

NEWSLETTER

No. 39 February 2003

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Review of Legislation

With increasing frequency, members are asking us about the *review* of the Retirement Village Act 1999; what is the state of play? Unfortunately we cannot say. There was a series of meetings, of a consultative nature, on a few major issues involving the Department of Fair Trading, ARQRV representatives and representatives and lawyers for Aged Care Queensland Inc. on behalf of village owners. The last of those meetings took place in May 2002, but there is no outcome yet. We cannot really see this as an entirely satisfactory state of affairs but we shall have to contain our souls in patience for a little longer.

Even before the Retirement Villages Act 1999 became law, the then Minister for Fair Trading undertook to review the Act after it had been in operation for a year. That review was to have started, therefore, in July 2001. In May 2001 this Association submitted a thirteen page submission of changes which we thought should be made to the Act. Many of the changes we proposed simply reflected what we had sought to have provided in the Act in the first place, three or four years earlier. Issues on which nothing had occurred to warrant a change in our attitude.

Two months later, in July 2001, we submitted two further submissions, one taking issue with Aged Care Queensland's draft Repair and Maintenance "guidelines", to which we referred in our December 2002 Newsletter. Another was a response to a submission by lawyers Minter Ellison on behalf of Aged Care Queensland. With much of Minter Ellison's submission we disagreed, not surprisingly; generally where they advocated clarifying the Act and resolving ambiguities but in a way detrimental to the interests of residents. But there were some things on which we did agree with Minter Ellison. We agreed that the PID, the generic one drawn up by the Department of Fair Trading, was much too repetitive and confusing. Also that the Act was seriously flawed and ambiguous, to which shortcomings we had long since drawn the Minister's attention. And as we said in our December newsletter, PIDs and contracts are becoming increasingly long, increasingly confusing and increasingly inequitable.

Repairs & Maintenance (non-freehold)

The introduction, by the Retirement Villages Act 1999, of the Maintenance Reserve Fund was to require residents to pay for the maintenance and repair of the owner's capital. That is of everything that belongs to the scheme operator and

not to the resident. Retirement villages present the only residential accommodation scenario in Australia in which the tenants, which is what we are even though we are called residents, have to pay for everything which should be the responsibility of the landlord, which is what the village owner is even though he is called the scheme operator.

Prior to that Act, repairs and maintenance were almost invariably part of the "total outgoings" for which residents were required to pay through

what is now called the General Services Fund, into which residents alone are required to pay. As most of us now realise, the Maintenance Reserve Fund is also being used as an extension of the General Services Fund and all sorts of run of the mill operational expenses charged to it. Periodic repainting used to be somewhat haphazard and occasional. Now that it can all be charged to our MRF, scheme operators can quite cheerfully repaint regularly to preserve their property, at our expense!

Before the 1999 Act came into being there was the 1988 Act, which allowed scheme operators (owners, that is) to require residents to pay for significant repairs, replacement and maintenance by raising a "special levy". Now that we have the Maintenance Reserve Fund and the Capital Replacement Fund there can be no need for special levies and neither does the 1999 Retirement Villages Act provide for such levies. Nevertheless that has not stopped some scheme operators from trying to impose them.

Robina Retirement Village, on the Gold Coast, managed by Prime Life Corporation, has imposed a special levy on its residents to make good a substantial deficit in the operational account, the General Services Fund. They have cited the 1988 Act as authority for the levy. The 1988 Act was repealed, it may not now be relied upon for anything instituted after the 30th June 2000. The deficit was caused mainly by some hefty salary increases but also because he declined to take advantage of the prompt payment Rates discount allowed by the Gold Coast City Council. He arranged to pay the rates in monthly instalments so residents had to pay more than they needed to pay. We have urged residents not to pay the levy and to take the scheme operator to the Disputes Tribunal.

Residents being White-Anted!

For scheme operators, another blessing of the Maintenance Reserve Fund is that they can now undertake termite inspection, treatment and even repairing termite damage at the expense of residents. Termites and their ravages and who paid for what used not to feature significantly in PIDs before the 1999 Act. Scheme operators did not bother much; there was always a special levy if needed!

