditation presumably by Aged Care Queensland or The Retirement Villages Association of Australia, a national association of retirement village owners. or perhaps by both.

The only sort of accreditation that might be of any benefit to residents would have to be a Government accreditation system which set high standards and in the formation of which our Association was heavily involved. But accreditation of

villages by a village owners' association is a bit like Caesar judging Caesar. It might very well be used by village owners to impress prospective residents. It might just work as a marketing tool but that is really all it is. It would in fact represent an industry based code of conduct and few of us are under any illusions about voluntary codes of commercial conduct.

## **Website**

Members with access to our web-site will have noticed some changes to the way we have organised the pages. Articles in earlier newsletters have been put in the "archives" and filed under their subject headings; nothing has been lost. There are also some changes to the style and layout of which we hope you will approve.

## **Newsletters**

The Executive Committee is contemplating having newsletters only four pages long instead of six but issuing one every two months instead of one every three months. Some issues may run to six pages, depending on what news we have to bring you and it is probably better to have that sort of flexibility. We'll have to see how it goes. What do you think?

No end of year Newsletter would be complete without mention of membership renewal. We are maintaining that "tradition" by reminding our members that as an Association we cannot function without your subscriptions. Please make your liaison officer's task a little easier by contacting him, or her, to pay it. Please do remember the increase to \$10.00 if renewing or joining after 1 January 2003. Thank you.

So, until 2003, the Executive Committee extends to all members of our Association the compliments of the festive season and wishes you all a Merry Christmas and a Happy New Year.

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