

# NEWSLETTER

## No. 44 January 2004

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Greetings for 2004

A number of things conspired to prevent the publication of a newsletter in December last year, so we were unable to exchange Christmas greetings with you all. However, it is not too late to wish ourselves a Happy New Year, with the hope, if not the expectation, that 2004 will bring some legislative relief from the increasingly oppressive contracts to which new residents are being subjected and from the unabashed flouting of the Retirement Villages Act by many village operators, who take encouragement from the laissez-faire attitude of the Department of Fair Trading.

### Disputes Tribunal

For retirement village residents, one of the more favourable features, indeed perhaps the only really favourable feature, of the Retirement Villages Act 1999 was the establishment of the Disputes Tribunal. It has been the only means of achieving one of the Act's stated Main Objects:

*"to promote fair trading practices in operating retirement villages and in supplying services to residents."*

and residents' only avenue of redress for wrongs against them. One might easily have thought that the Tribunal was to be a forum for the fair and speedy resolution of disputes, with an absence of legal pettifogging. Indeed, it is precisely for that reason that the new Commercial and Consumer Tribunal was established - to settle issues and disputes as quickly and inexpensively as is consonant with justice. And that purpose is expressed in the introduction to the C&CT Act., -"Objects of the Act".

But no, lawyers appearing for scheme operators use every legal quibble they can, not to show that the resident is wrong and that his or her case is without merit but, almost invariably, to prevent the resident's case from even getting a Tribunal hearing. They will argue that the resident's complaint has been brought under the wrong section of the Act, or that the Tribunal does not have the necessary jurisdiction. They use those delaying tactics because they know the resident's case has a lot of merit and has a good chance of succeeding, otherwise they wouldn't bother to drag things out as they are doing.

Delay is their modus operandi. They hope that the resident will find it all too stressful and simply give up. Or, if the resident has been legally represented, they hope that the escalating cost will force the resident to throw in the towel. In a couple of residents' cases before the Commercial and Consumer Tribunal at present, cases started under the former

Retirement Villages Tribunal, the scheme operator's lawyers are claiming that the Tribunal doesn't have jurisdiction. They seem bent on trying to prevent, one way or another, residents' cases from being heard.

Scheme operators would sooner have the resident leave the village than risk adverse Tribunal Orders that would be published - to the benefit of other residents.

One of the features of the Commercial and Consumer Tribunal is that parties do not have an automatic right to be represented by a lawyer. Much as they might like to, scheme operators cannot just send their lawyers along to the Tribunal and sit back. The Tribunal requires that the agreement of the other party, that is of the resident, is first obtained and there is a particular Form on which that agreement has to be sought.

Members of this Association's Committee have a fair amount of Tribunal experience, as observers, advocates, helping prepare cases and being closely involved in the sorts of issues which go to the Tribunal. It would be a good idea, we think, if residents contemplating taking a case to the Tribunal would first confer with us. We do have a fair knowledge of the Retirement Villages Act and of the way in which applications should be made. We certainly do not hold ourselves out as lawyers but we are probably a good first port of call. Not only might we be able to help you, at no cost, but what we learn from your case helps us to help others.

## Mediation

Some disputes do not go as far as a Tribunal hearing but are settled at a mediation conference. Here, too, a party does not have a right to be represented by a lawyer. Such representation at a mediation conference may be allowed only if the mediator believes it is in the interests of justice. It seems unlikely that a mediator would allow the scheme operator to be legally represented if the resident wasn't similarly represented. That would not be in the interests of justice!

Whatever is settled at mediation, the scheme operator almost invariably wants the settlement to be confidential. This is something to which we should not agree. Not only that, we should exercise our right to insist that the mediated settlement be made an "Order of the Tribunal". The advantage of this is that if the scheme operator does not abide by the settlement then it can be enforced through the District Court. As well, mediated settlements and Orders which are not confidential may be made known to other residents in the village and in other villages and that is to the advantage of all residents. Secrecy and absence of publicity suits scheme operators but it is of no advantage to residents.

## Whom to Believe

Sometimes scheme operators use their own lawyers in an attempt to convince residents of what they want them to believe. For example, what their contracts and Public Information Documents mean. Or to convince residents that they cannot do this or that they must do that. Or that they have to pay personally for repairs and replacements! Or that they must pay any "excess" in respect of an insurance claim. Most of the time they are trying to make us believe what is simply not accurate.

Generally what happens is that the scheme operator gets his lawyer to write a letter, a copy of which is put in each resident's mail-box. Solicitors for scheme operators will write anything their clients ask providing it is not downright unlawful. They can and often do express "Opinions", for residents' consumption, whether or not they actually hold those opinions, and often they don't. In any case: ***Do not just accept direction or opinions from the scheme operator's lawyers!*** Their opinions are just that, opinions. They are not law.

## Insurance

Australian Retirement Homes have reverted to Forrester Kurts Properties so we shall in future refer to them as such. It seems that they are breaching the Retirement Villages Act, Section 110, by failing to insure their villages as required by the Act. They are taking out Public Liability Insurance with a \$10,000 excess provision. This would be wrong even if, in the event of a claim, the excess were charged to the General Services Fund, to which insurance premiums are charged.

But FKP are going further than that. They are saying that when a claim against the Insurance succeeds, all the residents must pay a special levy.

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But FKP are going further than that. They are saying that when a claim against the Insurance succeeds, all the residents must pay a special levy to cover the excess, that is the \$10,000 which the Insurers cannot be required to pay. This is actually happening in one FKP village but, commendably, the residents are resisting, not just caving in.