To have such things charged to residents' Maintenance Reserve Fund is, in our opinion, bad enough and contrary to customary landlord/tenant precepts but Australian Retirement Homes, with their leasehold Units at the Domain retirement village on the Gold Coast, and perhaps elsewhere, are insisting that inspection, treatment and repair of termite damage is entirely the resident's personal

responsibility. They will rely on the expression

"keep the Unit clean and free from insects and vermin and in a good state of repair",

which is in most PIDs, and on the fact that a termite is an insect. The above expression, or similar, is in both the Property Law Act and the Residential Tenancies Act. But it does not mean that the lessee is responsible for repair or replacement of the landlord's property. Neither does it mean that termite inspection and treatment and remedial work is at the lessee's expense. The Residential Tenancies Act quite clearly and specifically makes that the responsibility of the lessor.

Unfortunately, that Act does not apply to retirement villages and the Act itself says that it doesn't. But there doesn't seem to us to be any good reason why some, at least, of its lessor/lessee philosophy and rules should not feature in the Retirement Villages Act. After all, according to the Acts Interpretation Act lessors includes landlords and lessees includes tenants. So why a distinction in retirement villages.

Reinstatement

When we leave the village in which we have lived we are obliged by Section 58 of the Retirement Villages Act 1999 to agree with the scheme operator on what reinstatement work to our Unit is necessary. So what is reinstatement? Basically it means to restore the Unit to the condition it was in when we moved in. That requirement features in both the Residential Tenancies Act and the Property Law Act but in both of those Acts remedying "**fair wear and tear**" is not the lessee's responsibility. Not being required to remedy fair wear and tear means that the lessee does not have to repair or replace anything at the end of occupancy except damage caused wilfully or negligently by the resident. It means that the lessee does not have to pay to have the Unit re-painted or pay for a new carpet or replace worn out fixtures or fittings. It means that if the lessor/landlord, the scheme operator, wants those things done then he has to pay for them. And that's how it should be.

Once upon a time (as the fairy story has it) most PIDs in retirement villages used to except fair wear and tear from lessees' responsibility, and some PIDs provided quite specifically that the scheme operator was responsible for reinstatement, or refurbishment. Usually the outgoing resident was required only to shampoo or steam clean the carpet, also a requirement of the Residential Tenancies Act

These days, many Retirement Village PIDs issued to new residents require the resident, when leaving the Unit, to pay for a new carpet, irrespective of age or condition, to repaint, to renew fixtures and fittings and to restore the Unit to an "as new" condition. Scheme operators want us residents to indemnify them against every expense, including keeping their income producing property in pristine condition. However, it is very important that we residents remember that we are in no way affected by another resident's PID. Later residents may have a PID

different from ours, most likely more onerous, but it does not apply to us. We are subject only to the PID issued to us and the contract we signed when we entered the village.

If your contract is dated before 1 July 2000 and is silent on the question of who pays for what when you leave, Section 62 (1)(c)(ii) of the Act requires the scheme operator to share with you the costs of reinstatement. Bear that well in mind because the scheme operator is unlikely to voluntarily offer to do what the Act requires.

We can hardly invoke the Residential Tenancies or Property Law Acts to resist all the inequitable provisions of our contracts because you will find that in the lease agreements we signed, we accepted that if there were conflict between our lease and those two Acts, our lease provisions will prevail. We didn't realise the implications of that, did we? And we have to suppose that our solicitors, if we consulted one, didn't either. But lawyers for the scheme operators did, they wrote the contracts! What with that and waiting indefinitely for our Exit entitlement and paying our fees for long after we have left the village, we have been well and truly stitched up!

And all that was made possible by the failure of Government to ensure, through the Retirement Villages Act 1999, that residents were treated equitably and not held to ransom by unscrupulous owners. Government should now legislate to make the provisions of the Residential Tenancies Act, at least in relation to fair wear and tear, reinstatement and termite prevention and eradication, apply to Retirement Villages. Let the insidious transfer of landlords' responsibilities to tenants be halted and reversed.

Management Coercion

If you are leaving your village, do not in any circumstances sign any agreement to pay for anything which is not required by your lease or PID. If you do, you may find that you have agreed to pay for a reconstruction of the kitchen or the bathroom, or a new water heater or other appurtenances. That is not far-fetched, it is happening.

We realise that if departing residents protest, ruthless management may delay or threaten to cancel, even actually cancel, the "sale" of the Unit and that could be disastrous for the resident who is leaving. That particular method of coercion is not uncommon. If it happens to you and you have it in writing, you can "throw the book" at the scheme operator even after you have moved out. However, such coercion is usually more subtle, it is not usually in writing but it does take place. The Disputes Tribunal cannot acknowledge that sort of unwritten coercion even though we know beyond doubt that it exists. Knowing and proving are not quite the same thing. Without proof it is one person's word against another's. Government should take the opportunity of the review of the Act to rewrite certain Sections of it to make such coercion impossible. We shall be suggesting ways.

Direct Debit

Many of us find paying our bills by "direct debit" a very good idea, some of us pay every thing we can by that method. We do it because we find it convenient, not because the bank or somebody else finds it convenient. Increasingly, it seems that Village managements are requiring residents to change from their customary method of paying their recurrent fees, by cash or cheque, to paying by direct debit, - to suit their convenience! We want to say as clearly as we can that you do not have to do what they want. **You can continue to pay in the way you always have.**

One of the bigger culprits in all this direct debit imposition is Australian Retirement Homes, a subsidiary of Forrester Kurts. They have circulated to residents in their villages a whole page of spurious reasons to justify their improper decision not to accept any more payments at the office, even though some PIDs specify that the recurrent fees are to be paid to the manager. Occupational health and safety, the risks in transporting cash and other specious arguments are adduced in order to coerce residents. Those considerations are not the responsibility of residents. ARH says:

"This is the preferred method of payment and is the most convenient for both village staff and the accounts staff at head office"

There you have it! Never mind the convenience of residents; they obviously don't count. ARH are requiring residents to pay either by direct debit or take their payment to ARH's bank. If that means getting a taxi, that's your hard luck! **What incredible arrogance.** You can't be required to do that. If management refuses to accept your payment at the office then that's their problem. They cannot accuse you of withholding payment and they will have no lawful redress. Please let us know if you are subjected to any more intimidation, victimisation or coercion.

ARH's tactics seem to be in breach of Section 50 of the Queensland Fair Trading Act and we shall be drawing it to the attention of the Minister for Fair Trading. All this is but another example of village managements bullying residents. It could be viewed by the Anti-Discrimination Commission as discrimination against the elderly or the frail. If you believe that you are being victimised you might consider taking your case to that Commission. You will find the staff there very helpful. Talk to us about it.

Tax Rulings

Except for villages which are run by tax exempt bodies, village owners have to pay tax on our in-going contribution, that is what we pay them when we first go into the village, unless what we pay is a bona fide loan.

Last July, the Australian Taxation Office issued a Tax Ruling, (TR2002/14) which allows village owners to treat the in-going contributions as a loan instead of a lease premium or similar. The ruling is complex but basically it means that if our in-going contribution is a loan, the village owner does not have to pay tax on it. But there is a catch. To take advantage of that ruling, residents' contracts have to contain a provision by which residents are assured of being paid out when they

cease to occupy their Unit, or very soon thereafter. The ATO might accept a few months delay as reasonable but they are unlikely to accept the five years we mentioned in our December newsletter. Perhaps the ATO will be instrumental in securing for us the "cap" for which this Association has long campaigned.

Communication

Our newsletters are our only means of general communication with most members and we are unable by that means to let you know about all the correspondence we have with other members, Government and the Department of Fair Trading. For the majority of members there really isn't anything we can do about that.

However, although it will have only limited circulation, we now propose to put on our web-site copies of correspondence which we believe is of considerable significance to all members. We'll leave the letters etc. there for some time before removing them. We will not publish names of members who write or anything else by which they may be identified.

Just a reminder about subscriptions. They are now due and we look forward to receiving payment from those of us whose memory it has escaped. We are certainly not wasting money and, as we have said in our recent newsletters, we expect to be outlaying funds on legal advice and advocacy that will be of great benefit to all residents. Subscriptions may be paid to the ARQRV liaison officer in your village or sent to the Secretary, whose address is at the top of the Newsletter.

Ran out of space. 'Til next time.

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