Section 110 of the Act provides that the scheme operator's insurance policy, which necessarily includes public liability: *"Must cover, to the greatest practicable extent---*" Quite clearly, a policy with a \$10,000 excess is not insuring to the greatest practicable extent.

We have drawn this breach of Section 110 of the Act to the attention of the Minister for Fair Trading but, in the light of effete responses in previous cases where the Insurance Sections of the Act have been breached, it might be somewhat naïve to expect the Minister to invoke the punitive provisions of the Act. Which means that scheme operators will go on breaching the Act with impunity.

## Autocracy Rampant

A little while ago, in that same village where residents have been told they must all pay up to fund the Insurance excess, the scheme operators, Forrester Kurts Properties, were, to the dismay of residents, breaking their own rules and Section 5 of the Act, by allowing a couple with a young schoolboy son to take up residence in the village. It was an invidious situation in which to put other residents and it set an alarming precedent. Residents had meetings about it with FKP's hierarchy but the latter were quite intransigent and the situation was resolved only by the residents and their son deciding to leave the village.

FKP, in common with a lot of owners and managements, seem to care little about the Retirement Villages Act, the Disputes Tribunal, the Department of Fair Trading or, indeed, residents.. *"This is our village, we make the rules, we decide what happens and how much you pay; shut up and don't argue"* seems to be their attitude. With a largely disinterested Government, we may be in for the long haul but we have to teach scheme operators that we residents are not simply going to be their quiescent milch cows.

## Tribunal Cases

Several cases are in various stages of examination and process by the Commercial and Consumer Tribunal and despite scheme operators' delaying tactics we believe there will be some results in the fairly near future. Some of the cases have been a long time in preparation and some residents of some villages have burned a lot of midnight oil. We certainly hope that our next newsletter will bring some good cheer on that score.

## Branches

We have in the past expressed our opinion that members should form branches of our Association in their villages. We believe, more than ever, that that is the way to go. The Retirement Villages Act provides for residents to elect a committee to represent them and their interests in dealing with the scheme operator and management. It is quite clear from what you tell us and from our own experiences that some committees are effective but some are really not very good at all.

Many committees see themselves simply as a Social Committee and, competent in social functions though such committees mostly are, it is not quite the same thing. It is not the function contemplated by Section 129 of the Retirement Villages Act. Some committees believe that they are a channel through which management conveys instructions and, quite improperly, as having a vested authority to agree with what management proposes without consulting and taking direction from a residents' meeting.

Remember that residents are not obliged to elect a committee and, if they do, they are not subservient to it. Quite the contrary, committees are subservient to and must draw their authority from those who elected them. Residents who have a complaint to make to management may complain via the residents' committee but they are not compelled to, and if it is an ineffectual committee then there is little point in doing so.

It would be a good idea if Association members formed a group and became a bona fide Branch of the Association. They could have meetings to discuss village matters, as contemplated by Section 3(g) of the Act, formulate views and initiate action. Better still, form a team from the ranks of Branch members to nominate for election to the committee.

Some managements refuse to listen to residents' complaints and tell them to put their complaints to their committee to pursue. Any resident has a right to complain to or raise an issue with management and a right to be heard. And every resident has the right to apply to the Commercial and Consumer Tribunal to hear their complaint.

## Depreciation

Except in the case of Income Tax Exempt bodies, like Churches, everything we pay to Village scheme operators is taxable income in their hands. Similarly, every expense that they incur in running the village is, one way or another, a tax deductible expense.

In any business, capital items have to be replaced and, in terms of their value, they depreciate. Their original cost is written off gradually over a number of years and funds are set aside out of the profits of the enterprise so that there is sufficient money to pay for replacement when it becomes necessary. The funds which the business, including the business of retirement villages, retains for that purpose are not taxable; they are not regarded as a profit of the business. That is a feature of Australia's Tax Laws and its application to retirement villages is not something to which we can take exception.

What we can and do take exception to is the practice of some village owners, over many years past, of charging to residents' general services funds an amount for depreciation of their capital. How's that for double dipping! It was wrong even before the Retirement Villages Act 1999 became law but since then the replacement of capital items is a charge to the Capital Replacement Fund, contributed to only by the owner, who can take advantage of whatever tax concessions are available.

In no way can provision for depreciation be seen as a service to residents and therefore chargeable to their General Services Fund.. This is wholly wrong and if it features in your budget we would urge you to refuse to pay it and let us know. We must and will put a stop to that practice.

## Improper Charges

In relation to what we residents pay for, there are a couple of questionable charges. One is payroll tax and another is salaries ostensibly payable in accordance with an award or workplace agreement. - Section 107 of the Act.

Payroll tax is not payable until the payroll of a commercial enterprise reaches about \$850,000. We know of no village where the payroll even begins to approach that figure. But if an enterprise owns several retirement villages, then the total payroll, especially with a top-heavy central management structure or other, non-retirement village, strings to its bow, aggregate salaries might well pass the payroll tax threshold. But it is not imposed in respect of a particular village and there is therefore no justification for apportioning such group tax amongst villages because there is no liability in respect of an individual village. This imposition of a payroll tax on village residents will be challenged.

In relation to salaries, we have become aware that some scheme operators are putting their wages and salaries under S.107 even if there is no salary award or registered workplace agreement or where salaries are being paid in excess of an award or workplace agreement.

Their object is to be able to increase salaries at will and escape the CPI cap which would apply if they were under S.106, where they should be. This practice, too, will be challenged.

## Membership

Subscriptions for 2004, still at \$10.00 a year , are now due and the inflow is already encouraging. One of the problems we have as our years advance is failing memory; it happens to us all. So this is just a gentle little reminder to those of us who have not yet renewed our subscription. Please do, so as to keep our protests and newsletters going.

.....**Happy New Year.**

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